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THE
FEDERAL REPORTER.

VOLUME 44.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

DECEMBER, 1890—MARCH, 1891.

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

OLESON *et al.* v. NORTHERN PAC. R. Co.

(Circuit Court, D. Washington, S. D. September 9, 1890.)

1. JURISDICTION—AMOUNT IN CONTROVERSY—PLEADING.

It is essential to the jurisdiction of a United States circuit court, in any case, that the amount or value of the matter in dispute must exceed \$2,000; and this must be distinctly alleged in the bill of complaint.

2. SAME—INJUNCTION—MATTER IN DISPUTE.

Where the object of the suit is to restrain the use of property by a party other than the owner, the right to use the property is the matter in dispute, and the value of such right must determine the question of jurisdiction.

(Syllabus by the Court.)

In Equity.

Norman Buck, for plaintiff.

J. H. Mitchell and *E. H. Sullivan*, for defendant.

HANFORD, J. This is a suit for an injunction to restrain the operation by the defendants of a certain railroad alleged to have been unlawfully constructed in a public highway known as the "Almota Road," situated in the town of Palouse City, Whitman county, in this state, and which is an obstruction of said public highway, and specially injurious to the plaintiffs, who each own in severalty certain lots abutting upon said highway, the use of the highway being necessary to afford ingress and egress to and from said lots. One Skeels, who is not a party to this suit, built the railway complained of for his individual convenience and use, in connection with the operation of a saw-mill which he owns. The defendant, under a contract with Skeels, furnished certain iron and materials used in constructing the road, and has done some work towards completing the railway, and proposes to operate it in connection with another railway of which it is lessee. The above-recited facts appear by the bill and affidavits on file. The case has been argued and submitted upon the plaintiffs' application for a temporary restraining order and the defendant's demurrer to the bill.

The demurrer assigns several grounds, among others want of jurisdiction in the court, for the reason that it does not appear that the matter in dispute between the parties to the suit exceeds the sum or value of \$2,000. In my opinion this objection to the jurisdiction is well taken, and fatal to the case, and therefore it will be unnecessary to consider either of the other questions raised, unless by an amendment of the bill the particular defect mentioned shall be cured. By the statute defining the jurisdiction of the circuit courts of the United States it is made essential to the jurisdiction of the court that, except in certain specified cases, the matter in dispute must exceed the sum or value of \$2,000, exclusive of interest and costs. 25 U. S. St. 433. Every party invoking aid or protection from a circuit court of the United States must show affirmatively all the facts necessary to entitle him to the relief prayed for, and to authorize the court to grant it; and the sum or value of the matter in dispute, like every other jurisdictional fact, must be distinctly alleged in the bill. *Fost. Fed. Pr.* § 108; *U. S. v. Coke Co.*, 18 Fed. Rep. 708. The case has been argued on the part of the plaintiffs as if the railway (which is alleged to be of the value of \$6,000) were the matter in dispute; but I cannot agree that it is so. The suit is brought simply to restrain the use, by a party not the owner of it, of a railway, and the rule for computing the value of the matter in dispute is not the same as in a suit to abate a nuisance, as, for example, to remove an obstruction to the public highway mentioned by destruction of this railway. The court cannot by any process cause a destruction of the railway, or impair its value, because it appears upon the face of the bill that parties not within the jurisdiction of this court have rights respecting it, which rights, of course, cannot be affected by any decree the court can lawfully make. The matter in dispute between these plaintiffs and this defendant, as the bill shows, is the right of the defendant to operate the railway mentioned. From the allegations of the bill it cannot be ascertained what the value of that right is, or whether it is of any value. For this reason only the demurrer will be sustained.

UNITED STATES v. TAYLOR.

(Circuit Court, D. Washington, S. D. November 7, 1890.)

1. COURTS—TERRITORY BECOMING A STATE—INJUNCTION—PENDING CASE.

Where a territorial court, by its final decree in a case, granted an injunction for the protection of a continuing right, the case is after such decree still a "pending" case, within the meaning of the twenty-third section of the act providing for the creation of state governments for Washington and other territories, (25 St. U. S. 676,) and is transferable to the court which by said act is made the successor of said territorial court.

2. SAME—JURISDICTION—CONTEMPT—JUDGMENT.

The judgment of a territorial court in a case which, after the territory became a state, was lawfully transferred to a United States circuit court, is to be regarded as having, by adoption, become a judgment of the circuit court, which court has

the same power to execute such judgment and punish as a contempt any willful disobedience of its mandate as it would have if the judgment were originally its own.

(Syllabus by the Court.)

In Equity. Motion to discharge

P. H. Winston, U. S. Atty..

W. Lair Hill, for respondent.

HANFORD, J. This is a proceeding growing out of a suit in equity brought by the United States to protect certain Indians in the enjoyment of fishery privileges guarantied to them by the government in a treaty made with them. The original case was commenced July 7, 1884, in the district court of the fourth judicial district of the territory of Washington, holding terms at Yakima. The final decree in the case was rendered by that court in the year 1887, by which decree the court granted a perpetual injunction against the defendant, Frank Taylor, forbidding the doing by him of certain acts, among others, the obstructing of a way across premises of which he was owner, and which he has since conveyed to O. D. Taylor, who is accused in the present proceeding of violating the injunction by obstructing said way. To a rule to show cause why he should not be punished for contempt, the respondent has interposed a motion by which he asserts that, as to said case, this court is not successor to the court which granted the injunction, and denies that this court has any power to punish him for a contempt of court committed by disobeying an order of the territorial district court, or to execute the decree of that court. It is conceded that the case is one of which this court might have had jurisdiction under the laws of the United States had it (the court) existed at the time of the commencement of the suit. But it is contended that, because a final decree had been previously rendered, the case had terminated, and was not a pending case at the time the territorial court passed out of existence upon the admission of the state of Washington into the Union; and, therefore, in respect to this case, this court is not the successor of the territorial court. The decision upon this point involves simply a definition of the word "pending" as used in the twenty-third section of what is commonly called the "Enabling Act." 25 St. U. S. 676.

In my opinion this act, when all its provisions are considered, manifestly shows that congress intended to fully protect and preserve not merely the rights of parties in a few select and especially favored ones of the cases commenced in the territorial courts, but every right of every party in every case which at any time had been or should be commenced in those courts during their existence; and the words "all cases, proceedings, and matters * * * pending," used in the act, must be construed to embrace all cases, proceedings, and matters initiated in the territorial courts, and in which at the time of the actual transformation of the territorial judicial system into the state and national systems there should be yet any vitality, force, or virtue. I have heretofore decided, in a case which had proceeded to judgment in a territorial court, that the court,

which, as to that case, was successor to the territorial court, should proceed with it, from the precise point to which it had already progressed, exactly as if the case had been commenced and proceeded with to the same point in that court. This view is supported by the court of appeals of New York in the case of *Wegman v. Childs*, 41 N. Y. 159, and in that case other decisions are cited and followed. Certainly rights established by a final judgment ought not to be held to have been forfeited or sacrificed by this statute, if by any reasonable or fair construction of its terms a different conclusion can be arrived at. The construction I have given to the act does lead to a different and more satisfactory conclusion. The construction contended for by counsel for the respondent does not, for the word "pending" is used in the clause descriptive of the class of cases and proceedings to be transferred to the state courts, and bears exactly the same relation to those cases that it does to the cases and proceedings which are transferable to the national courts, and it is not possible to exclude this court from taking jurisdiction of a case on the ground that because it had proceeded to judgment in a territorial court it then ceased to be a pending case, and yet hold that by virtue of this act of congress the courts of this state could take cognizance of the same case. I hold, therefore, that the case has been lawfully transferred to this court, and also that being so transferred this court, of necessity, must adopt as its own all the proceedings and orders of its predecessor in the case, including the judgment, and must exercise the same powers which that court would now have if it had continued to be, including the power to punish a violation of the injunction. The motion to discharge the rule is therefore denied.

HAMILTON v. THE WALLA WALLA.

(District Court, D. Washington, N. D. August 26, 1890.)

1. SUCCESSOR OF TERRITORIAL COURTS—ADMIRALTY—APPEAL.

An admiralty cause having been appealed to the supreme court of Washington Territory, but not docketed in that court prior to the admission of the state into the Union, must necessarily be transferred from the territorial district court, which rendered the decree, to this court, which is as to all admiralty causes successor to the territorial court of original jurisdiction. Failure of the appellant to cause the transcript to be sent up and have the cause docketed in the circuit court before the beginning of the term is not such laches as to be deemed an abandonment of the appeal, there having been heretofore no opportunity for trial of the cause in the circuit court, and no actual delay.

2. EXECUTION—ISSUE AFTER APPEAL—LACHES.

The court will deny a motion for leave to issue an execution made after an appeal taken, and a considerable delay in causing a transcript of the record to be sent up, and based on an assumption that the appeal has been abandoned, when it appears that a hearing of the cause in the appellate court has not been actually delayed by laches on the part of the appellant.

(Syllabus by the Court.)

In Admiralty.

Richard Osborn, for libellant.

J. C. Hawmes, for claimant.

HANFORD, J. In this case, a decree in favor of the libelant was rendered by the district court of the third judicial district of the territory of Washington, from which an appeal was taken to the supreme court of the territory, and everything necessary to perfect said appeal was done before the retirement of the territorial courts, consequent upon the organization of the state government, except to certify and transmit the record to the supreme court, and docket the case therein. As I understand the different statutory provisions affecting the subject, this court is the successor of the territorial court of original jurisdiction as to all admiralty causes pending at the time the change from a territorial to a state government took place. And all such cases are to be understood as having been, by operation of law, transferred from such court of original jurisdiction to this court. And this court, in taking cognizance of them, regards them as if everything done by its predecessor had been done by this court, and its duty is to do whatever may be properly done to finish them. In other words, this court takes such cases in the condition in which the territorial district court left them, and proceeds to do whatever remains to be done to afford the parties on either side whatever relief they may be entitled to have, and to end the litigation; therefore the case came properly into this court, and in due course it should have given effect to the appeal taken by certifying and transmitting the record to the circuit court of this district, which is—as to such cases the successor of the territorial supreme court, and the only court to which the cause can be taken on appeal. The record should have been sent up, and the cause docketed in the circuit court before the first day of its first term for the northern division of the district, and I consider it the fault of the proctor for the appellant, rather than of the clerk, that this was not done, for it is not claimed that the clerk has ever refused or been unwilling to make the transcript or docket the cause, and as a matter of fact he has only delayed for want of a request to proceed. This neglect, however, has not in fact delayed the hearing or decision of the case, for there has been no judge in attendance except the district judge, who, as judge of the territorial court, gave the decision appealed from; and who is therefore, within the spirit and reason of section 614 of the Revised Statutes, debarred from again deciding the case. Such being the facts and condition of the case, the libelant now moves for leave to issue an execution upon the decree, claiming that by laches the appeal has been abandoned. I hold, however, that no actual intent to abandon the appeal is shown, and that until an opportunity to have a review of the case has been suffered to pass, abandonment of the appeal cannot be legally implied from laches. The first term of the circuit court has not yet ended; and whether the appellant shall be denied a trial in the appellate court as a penalty for failure to have the case docketed before the beginning of the term is a question for that court to decide. No rules of practice have as yet been adopted by either the circuit court or this court, and the interruption of the proceedings in the case, incident to the change of government, has created confusion and uncertainty in the practice. In view of all the facts and circumstances proper to be con-

sidered, notwithstanding the hardship to the libellant of having to wait so long for the final decision of his case, I could not but regard a ruling, which would in effect cut off the right of appeal, as tyrannical, and I therefore deny the motion.

NON-MAGNETIC WATCH CO. v. ASSOCIATION HORLOGERE SUISSE OF
GENEVE *et al.*

(Circuit Court, S. D. New York. October 13, 1890.)

1. WRITS—SERVICE BY PUBLICATION.

In a suit to determine the title to a patent-right, a non-resident defendant cannot be served by publication under the judiciary act of 1875, § 8, providing for such service in suits "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district."

2. SAME.

On a motion for service by publication on a foreign corporation, the court cannot determine the question whether it is engaged in business in the district, and therefore bound by service had on its director.

In Equity.

Briesen & Knauth, for complainant.

John H. Kitchen, for defendants.

LACOMBE, Circuit Judge. This is an application for an order directing service of process upon the defendant, a Swiss corporation, by publication. The petition states that the suit is brought to remove a cloud upon "the title to certain letters patent" which it is claimed are the property of the complainant corporation, or rather of its receiver, and which "original letters patent, the subject-matter involved in this suit, are in the possession of [such receiver.]" This statement is not technically accurate. What the suit is concerned with is the title to the patent itself, —to the patent-right; and the mere custody of the letters evidencing the fact that such patent-right was originally granted to a particular inventor is immaterial.

The petitioner claims that he is entitled to the relief prayed for, under section 8 of the judiciary act of 1875, which provides for such service upon non-resident defendants when the suit is commenced "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought." The various cases which were cited by the complainant's counsel interpreting this section are concerned either with real property, or with such tangible personal property as was susceptible of reduction to actual possession. I cannot satisfy myself that the section covers (or was intended to cover) such incorporeal and intangible property as a patent-right, possession of which must of necessity be ideal, not actual, and which cannot be seized or sold under an

execution. *Stephens v. Cady*, 14 How. 528; *Stevens v. Gladding*, 17 How. 447. Statutes which undertake to give to courts jurisdiction over non-residents, who do not come within the district for purposes either of residence or business, should not be enlarged by too liberal construction, and in the absence of authority I must decline to make the order prayed for. It seems further from the moving papers that Louis Bornand, who is made a defendant, has been served with process, and has appeared personally. He is a director of the defendant corporation. Complainant asks for an order declaring that the service of process on defendant Bornand shall be deemed good and sufficient service on the defendant corporation. If that motion is based upon the statute already quoted, it should be denied for the reasons above given. If it is contended that the defendant corporation is in fact engaged in business in this district, (as the supplementary motion papers seem to indicate,) and therefore service upon the director is service upon the corporation, that question cannot be settled on such a motion. Unless it is raised by a motion on the part of the defendant corporation to set aside the service, it will be properly disposed of when the court comes to enter final judgment.

EASTON *et al.* v. HOUSTON & T. C. RY. Co. *et al.*, (WATERS-PIERCE OIL Co., Intervenor.)

(Circuit Court, E. D. Texas. December 1, 1890.)

FINAL DECREE—REHEARING—TIME OF APPLICATION.

At the term succeeding that at which a decree dismissing an intervention on the merits, without prejudice, was rendered, there was a final decree in the main cause. *Held* that, even if the decree dismissing the intervention was not final at its rendition, it became final on the rendering of the final decree in the main cause; and therefore, under equity rule 88, providing "that no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court, but if no appeal lies the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court," a rehearing on the intervention could not be granted at the third term after the final decree in the main cause was rendered.

In Equity.

John C. Walker, for the Waters-Pierce Oil Company.

Waller T. Burns, *contra*.

PARDEE, J. The Waters-Pierce Oil Company filed an intervention in the above-entitled cause on the 10th day of November, 1886, claiming the sum of \$969 as a lien against the trust funds in the hands of the court, arising out of the earnings of the Houston & Texas Central Railway Company for and on account of certain oil supplies furnished the Houston & Texas Central Railway Company during the months of January and February, 1885, and prior to the original appointment of receivers in this case. This intervention, under a general order of the court theretofore made relative to petitions *pro interesse suo*, was duly re-

ferred to the special master for investigation and report. The special master, after several extensions of the hearing, finally took up the intervention, and on the 16th of February heard the evidence contradictorily with the complainant trustees. On the evidence so taken, the master reported against the intervenor's demands, finding that on the hearing the evidence was insufficient to establish the right to the equitable relief sought, and recommending a decree accordingly. This report was filed on June 10, 1887. On June 15, 1887, the intervenor filed exceptions to the said report, and again on August 12, 1887, filed amended exceptions to the report. These exceptions and amended exceptions attacked the master's report on its conclusions of law and its findings of fact. These exceptions came on to be heard at the succeeding term of court, and were argued and submitted, whereupon the court, November 16, 1887, rendered a decree that the said exceptions and amended exceptions should be overruled, and the said report confirmed; and thereupon it was "considered and ordered that the said Waters-Pierce Oil Company pay all costs incurred by reason of said intervention for which execution may issue. This order is made without prejudice." No further proceedings were had at this term of the court with regard to said intervention. At the following May term, a final decree in the main cause was rendered, directing a sale of all the mortgaged property. At the November term in 1888, following, the sale was reported of the mortgaged property, and the sale confirmed. On October 4, 1889, without any previous leave of the court, the Waters-Pierce Oil Company filed a motion to set aside the previous orders and decrees in the case, which motion, it seems, was set down before the court at the following term, March 20, 1889, and the following order was entered:

"Motion of the intervenor herein, the Waters-Pierce Oil Company, for a rehearing in this cause, having been set down by the court at a former day of this term for hearing this day, and it appearing to the court that no objections to the granting of said motion has been filed, now, therefore, the intervenor having appeared by solicitor, and said motion being considered, it is ordered by the court that the said motion be sustained, and the rehearing granted on April 1, 1890."

At the same time a motion was made by the attorneys of the receiver of the Houston & Texas Central Railway Company to vacate the order granting a rehearing, which on the same day was overruled by the court; and thereupon the petition of said intervention was set down for hearing for the 4th day of April following. On the 4th day of April, the court, without any recommittal of the intervention, and upon evidence then and there submitted, rendered a decree to the effect that the intervenor have and recover from the receiver of the Houston & Texas Central Railway Company the said sum of \$968.22, with interest at 8 per cent. from the time the goods were furnished, and the receiver was ordered to pay the said claims out of any funds in his hands as receiver; but it was further ordered that the cause be held by the court as on motion for a new trial for 20 days from that date; and thereupon, on the 18th day of April, within the 20 days, a motion was made to set aside the decree in

favor of the Waters-Pierce Oil Company, Intervenor, on the grounds following, to-wit:

"(1) The court erred in disturbing the findings of the special master in chancery filed herein on the 10th day of June, 1887. (2) The court erred in setting aside and vacating a decree entered in said cause confirming the said master's report; said decree being rendered after full argument upon the pleadings and facts on the 10th day of November, 1887. (3) The court erred in granting the petition for rehearing, because the same was not filed at the next ensuing term of said court, as required by rule 88 governing said court, but, upon the contrary, said petition for rehearing was not filed for two years after the final disposition of said cause, to-wit, the said petition was filed October 4, 1889. Wherefore, petitioner prays that he be granted a new trial, and that upon the hearing the said petition of intervention be denied on the order heretofore made allowing the same to be vacated."

This last motion has been brought on before me as circuit judge, and has been argued and submitted.

The question presented is practically this: Was the decree of November 16, 1887, dismissing the intervention of the Waters-Pierce Oil Company, without prejudice, a final decree? It disposed of the intervention on its merits, leaving the intervenor with no cause before the court; it turned the intervenor out of court, and condemned him to pay costs. That the decree was to be without prejudice meant no more than that the intervenor might institute another suit to enforce his alleged rights, and, at best, might, perhaps, intervene again on the same cause of action in this same cause. A decree is final when it determines the litigation on the merits, and leaves nothing to be done but to enforce by execution what has been determined. See *St. Louis, etc., R. Co. v. Southern Eqp. Co.*, 108 U. S. 24, 2 Sup. Ct. Rep. 6; *Railway Co. v. Dinsmore*, 108 U. S. 30, 2 Sup. Ct. Rep. 9; *Ex parte Norton*, 108 U. S. 237, 2 Sup. Ct. Rep. 490. When an intervention under a claim of a prior lien is dismissed, the order as to the intervenor is final. *Gumbel v. Pitkin*, 113 U. S. 545, 5 Sup. Ct. Rep. 616. As no appeal could be taken from the decree, it is my opinion that the decree was, in all respects, from the time of its rendition, a final decree. But it is not necessary to go so far in this case; because, at the next term following the decree, a final decree was rendered in the main cause, and then, if not before, it seems clear that all decrees theretofore rendered upon interventions, whether appealable or not, became final. The eighty-eighth equity rule provides "that no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court; but, if no appeal lies, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court." In the present case, the application for rehearing was not filed until the fourth term of the court after the decree sought to be reopened was rendered, nor until the third term of the court after the final decree in the main cause was rendered; and the petition or application for a rehearing was not admitted by the court until the fifth term after the decree to be reviewed was rendered, nor until the fourth term of the court after the final decree in the main cause was rendered. Un-

der the plain language of the equity rule above quoted, it seems clear that, when the petition for rehearing was admitted by the court, the court was without power or authority to grant the application.

In *Roemer v. Simon*, 91 U. S. 149, the supreme court, in considering the effect of equity rule 88 in an appealable case, say:

"The court below cannot grant a rehearing after the term at which the final decree was rendered."

Mr. Justice HARLAN, in the case of *Morgan's, etc., Co. v. Texas Cent. Ry. Co.*, 32 Fed. Rep. 530, says:

"It is an established principle that, except upon bills of review in cases in equity, upon writs of error *coram vobis* in cases at law, or upon motions which, in practice, have been substituted for the latter remedy, no court 'can reverse or annul its own final decision or judgment for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing.'"

—Quoting *Sibbald v. U. S.*, 12 Pet. 488; *Bank v. Moss*, 6 How. 31; *Bronson v. Schulten*, 104 U. S. 415; *Schell v. Dodge*, 107 U. S. 630, 2 Sup. Ct. Rep. 830; *Phillips v. Neyley*, 117 U. S. 665, 6 Sup. Ct. Rep. 901; *Cannon v. U. S.*, 118 U. S. 355, 6 Sup. Ct. Rep. 1064.

If equity rule 88 is thus absolute with regard to the power of the court to grant a rehearing in equity causes in which an appeal lies, after the term at which the final decree is entered and recorded, it seems to be equally absolute with regard to the power of the court to grant a rehearing in equity causes in which no appeal lies after the next term of the court following the term in which the final decree was rendered. As the court was without power or authority to grant the application, it seems to follow conclusively that the order granting the rehearing, and the subsequent proceedings thereunder, were void. It is therefore ordered, adjudged, and decreed that all the proceedings had in the matter of the Waters-Pierce Oil Company intervention in this cause, since the adjournment of the March term, 1888, be and the same are vacated and annulled. It is further ordered that the Waters-Pierce Oil Company be condemned to pay all costs incurred herein since the March term, 1888, aforesaid.

UNITED STATES *v.* MASICH *et al.*

(Circuit Court, E. D. Louisiana. November, 1890.)

RECEIVERS—WHEN APPOINTED—MORTGAGEE IN POSSESSION.

As against a mortgagee in possession of the mortgaged property, a receiver will not be appointed in favor of one claiming a subsequent lien thereon by seizure under execution, but the court will compel the application of the rents and profits of the property to the satisfaction of the mortgage, by injunction.

At Law. On motion to appoint a receiver.

Wm. Grant, for complainant.

T. J. Semmes, for defendants.

PARDEE, J. Since the bill was filed in this case, the defendants by transfers of notes and properties among themselves have materially changed the *status* and possession of the property on which complainant claims a lien by and through seizure under execution. These transfers *pendente lite* cannot, of course, prejudice any of complainant's rights in and to the property upon which the lien is claimed; but I think they may be considered in determining the present question before the court, which is, whether it is necessary, in order to protect complainant's rights, that a receiver of the property in controversy should be appointed, so that the rents and profits may be applied, so far as may be equitable, towards the satisfaction of complainant's judgment against Masich. The bill makes no serious attack upon the validity of the vendor's lien and privilege claimed for the second note of \$8,000, given by Faget at the time of the purchase of the property. The showing made upon this hearing leaves little doubt in my mind as to the validity and priority of that vendor's lien. This showing is to the further effect that defendant David Jackson is the owner of that mortgage note carrying the vendor's lien, and is in possession of the mortgaged property for the custody of which the receiver is asked. It is true that by the letter of the transfer made he is in possession as owner with said note extinguished; but as such transfer imports that he purchased the property, giving the said note as part consideration, it would seem clear that his worst position in regard to the property is that of a mortgagee in possession. Against a mortgagee in possession, the general rule is not to appoint a receiver in favor of subsequent lienholders. See Beach, Rec. § 80. While Jackson's actions and conduct in the matter, both before and after filing this bill, are such as to throw suspicion upon him, and tend to show that the charges made by complainant in the bill, as to his collusion with defendant Masich, in this case, are true, I am inclined to think that all that the complainant can ask in the case is that the rents and profits of the real estate in question shall be applied in favor of its claim, if eventually sustained; and this can be as well done, indirectly, by compelling the application of rents and profits to the satisfaction of the undoubted prior mortgage as by the appointment of a receiver. I am of the opinion that an injunction should issue in the case restraining defendants, Jackson and Masich, from further transferring or incumbering the property in any wise, and from applying the rents and profits of the said real estate to any other purpose than the reduction of the principal and interest of the note for \$8,000, made by Laurent Faget to his own order, and by him indorsed, dated 19th April, 1884, payable two years after date, which note is alleged to be secured by the mortgage and vendor's privilege upon the property in question. Such injunction may issue.

McCULLOH v. SMITH.

*(Circuit Court, S. D. New York. October 1, 1890.)***SALE—FAILURE TO ACCEPT—REMEDIES OF SELLER.**

Where a corporation wrongfully refused to accept and pay for certain watch movements made for it, the maker may himself sell them, though the name of the corporation was, by its direction, inscribed on each movement.

On Motion for Preliminary Injunction.

Briesen, Steele & Knauth, for complainant.

Robertsons & Harmon, for defendant.

LACOMBE, Circuit Judge. Defendant by his affidavit admits that he has sold about a dozen watch movements bearing upon them the name of the Non-Magnetic Watch Company of America, as to which he offers no explanation or excuse. Small though this violation of his rights may be, it is sufficient to entitle the complainant to a preliminary injunction. The order, however, should except from its operation those movements which were made by Aeby & Co., at its request, for the corporation, represented by the complainant, as receiver, upon which its name was inscribed by its own directions, which were tendered to it and refused, without any other expressed ground than its inability to pay for them, and as to which Aeby & Co. have not rescinded the contract of purchase because of such failure to accept. As to those movements, the equities of the case, so far as the papers show, seem to be with Aeby & Co., and the defendant is their agent. That the inscription upon these particular movements would seem to imply that they are the goods of the Non-Magnetic Watch Company of America is immaterial. They are in fact the goods of that company; goods of which the law makes Aeby & Co. the selling agents, and as to the proceeds of which they must account when their claim upon the corporation for the agreed price of such movements comes up for adjustment. Nor is the public in any way deceived. The movements are made by the same makers, and, for all that appears, are identically the same in character and quality with those which complainant is selling. In order to avoid embarrassment in the future, the order should, if possible, describe the excepted movements by number.

NATIONAL EXCH. BANK OF BALTIMORE v. PETERS *et al.*

(Circuit Court, E. D. Virginia. October 25, 1890.)

NATIONAL BANKS—LIABILITY OF DIRECTORS—EQUITY JURISDICTION.

Rev. St. U. S. §§ 5234, 5239, prescribing the method of enforcing the liability of the directors of national banks for violation of the banking law, are exclusive of other remedies, and a creditor of an insolvent bank, for which a receiver has been appointed, cannot sue its directors for the purpose of making them personally liable for the mismanagement of the bank.

In Equity. On demurrer to bill.

G. M. Dillord and John Neely, for complainant.

Alfred P. Thom, Sharp & Hughes, and *John B. Jenkins*, for defendants.

HUGHES, J. The complainant is one of the creditors of the late and now insolvent Exchange National Bank of Norfolk. The bill is brought against the late directors of the insolvent bank, one of whom was president and another cashier, and against the present receiver of that bank. The complainant bank transacted with the Norfolk bank the business of collections, each for the other. In the fortnight preceding the closing of the doors of the insolvent institution, which occurred on the 2d of April, 1885, a balance of \$14,883 was in favor of the complainant against the Norfolk bank, less dividends, not exceeding 60 per cent., that have been paid by the receiver. The bill, after setting out this claim, charges that the defendant directors—

“Did not give that care, supervision, and attention to the affairs of the bank which the duties of their office and the nature of the trust reposed in them required; but, on the contrary, neglected the same, and intrusted the entire business concerns of the bank to [its president and cashier,] who recklessly and improvidently loaned the money and securities of the bank to various embarrassed and insolvent firms and individuals, without taking proper and sufficient securities for the protection of the creditors and others confiding in the directors’ management of the bank, and recklessly converted the money of the bank to their use; the said president and cashier carrying a joint-account at said bank, which at the time of its failure was overdrawn in the enormous sum of over sixty thousand dollars.”

The bill proceeds to set out a detailed series of “facts and circumstances,” similar to the statement as to the president and cashier, relating to these officers and two other of the defendant’s directors, with a view of showing more specifically what it characterizes as the “gross negligence and mismanagement of the bank by its directors and officers.” It charges that “it was the custom of the directors to meet only to organize and to declare dividends,” and that the misappropriation of the funds, and wrongful acts which it describes, occurred during the management of the affairs of the bank by the directors, who are defendants in this suit. The bill prays for a discovery on oath from each of the defendants of all facts in their knowledge, and which they may have heard and believe, touching the mismanagement complained of, and that they shall severally answer, generally and specifically, the charges which

it sets out. It prays that the matters charged may be referred to a commissioner of the court, to ascertain the truth of the statements and charges which it makes, and the liability of the defendants severally to make good the loss complained of, and to ascertain and report all other matters pertinent to this case which complainant has not had the means of obtaining. There is a prayer for general relief.

The epitome thus given of the bill shows sufficiently the character of this suit, and suggests on its face the grounds of demurrer on which the case comes before the court; and the question presented is whether a creditor of an insolvent national bank of the United States can sue its directors for the purpose of fixing upon them a personal liability for the mismanagement of such an institution. It is not a question whether these directors are liable or not, or may be sued or not, and subjected to the liability, but only whether a creditor of a national bank can sue its directors for mismanagement and negligence of his own mere volition. It is elementary law that, if Jones injures Smith's person, and Smith owes Brown a debt, Brown cannot sue Jones for damages as a means of making good his debt against Smith. So, if Jones buys a horse from Smith, Brown, Smith's creditor, cannot sue Jones, Smith's debtor, for the purchase money. There is no privity between Jones and Brown, either of contract or tort, on which the action can rest. The universal rule, as old as the law itself, is that, unless there be privity between plaintiff and defendant, no action will lie; and in this respect equity follows the law, although equity, when once having cognizance of a cause between principal parties in privity, will then, when necessary to effect its policy of doing complete justice, bring other persons incidentally connected with the subject of controversy before it, whether these latter are in privity or not. The rule has no relaxation except where statute law intervenes to relieve a hardship, which, in exceptional cases, would result from its enforcement, and except where equity, after a wrongful refusal to sue by the proper plaintiff, then authorizes suit under its own direction. A case in which the statute law intervened was that of *Trustees v. Bossieux*, 4 Hughes, (U. S.) 387, 3 Fed. Rep. 881, cited on brief for complainant. The case is known to the profession of Virginia as "*The Dollar Savings Bank Case*." That suit was brought by trustees in bankruptcy against the directors of a disgracefully insolvent bank, by trustees whom the national bankruptcy act expressly authorized and directed to sue for assets of the bankrupt. That suit went to a decree from which there was no appeal, and the directors paid into the assets in bankruptcy the amount settled upon as proper in the case.

If the receiver of the late Exchange National Bank of Norfolk, instead of a single creditor, had brought the suit now under consideration, the question of demurrer would have been similar in its main feature, but not in all its features, to that which was decided on demurrer in the *Dollar Savings Bank Case*; because, under the national banking act, the receiver of an insolvent national bank is authorized and required, under the direction of the comptroller of the currency, to take possession of the assets of every description of the insolvent bank, and to collect all debts,

dues, and claims, belonging to it. Section 5234. In respect to directors of an insolvent national bank, the national banking act provides that, if they knowingly violate, or knowingly permit any of its officers, agents, or servants to violate, any provisions of law enacted to secure a proper administration of the affairs of such banks, its charter may be forfeited, on a decree by a proper court of the United States, in a suit brought by the comptroller of the currency in his own name for that purpose. Section 5239. It further provides that every director who shall have participated in or assented to the violation shall be liable in his personal and individual capacity for all damages which the association or its shareholders shall have sustained in consequence of such violation. Thus the statute law makes directors of a national bank liable in damages for violations of their duty, or negligence or malfeasance as directors, and prescribes how they shall be subjected to liability. Being liable in damages, they are amenable to suit for damages in a jury proceeding, and not, I infer, to suit in any other form, whether at law or in equity. But, even if they were amenable to liability in a proceeding not sounding in damages, then, the damages recoverable being an asset of the bank, the statute law empowers and requires the receiver of the injured bank, under the direction of the comptroller, and him alone, to sue for the claim. Except the receiver, the statute law nowhere authorizes suit to be brought by any person not in privity against directors of national banks. The bill of complaint under consideration has therefore no sanction in respect to its party plaintiff from the statute law of the land. Does it present a case in which equity, in the exercise of a high prerogative to which it feels at liberty sometimes to resort, will relieve against the rule of privity, and entertain this suit, though brought by a plaintiff otherwise incompetent to sue? Certainly the bill contains nothing on its face to require or to justify such a recourse. Exceptional authority to sue is given only in the rare cases in which those legally competent to sue wrongfully refuse to do so. When such a case is presented, equity will sometimes authorize and direct suit to be brought by some other plaintiff whom it may approve.

As before said, whatever is claimed in the suit at bar would be an asset in the hands of the receiver if recovered, and the statute law imposes upon him the duty of suing for it, under the comptroller's direction. But this bill contains no allegation either that complainant called upon the comptroller to direct the receiver to sue, and he refused, or that the receiver himself was called upon and refused. Containing no such allegation, the bill makes no case for a suit by a person other than the receiver. Nor would it follow, even if such an application had been made and refused, and the fact had been duly alleged in the bill, that this suit could be maintained; for in cases where directors of national banks have violated, or negligently permitted the violation of, the laws regulating those banks, the statute law seems to require that the question of violation shall be judicially determined in a proper court of the United States, in a suit instituted in his own name by the comptroller for that specific purpose, before the liability can attach to the directors; and

therefore it would seem that directors cannot be pursued individually for such violation until after such an adjudication thus obtained. So that, if the receiver and the comptroller, though called upon to sue the defendants in this suit, had refused to do so, even the allegation of such application and refusal would have been insufficient ground of authority for bringing this suit.

I am of opinion that the provisions of the national banking act enter as part into the contracts of creditors with the national banks, and that those provisions which define the liability of directors, and prescribe the proceedings to be taken against them, when guilty of violations of the act, are exclusive of other liability and other proceedings; and that it is not within the prerogative of equity to authorize a disregard of the provisions of the national banking act, defining such liability and prescribing such proceedings. In view of sections 5234 and 5239 of the act, I am of opinion, therefore, that this court cannot entertain the suit of a creditor against the directors of the late Exchange National Bank.

It is useless to maintain that the bill under consideration is a general creditors' bill, and as such may be entertained, in accordance with the usual practice of equity, in creditors' suits. A creditors' bill is one brought by creditors of an insolvent debtor against the debtor and such person as may have custody of his estate, having for its object an equitable distribution of his effects. It is a suit between creditors and their debtor; between parties standing in the relation to each other of direct and complete privity. No statutory authorization or extraordinary stretch of the equity prerogative is required to validate such a proceeding. In this respect, a creditors' bill is the antipodes of the one at bar. That rests on full privity between plaintiffs and defendant; this has no shadow of privity to stand upon. But even if this were a bill resting on privity, it would be a creditors' bill only in form. It was filed on the 31st March, 1890; whereas, on the 2d April, three days afterwards, the fifth anniversary of the closing of the doors of the Exchange National Bank of Norfolk recurred, when the claims of all creditors who could come in and participate in the benefits of the bill became barred by limitation. No petition was filed in the case by any creditor before the 2d April, 1890, and of course none have been filed since. So that, in fact, the bill is that of one creditor alone of an insolvent national bank, brought gratuitously, without previous application to the comptroller and receiver, and a refusal on their part to sue.

The demurrer must be sustained, and the bill must be dismissed.

MCBRIDE v. BOARD OF COMMISSIONERS OF PIERCE COUNTY.

(Circuit Court, D. Washington, W. D. October 15, 1890.)

1. INJUNCTION—WASTE—DISPUTED TITLE.

A bill for an injunction to prevent the commission of waste, which shows that the plaintiff is an applicant to purchase the premises from the United States as mineral land; that his right to so acquire the title is being contested in the United States land-office; and that the defendants claim title adversely to him,—does not state a case within any known exception to the general rule, that equity will not interfere by injunction to prevent waste when the complainant's title is disputed.

2. SAME—INTERPRETATION OF STATUTE.

Under the rule for construing statutes, that an act of the legislature is not binding upon the state unless made so by special and particular words, a state law, authorizing an injunction to prevent waste where two or more persons are opposing claimants to the same tract of public land under the laws of the United States, is not applicable in a case in which the state is one of the claimants.

3. SAME—"PERSONS."

The word "persons," when used in a statute, does not include the state.

(Syllabus by the Court.)

Wm. H. Ried, for plaintiff.

Snell, Bedford & Claypool and Calkins & Shackleford, for defendants.

HANFORD, J. This is a suit for an injunction, brought against the defendants in their official and representative capacity as the board of county commissioners of Pierce county. A demurrer on the ground that there is no equity in the bill has been interposed, and the questions so raised are now to be passed upon. The sole object of the suit is to prevent the commission of waste upon portions of section 16, in township 20 N., of range 3 E., in Pierce county, which, as the bill alleges, the defendants, in their official character, threaten and intend doing by causing the timber trees growing thereon to be cut down and removed, which will materially lessen the value of the inheritance. The plaintiff shows no title to the lands, nor interest therein, other than as an applicant to purchase the same as mineral land from the United States, under the laws providing for the sale and disposal of lands valuable for the mineral therein, and the bill shows that his claims are being contested in the United States land-office by the state of Washington, and that the register and receiver of the land-office have not yet given their decision as to his right to acquire title. As now administered in some of the courts of this country, equity will not deny to one having the title to land an injunction to restrain the commission of waste thereon, seriously impairing the value of the inheritance, on the ground of the title being disputed, or because of the pendency of an action to establish the title or to determine any question affecting it. Such relief has been granted in a few cases, under peculiar circumstances, or where by statute the equity power of the courts has been enlarged, as in the case of *Lanier v. Alison*, 31 Fed. Rep. 100. But in general such relief will be granted only for the protection of an existing right, and only in favor of one in whom an estate of inheritance is shown to be vested by unquestioned proof.

I can find no reason in the facts of the case before me to justify a departure from this time-honored rule. On the contrary, the court could only, in the performance of an imperative and manifest duty under the law, exert its extraordinary power so as to interfere with the use of property known to be of immense value for purposes other than mining, in behalf of one whose claim to a mere inchoate right to acquire title is supported only by the assertion of a mere conclusion that the land was, under the laws relating to mineral lands of the United States, subject to his entry. Section 604, of the Code of Washington Territory, has been called to my attention by counsel for the plaintiff, and it is urged that by this enactment a right to the injunction prayed for is given. This statute does in effect authorize an injunction to prevent waste in cases where two or more persons are opposing claimants to the same tract of land under the land laws of the United States. But it is not applicable to this case, for, although this is a case in which there are opposing claimants to the same tract of land, under the laws of the United States, inasmuch as the plaintiff is endeavoring to acquire it through the pretense of an intention on his part of working it as a mine, and it may be assumed as a matter of law, although it is not alleged in the bill, that the state of Washington claims it as a part of the grant made to it by act of congress for school purposes, still it does not come within the letter of the act, because the opposing claimants are not two or more persons. One of the opposing claimants is the state of Washington, and it is not a "person" within the ordinary or legal definition of that word. The court of appeals of New York, in a case in which the definition of the word was of vital importance, and in which its decision was afterwards, on appeal, affirmed by the supreme court of the United States, held that the word "person" does not, in its ordinary or legal definition, include either a state or a nation. *In re Fox*, 52 N. Y. 535; *U. S. v. Fox*, 94 U. S. 315. Looking now to the spirit and intent of the law, it becomes only more clearly apparent that it cannot apply to this case. The injunction prayed for cannot affect the defendants as individuals. It is only sought to restrain the board of county commissioners from executing a law of the state as the agent and instrument of the state, and by no rule for the interpretation of statutes can such a law, made for the benefit of its citizens, be fairly invoked or applied as against the sovereign and maker of the law. Blackstone, speaking of the prerogative of the crown, says:

"The king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons, bodies politic or corporate,' etc.,) affect not him in the least if they may tend to restrain or diminish any of his rights or interests, for it would be of most mischievous consequence to the public if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject."

In this country the same rule of construction has always been recognized. Laws giving rights to litigants are in general made for citizens, and, unless clearly indicated by particular words, an intention to bind

the state by such enactments will not be presumed. Endl. Interp. St. § 161. This statute was first enacted by the territorial legislature, at its first session, in 1854, as part of the civil practice act, and I think it is obvious that the law-makers did not, either at the time of originally drafting it, or re-enacting it, contemplate that the territory or state would become an opposing claimant to land under the laws of the United States, or that the execution of its subsequently enacted laws could be thereby hindered or prevented. The demurrer, therefore, should be sustained, and a judgment thereon entered for the defendant.

KELLEY v. YPSILANTI DRESS-STAY MANUF'G CO.

(Circuit Court, E. D. Michigan. November 17, 1890.)

1. INJUNCTION—SUITS FOR INFRINGEMENT—ISSUE OF THREATENING CIRCULARS.

A defendant in a patent suit, who was the manufacturer of certain articles claimed to be an infringement of plaintiff's patent, sought to obtain an order enjoining the prosecution of three suits begun in other districts against its customers, as well as the commencement of new suits, and the sending of letters and circulars to others engaged in the trade, threatening prosecution for selling articles made by the defendant. *Held—First*, that the prosecution of suits in other districts should not be enjoined, because such suits were begun before this suit, and because comity demanded that application should be made to the court in which such suits were pending.

2. SAME—IRREPARABLE INJURY.

Second, that as the plaintiff might recover substantial damages against the defendant's vendees, in addition to those which he would be entitled to recover against the defendant as manufacturer, the commencement of new suits should not be enjoined, unless irreparable injury was threatened to defendant's business, or there was evidence of malice or bad faith on the part of the plaintiff in commencing such suits.

3. SAME.

And, *third*, that plaintiff had a right to notify persons using his device of his claim, and to call attention to the fact that, by selling or using it, they were making themselves liable to prosecution, and that an injunction would not be ordered unless the language of his letters or circulars was false, malicious, offensive, or opprobrious, or they were used for the willful purpose of inflicting an injury.

(Syllabus by the Court.)

In Equity.

On petition by defendant for an injunction to restrain the commencement and prosecution of suits against its customers and the sending of circulars to others engaged in the trade.

The petition set forth, in substance, that this suit was brought against the petitioner on the 10th of September, 1890, for the infringement of a patent corset stay; that petitioner owns property subject to execution in this district of the value of \$50,000, and is engaged in the manufacture of dress stays at Ypsilanti, under a patent to Enoch C. Bowling, and another to Elsie M. Smith; that plaintiff has brought three suits for alleged infringement of his patent against customers of petitioner for selling, in the ordinary course of trade, dress stays made by petitioner, the defense of which suits petitioner is forced to assume, viz., one in the circuit court for the southern district of New York against the firm of

Calhoun, Robbins & Co., one in the circuit court of Massachusetts against Coleman, Mead & Co., and one in the circuit court for Illinois against the Storm & Hill Company; that the defendants in these suits are merchants, and have no real interest in the suits, petitioner being the real defendant; that, in addition to bringing said suits, plaintiff has sought further to intimidate the trade, and maliciously to injure and interfere with his business by means of circulars and letters from himself and his counsel addressed to petitioner's customers, threatening suit against them; and also in advertising that he will bring suit against any person who sells a dress stay made in the same manner as petitioner's; that petitioner has filed its answer, and is ready to proceed with the trial, and is abundantly responsible for all damages or profits which may be recovered against it. Prayer for an injunction against the prosecution of suits already begun, against the bringing of other suits against petitioner's customers, and against molesting in any way by letters, circulars, oral threats, or otherwise, persons who may buy or sell or deal in petitioner's dress stays, etc., during the pendency of this suit.

George H. Lothrop, for petitioner.

Chas. H. Fisk and Broadnax & Bull, for plaintiff.

BROWN, J. Defendant seeks in this petition to obtain an injunction for three distinct purposes, viz., to prevent (1) the prosecution of three suits already begun; (2) the commencement of new suits against its customers; and (3) the molesting of others engaged in the trade by letters, circulars, or oral threats. As the legal principles applicable to these three kinds of relief are not precisely the same, we are compelled to give them an independent consideration.

1. Conceding that there are intimations in some of the cases that the court has power to enjoin the prosecution of suits already begun in other districts, (although our attention has not been called to any reported case where an injunction was actually ordered,) we think that this power, if it exists at all, of which we have grave doubt, should not be exercised in this case for the following reasons: *First.* Because the suits sought to be enjoined were all begun before this suit. While this case may not be exactly within the line of authorities which hold that, where jurisdiction has once attached, it cannot be taken away by proceedings in another court,—a question which frequently arises where property in possession of one court is interfered with by another, or an issue pending in one court is raised in another,—still we apprehend that there must be some peculiar reason giving to the court enjoining some superior authority to the other, such, for instance, as the pendency of proceedings under the bankruptcy or limited liability act, to authorize it to reach out its arm and arrest a pending suit of like character in another court. *Second.* Because we think that comity demands that the application should be made to the court in which the proceedings are pending. Such court is perfectly competent to give the relief, and would undoubtedly do so upon a proper showing. For this court to assume such power is virtually an attempt to dictate to another court of co-ordinate jurisdic-

tion what it ought to do in a particular case, and would naturally be considered as an offensive intermeddling with its proceedings. *Third.* As the plaintiff is a non-resident of this district, an injunction, if granted, could only be enforced by staying proceedings in this court, or dismissing his bill. He might still elect to proceed in the other courts, which would be under no obligation to take notice of our injunction.

2. With regard to the commencement of new suits, there are undoubtedly authorities which support the contention of the defendant; but most of them seem to be founded upon an impression with regard to the rights of a patentee against infringers which the supreme court has held to be erroneous. Thus, in *Birdsall v. Manufacturing Co.*, 1 Hughes, 64, where a similar application was made by a defendant who had been sued for manufacturing and selling a patented machine for hulling and threshing clover, it was held that an injunction should be granted, the court giving as a reason:

"That the defendants were thoroughly responsible, and that upon the original suit being carried on to completion, if recovery was made, the complainant would recover in that suit all the profits that defendants had obtained from the wrongful manufacture, and the damages that he had suffered by reason of the wrongful manufacture, and that complainant would therefore be put in the same position as if he had originally sold all the machines; that, this being the case, he ought not to be allowed to interfere with the vendees of defendants while the suit against them was pending."

Yet, in a subsequent case upon the same patent, (*Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244,) it was held that a decree in favor of a patentee, upon a bill in equity against one person for making and selling a patented machine, was no bar to a subsequent suit by the patentee against another person for afterwards using the same machine within the term of the patent; that while a license to make, use, and sell machines gives the licensee the right to do so throughout the term of his patent, and has the effect of wholly releasing them from the monopoly, and discharging all claims of the patentee for their use by anybody, an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to a future use of the machine. "On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed." The court in this case cites with approval the case of *Penn v. Bibby*, L. R. 3 Eq. 308, in which the chancellor said that "the patent is a continuing patent, and I do not see why the article should not be followed in every man's hands until the infringement is got rid of. So long as the article is used, there is a continuing damage." We do not see why the same principle does not apply to one who purchases of the manufacturer for the purpose of reselling to consumers. Indeed, it is difficult to see how this case can be reconciled with the language of the courts in *Spaulding v. Page*, 4 Fish. Pat. Cas. 641; *Gilbert, etc., Co. v. Bussing*, 12 Blatchf. 426; *Perrigo v. Spaulding*, 13 Blatchf. 391; *Booth v. Seevers*, 19 O. G. 1140. So, in *Allis v.*

Stowell, 16 Fed. Rep. 783, in which the injunction was denied, it was intimated that, "where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee." In this view of the law it was held that, to prevent a multiplicity of suits, the court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of a patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine,—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending. The cases of *Ide v. Engine Co.*, 31 Fed. Rep. 901, and *National Cash Register Co. v. Boston Cash Indicator Co.*, 41 Fed. Rep. 51, seem to have been decided upon the authority of the prior cases, and without the attention of the court being called to the case of *Birdsell v. Shaliol*, above cited. Upon the other hand, in *Chemical Works v. Hecker*, 11 Blatchf. 552, it was held, by Mr. Justice BLATCHFORD, that the court had no jurisdiction of a bill filed by a patentee to assume to regulate the conduct of the plaintiffs by injunction, except as regards the proceedings in the particular suit. "To grant the injunction asked for, would be to turn the defendant into the plaintiff, and the plaintiff into the defendant, and to administer independent affirmative relief in favor of a party, without his coming into court as an actor, by bill or other pleading containing allegations capable of being put in issue by formal pleading, or of being contested on proofs, and to do so on matters arising *post litem motum*." See, also, *Asbestos Felting Co. v. U. S., etc., Felting Co., etc.*, 13 Blatchf. 453.

The view we have taken of the case of *Birdsell v. Shaliol* seems to be supported by the opinion of Judge COXE, in *Tuttle v. Matthews*, 28 Fed. Rep. 98, in which a similar application for an injunction was denied upon the authority of that case.

There is undoubtedly great force in the argument that a defendant manufacturer, who has agreed to defend suits brought against his customers, and indemnify them against damages obtained by their selling his machines or device, ought not to be vexed by a multiplicity of suits in different parts of the country. But, in view of the case of *Birdsell v. Shaliol*, it is not easy to see how the recovery of damages from the defendant for manufacturing and selling would prevent the recovery of other substantial damages from the defendant's vendees for their profits upon reselling the patented articles. If the recovery of damages from the manufacturer does not operate as a license to use the patented article, or, in the language of the supreme court in *Bloomer v. McQuewan*, 14 How. 549, to pass it out of the limitation of the monopoly, there would seem to be no reason for enjoining him from prosecuting any one trespassing upon his domain. The risk of being mulcted in costs will ordinarily be sufficient to prevent the patentee from bringing any great number of suits until his patent has been judicially established.

In addition to these considerations, the plaintiff, by an injunction of this kind, might be debarred from the commencement of actions pending an appeal so long as to lose his rights against infringers, since it is well settled that the existence of an injunction does not operate to suspend the running of the statute of limitations. *Wood, Lim.* 484.

There would seem to be, however, no objection to the court in which such actions are brought staying proceedings in them until the validity of plaintiff's patent and the infringement of the defendant have been judicially ascertained in one of the principal suits; and perhaps in an aggravated case of threatened irreparable injury to defendant's business, or, if there were any evidence of malice, oppression, or bad faith on the part of the plaintiff, the court might enjoin temporarily the commencement of new suits.

3. With regard to the third branch of this application, viz., the molesting of others engaged in the trade by letters, circulars, and oral threats, it is sufficient to say that, even if it be conceded that a court of equity has power upon petition of a defendant to enjoin the plaintiff from publishing libelous statements concerning his business, there would seem to be no good reason why a patentee may not notify persons using his device of his claim, and call attention to the fact that, by selling or using it, they are making themselves liable to a prosecution. There is undoubtedly authority for holding that, if the language of such letters or circulars be false, malicious, offensive, or opprobrious, or used for the willful purpose of inflicting an injury, the party is entitled to his remedy by injunction; and this is the extent to which the authorities go. *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119; *Snow v. Judson*, 38 Barb. 210; *Emack v. Kane*, 34 Fed. Rep. 46; *Croft v. Richardson*, 59 How. Pr. 356; *Wren v. Weild*, L. R. 4 Q. B. 730. Upon the other hand, it would seem to be an act of prudence, if not of kindness, upon the part of a patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others, and in such cases an injunction has been uniformly denied. *Chase v. Tuttle*, 27 Fed. Rep. 110; *Boston Diatite Co. v. Florence Manuf'g Co.*, 114 Mass. 69; *Kidd v. Horry*, 28 Fed. Rep. 773. The language of the letters in the present case is perfectly respectful and courteous, and while the circular is a distinct and firm assertion of the patentee's rights, there is nothing in it to which the person receiving it can take a just exception. Nor is there anything to indicate that they were not written in good faith, and in the belief that the plaintiff had rights under his patents which he was entitled to protect by suit.

The motion for an injunction is therefore denied.

SOUTHERN COTTON OIL Co. v. WEMPLE.

(Circuit Court, N. D. New York. November 14, 1890.)

TAXATION—FOREIGN CORPORATIONS DOING BUSINESS WITHIN THE STATE.

A foreign manufacturing company which maintains an established location and an agent in New York city for the purpose of selling its products or facilitating their sale, and which keeps funds in New York city to maintain its place of business and to enable its agent to carry on his operations, is "doing business within the state" within the meaning of Laws N. Y. 1885, cc. 359, 501, which provide that every foreign corporation "doing business within this state" shall be subject to a tax on its corporate franchise or business, to be computed on the basis of the amount of capital stock employed within the state.

In Equity. On bill for injunction.

W. W. MacFarland, for complainant.

Chas. F. Tabor, Atty. Gen., for defendant.

WALLACE, J. This suit is brought by complainant to restrain the collection of a tax assessed against it by the comptroller of the state of New York for the years 1887, 1888, and 1889, under a statute which enacts that "every corporation, joint-stock company, or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country, and doing business in this state, shall be subject to pay a tax upon its corporate franchise or business." Laws N. Y. 1885, c. 359. The statute provides that "the amount of capital stock, which shall be the basis for tax, * * * shall be the amount of capital stock employed within this state." *Id.* c. 501. Complaint is not made of any excessive or irregular assessment, but the bill avers that the complainant is not subject to taxation, and that the assessment is void. The complainant is a manufacturing corporation, organized under the laws of New Jersey, and having its principal place of business in that state. Its factories and plant are all situate outside the state of New York. It sells its products in various states and in foreign countries, and for that purpose, during the years 1887, 1888, and 1889, it maintained a sales agency and office at New York city, and kept a bank account there for the convenience of its local transactions. Its corporate meetings have always been held either at its principal office in New Jersey, or in Philadelphia, where it has a branch office, and where its books of account are kept and its general financial business is done. The president of the corporation deposes as follows:

"Since about October, 1887, the company has had a sales agent in the city of New York, whose duty it has been to make sales of the products of the company's mills. These products are not regularly kept on store at any place in the state of New York, but the sales agent receives orders, which he transmits to the company's officers and managers, and the goods are then forwarded from the company's mills for delivery to the purchaser. Such deliveries are, and always have been, made in the same barrels, tanks, or packages in which the products have been brought from the mills into the state, and without opening or breaking any of the tanks, barrels, or packages, ex-

cept that in certain instances, in 1888, purchasers having ordered refined oil, some crude oil was brought to New York and refined by certain refiners, under contract with the complainant, and when so refined was delivered to the purchasers. Occasionally a small amount of oil or other product of the company's mills in excess of actual sales has been sent to New York, and placed in store until sold. Such products have always been stored, and subsequently sold and delivered in the barrels or packages in which they have been brought into the state. The total amount of such sales from store during the years 1887, 1888, and 1889 has not exceeded 5 per cent. of the total sales made by the New York sales agent. The proceeds of all sales made by the New York agent were either sent to the Philadelphia office or deposited in bank, subject to the drafts of that office, as hereinafter stated. During the year 1888 the company, in the state of New York, had an average deposit of about \$15,000, and in the year 1889 about \$88,000. These deposits were subject only to the draft of the Pennsylvania office. The sales agent had a small bank account, never exceeding \$2,500, for payment of office expenses. Except as above stated, the complainant has done no business of any kind whatever in the state of New York, and all the sales and transactions of its sales agent have been conducted in the manner above stated."

The tax authorized by the statute is upon the privilege of foreign corporations to do business within this state, and is not one upon property. *People v. Trust Co.*, 96 N. Y. 387; *People v. Mining Co.*, 105 N. Y. 76, 11 N. E. Rep. 155; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. Rep. 593. Such a tax has no reference to the character of the property in which the capital of the corporation is invested or used, and its legality is not affected by the nature of the property upon which it operates. Whether the property upon which it may incidentally operate is taxable or not, is immaterial. *Wallace v. Myers*, 38 Fed. Rep. 184; *Society v. Coite*, 6 Wall. 594; *Institution v. Massachusetts*, Id. 631; *Home Ins. Co. v. New York*, 119 U. S. 129, 8 Sup. Ct. Rep. 1385. The real question, and the only question, in the case concerning the legality of the tax is whether, upon the facts shown, the complainant was doing business in this state. If it was not, within the meaning of this statute, there was no statutory authority for the tax which has been assessed against it. This question is one of the interpretation of a state statute. It is one which it is peculiarly the province of the state courts to decide, and one as to which their decisions, and not those of this court, are authoritative. It has been somewhat considered by the court of appeals in *People v. Trust Co.* and *People v. Mining Co.*, *supra*, but in no other adjudications which have been brought to the attention of this court. The case of *People v. Commissioners of Taxes*, 23 N. Y. 242, is also relied upon by the complainant as throwing some light upon the meaning of the statute; but that judgment seems to be of but little value here, because the tax under consideration was a tax upon property, and the question was as to the character of the property or investments subject to the tax. In *People v. Trust Co.* the question of the meaning of the term "doing business" or "corporate business" was not involved; but EARL, J., after stating that the inquiry was not presented, used this language:

"Does it mean occasional or incidental corporate business, or continuous business substantially through the year? * * * Does not the statute,

when it provides as the measure of the tax the amount of dividends earned by the entire business of the corporation, or the entire cash value of its capital stock, mean by 'its corporate business' substantially the whole or the main corporate business which it was chartered to transact? These questions we leave unanswered."

Since that case was decided the statute has been amended so that the measure of the tax is no longer the amount of dividends earned by the entire business of the corporation, or the entire cash value of its capital stock, but is "the amount of capital stock employed within this state." In other words, the present act apportions the tax, and measures it as to the business done within this state by the amount of capital employed here in doing it. In *People v. Mining Co.* the meaning of the term was necessarily involved, but the decision falls short of solving the present question. In that case the corporation taxed was a Utah mining company. While most of its business was done in Utah and Chicago, its silver bullion was all sent to New York city, and sold there. The proceeds were deposited there, and in part loaned and in part paid out for the company's business there, the balance being sent to Utah and Chicago for use in the business. The president, secretary, and treasurer of the corporation had their offices in New York city, its directors held their annual meetings there, and all its dividends were paid there. Referring to these facts, the court said:

"There was thus a very substantial portion of its business done in the city of New York. The business did not consist of an occasional transaction, but an office was kept there, and the business continuously transacted there during the whole year. We cannot construe the words 'doing business in this state' to mean the whole business of the corporation within this state, and while we are not prepared to hold that an occasional business transaction, that keeping an office where meetings of the directors are held, transfer-book kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done, would bring a corporation within the act, yet when, as in this case, all these things are done, and in addition thereto a substantial part of the regular business of the corporation was carried on here, then we are unable to say that the corporation was not brought within the act as one 'doing business within the state.'"

According to the views thus expressed, doing business within the state does not consist of occasional transactions, or the keeping of an office where transactions take place which are merely incidental to the regular business of the corporation. Applying them to the present case, the occasional refining of oil in New York and the occasional storage of products in advance of sales there by complainant, without more, would not constitute doing business here. In construing the statute regard must unquestionably be had to the nature of the transactions which it is competent for the state to regulate, and it should not receive a construction which would defeat its validity by extending its operation to subjects which are beyond the taxing power of the state. The state could not lay a tax upon the mere privilege of soliciting orders here for goods in behalf of sellers doing business in other states, because it would be one upon interstate commerce, and amount to a regulation of commerce which

belongs solely to congress. *Robbins v. Taxing-District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1. The statute ought not to be interpreted as taxing a privilege of that description. But a foreign corporation, which establishes a business domicile here, and brings its property within this jurisdiction, and mingles it with the general mass of commercial capital, is taxable here; and the power of the state is ample to tax its property directly or to lay a tax upon its privilege of doing business, whether the property consists of funds deposited in bank or of goods sent here from other states, not in transit merely, but to remain here till used or sold. The principle of the present statute is that such corporations shall contribute according to the value of their capital "employed within the state." It lays the tax upon the privilege, and measures the amount by the amount of property which is protected here. Reasonably interpreted, the statute means by "doing business within this state" using this state as a business domicile for transacting any substantial part, even though a comparatively small part, of the business which the company is organized to carry on, and in which its capital is embarked. It would seem that a manufacturing company which maintains an established location here, and an agent, for the purpose of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here; and if it keeps funds here for maintaining its place of business, and to enable it to carry on the operations of its agent, such a foreign company would seem to be taxable under the statute. Certainly it cannot matter that the volume of business done is small, or that the location, instead of being a warehouse or a shop, is an office or a sample-room.

The case made by the complainant is not free from doubt, but, after as forcible and persuasive a presentation in its behalf as the facts can warrant, the conclusion is reached that it is subject to the tax authorized by the statute. The question whether a court of equity has jurisdiction to restrain the collection of a tax, under the circumstances of this case, does not require decision in view of the conclusion reached. The injunction is denied.

MANN v. TACOMA LAND CO.

(Circuit Court, D. Washington, W. D. October 22, 1890.)

1. SURVEYS OF PUBLIC LANDS.

Under the land laws of the United States, the line of ordinary high tide on the shore of an arm of the sea is the boundary between the land and the water at which the surveys of the public lands of the United States terminate.

2. PUBLIC LANDS—LOCATION OF SCRIP.

The act of congress, providing for the issuance of Valentine scrip, and for its location upon unoccupied and unappropriated public land, cannot be so construed as to authorize the entry with said scrip of mud flats bare at low tide, but subject to daily overflow, situated in one of the harbors of a territory, and which has been omitted from the surveys made of public lands surrounding such harbor.

(Syllabus by the Court.)

In Equity.

Judson, Sharpstein & Sullivan and P. H. Winston, for plaintiff.

Louis D. Campbell, for defendant.

HANFORD, J. This case has been submitted upon a demurrer to the plaintiff's amended bill. The plaintiff, claiming to own three separate 40-acre tracts of the mud flats in Tacoma harbor, brings this suit for an injunction to prevent the defendant from proceeding further with certain harbor improvements it is making, in front of land it owns abutting upon the shore, which the bill alleges will interfere with plaintiff in the possession and use of the premises which he claims to own. The bill shows that said premises are what is commonly known as "tide-lands," or mud flats, and are situated below the line of ordinary high tide; that they are bare at ordinary low tide, but subject to overflow daily, and are not within the surveys of the public lands of the United States. The plaintiff's claim of title is based upon the location thereon of certain land-scrip called "Valentine Scrip." The plaintiff and his vendors were owners of the scrip, and they located the same, and filed the proper certificates and declarations in the United States land-office at Seattle, on October 30, 1889, which time was prior to the president's proclamation making complete the admission into the Union of this state, but subsequent to all the acts of legislation and proceedings leading up to that event. In deciding this case, I shall leave untouched the interesting question as to the power of congress to dispose of tide-lands in a territory, and most of the many other important questions which have been discussed in the very able arguments made before me, my opinion being such that it is unnecessary for me to do more than pass upon the single question as to validity of the plaintiff's claim of title, and a single reason for my opinion upon that question is all that need be given.

The Valentine scrip was issued pursuant to the act of congress of April 5, 1872, (17 St. U. S. 649,) for the relief of Thomas B. Valentine, authorizing scrip to be issued to him, and authorizing him, or his legal representatives, to locate such scrip upon such "unoccupied and unappropriated public lands of the United States," whether surveyed or unsurveyed, as he or his legal representatives, might select. The act provided further that such selection should be made, if on unsurveyed land, so as to conform to the government surveys, when the land should be surveyed, and in tracts of not less than 40 acres. This statute authorizes the location and entry of land, which, at the time of entry, either has been, or remains to be, surveyed and included in the public surveys of the township, according to established and known rules governing the land surveys of the United States. And obviously it was not intended by congress to give Mr. Valentine, his representatives or vendees, any right to acquire title by use of such scrip to any part of a navigable river, channel, or harbor, or the bed or shore thereof, situated outside the limits subject to survey according to established rules. As part of a general plan and system for the sale and disposition of the lands of the United States, the laws provide for surveys to be made, and officers

especially qualified to do that work and charged with official responsibility are assigned to the duty of subdividing the land and locating and establishing boundaries. The lands surrounding this harbor have been by such officers surveyed, and the boundary line between the land and the water of the bay has been by this official survey located and established. The line is approximately the line of ordinary high tide, which, according to all the laws and usages of this country, is the boundary line dividing the land and the water, and the limit to which the surveys may lawfully extend. The space which the plaintiff seeks to protect is not surveyed as land, and remains unsurveyed because situated outside of this boundary, and it was regarded by the official surveyor as being not land at all, but as water. The work of the surveyors in the field with their plats and field-notes has been approved by the commissioner of the general land-office, and it is, as to all matters relating to the sale and disposition of the lands of the United States, conclusive and binding upon all persons having to deal with the United States, as well as upon the government itself. *Bates v. Railroad Co.*, 1 Black, 204. Therefore, in my opinion, the plaintiff could acquire no title or right to the premises he claims by the proceedings in the land-office, and he cannot lawfully maintain this suit. The demurrer will be sustained, and a decree dismissing the bill, with costs, will be entered.

UNITED STATES v. OSBORN.

(Circuit Court, D. Washington, S. D. November 11, 1890.)

PUBLIC LANDS—UNLAWFUL OCCUPANCY—GRANT TO RAILROAD.

The inclosure and occupancy of lands in an odd-numbered section, and within the limits of a grant to a railroad company, where the entry was made after the same had been withdrawn from sale or entry, and before completion of the railroad, or any declaration of forfeiture of the grant, by a person who, in good faith, intended to acquire title to it by purchase from the railroad company, is not made unlawful by the act of congress entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885, (23 U. S. St. 321.)

(Syllabus by the Court.)

In Equity.

P. H. Winston, U. S. Atty.

D. J. Crowley, for defendant.

HANFORD, J. This suit is founded upon the act of congress entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885, (23 U. S. St. 321,) the first section of which defines unlawful occupancy as follows:

"All inclosures of any public lands in any state or territory of the United States heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling

the inclosure had no claim or color of title, made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful."

The land which is the subject of controversy in the case is situated in sections 20 and 21, township 7, range 35, in Walla Walla county, and within the limits of the withdrawal made August 13, 1870, of lands claimed by the Northern Pacific Railroad Company, under its grant for the projected railroad to Portland. The defendant denies in his answer that he has inclosed or occupied any part of section 20, and there is no proof that he has done so. As to the lands in section 21, I find, from the evidence, that the defendant inclosed the tract described in the bill in the year 1882, and has ever since occupied and cultivated the same. That in so taking possession of and improving said land he relied upon a promise of said company that it would, after perfecting its title, sell the land to him at its appraised value, exclusive of the improvements thereon which he should make, and expected to so acquire title to it from said company. Said company's purpose to build the projected railroad down the Columbia river, to Portland, had not been abandoned in 1882, and the defendant had an actual claim to the land, made in good faith on his part, at the time of his entry thereon. The mere statement of the facts in the case, as above, ends it, for by no possible construction of its terms can the act referred to be made applicable, and I am unable to understand why the late United States attorney for the territory of Washington instituted this suit, unless it was for the purpose of obtaining a decision upon the question as to the true southern limit of the railroad lands earned by the partial completion of the road, this land being north of a line designated as the southern limit in an order made by the acting commissioner of the general land-office March 20, 1885, known as the "Harrison Line," and is part of the land granted by the United States and earned by the company, if said line correctly fixes the extent of the grant. Said order was revoked within a month after it was made, and there has been contention and uncertainty ever since, as to the titles to all the lands north of said line and up to another line known as the "McFarland Line." The question, however, does not arise in the case. It can be decided either way, and the result of this case will be the same; for by the plain language of the act which I have quoted, one of the essentials of an unlawful occupancy is that at the time of its inception there should have been no claim to the land made in good faith, and no color of title acquired in good faith, and it is clearly established and conceded that the defendant entered under both a claim and color of title made and acquired in good faith. Let a decree be entered dismissing the bill.

CLEWS v. WOODSTOCK IRON CO.

(Circuit Court, S. D. New York. October 13, 1890.)

1. SERVICE OF PROCESS—FOREIGN CORPORATION—DOING BUSINESS IN STATE.

A foreign corporation, which has done no business in New York beyond negotiating a mortgage on its property, and having the bonds secured thereby put on the list of the New York Stock Exchange, is not engaged in business in the state, and no jurisdiction over it is acquired by service of summons on its president while temporarily in the state for those purposes.

2. SPECIAL APPEARANCE—WAIVER OF OBJECTIONS.

By appearing specially, and removing the cause from a state to a federal court, the corporation does not waive the right to object to the jurisdiction.

Motion to Set Aside Service of the Summons.

Defendant is an Alabama corporation. Summons in an action brought in the state court was served on its president, Alfred L. Tyler. That officer was a resident of Alabama, and had no residence in the state of New York. He was at the time of service in New York city, attending to the business of various enterprises, including the negotiation for said defendant of a certain loan upon mortgage of its property. In order to obtain such loan he presented the application of said defendant, on June 16, 1890, to the committee on stock-list of the New York Stock Exchange, asking to have the bonds secured by said mortgage listed on the stock exchange. Thereafter, on three or four occasions, he appeared before the committee to urge the granting of the application and explain the same. On June 25th the committee made a report favorable to the application. The bonds were sold by said Tyler principally to two firms of brokers, and were admitted to the list July 22, 1890. On July 18, 1890, the summons was served. The regular business of the defendant, which is carried on at the city of Anniston, Ala., is the development of lands owned by it in said state, mining and transportation of ores therefrom, and the manufacture of pig-iron and other manufacturing connected therewith. Defendant removed the case into this court, and moved to set aside the service of the summons, having appeared specially for that purpose.

Strong & Cadwalader, for the motion.

Noah Davis, contra.

LACOMBE, Circuit Judge. In *Good Hope Co. v. Railway B. F. Co.*, 22 Fed. Rep. 635, it was held that service of summons upon the president, secretary, or treasurer of a foreign corporation, which is not engaged in business in this state, would be inoperative to confer jurisdiction. The decision was rendered after the converse of that proposition had been announced by the court of appeals, (construing section 432 of the New York Code,) this court quoting with approval the language of the opinion in *Moulin v. Insurance Co.*, 24 N. J. Law, 224, which characterized a law similar to that of this state as "so contrary to natural justice and to the principles of international law that courts of other states ought not to sanction it." As indicated in *Golden v. Morning News*, 42 Fed.

Rep. 112, that decision must be accepted as settling the law in this circuit. Its principles are as applicable to causes which are removed as to those which are not. It would be absurd to hold that proceedings in a state court were void on the theory that such court acquired no jurisdiction of the party because its attempted service of process was abhorrent to natural justice and international law, and at the same time to hold that a federal court could administer justice under such a service after the cause had been removed to its forum. Nor does removal and special appearance by the defendant waive its right to avail of a defective service. *Harkness v. Hyde*, 98 U. S. 476; *Miner v. Markham*, 28 Fed. Rep. 395. The only question, therefore, which is left for decision upon this application is whether the corporation defendant was at the time of service of the summons engaged in business in this state. That question must be determined by what it had done, or was doing, at that time, rather than by what it might do thereafter. That it will probably hereafter provide a regular agency in this state for the continuous transaction of the business of registration and transfer of its bonds and payment of the interest on the coupons during the continuance of the mortgage is immaterial. The only business which it had done up to the 18th July was the borrowing of money upon its bond and mortgage, and the obtaining from the stock exchange of the privilege of having such bonds called on the list of securities dealt in on its floor. It could apparently have secured this privilege, and could have sold its bonds by correspondence. It kept no office here. It did not continuously, or even for a period of some duration, carry on here the business which it was organized to carry on, and by the regular transaction of which it gave evidence of its continued existence. It cannot, therefore, be held under the authorities that the defendant was, at the time when Tyler was served, engaged in business in this state so as to make service of the summons on him efficient to bind the corporation. *U. S. v. American Bell Tel. Co.*, 29 Fed. Rep. 37; *Good Hope Co. v. Railway B. F. Co.*, 22 Fed. Rep. 635; *Hunter v. Improvement Co.*, 26 Fed. Rep. 299; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. Rep. 802; *Carpenter v. Air-Brake Co.*, Id. 434. Motion granted.

ISAACS v. McNEIL et al.

(Circuit Court, S. D. Washington. November 10, 1890.)

ELECTIVE FRANCHISE—DENIAL OF RIGHT—STARE DECISIS.

Damages cannot be recovered, in an action against election officers, for deprivation of plaintiff's right, under the laws of Washington Territory, to vote, (if such right existed,) where the decision of the board as to her right to vote was controlled by and followed a previous decision of the supreme court of the territory, which decision had not been reversed or overruled, and where no rudeness or malicious conduct on the part of the defendants is charged.

(Syllabus by the Court.)

At Law. On demurrer to complaint.

J. L. Sharpstein and Laura De Force Gordon, for plaintiff.

D. J. Crowley, for defendants.

HANFORD, J. This is an action against the inspector and judges of election of a precinct to recover damages for depriving plaintiff of a right which she claims of voting at the general election held in the territory of Washington on the 1st day of October, 1889. The complaint does not charge the defendants with having insulted her, or with any rudeness or malicious conduct. The injury, if any, was committed by the mere refusal of the board to receive and count the plaintiff's ballot. The question as to the right of women to vote in Washington Territory, at the said election, depends upon the validity of an act of the territorial legislature, which the supreme court of the territory has held to be void, because in conflict with an act of congress, and this court has jurisdiction of the case only by reason of the fact that this question involves the construction of said act of congress. The court cannot, however, pass upon that question in this case, for, even if plaintiff's right to vote at said election be conceded, she cannot maintain the present action. The decision of the supreme court of the territory in the case of *Bloomer v. Todd*, 3 Wash. T. 599, 19 Pac. Rep. 135, was rendered prior to the election at which the plaintiff was denied the right to vote, of which she complains. In that decision the court held that women were not lawfully entitled to vote; and as the laws were not thereafter, and prior to the election of October, 1889, changed, and as that decision had not been reversed or overruled, it must have controlled the defendants in this case in giving their decision as to the plaintiff's right to vote at said election, and they cannot be held liable in an action for damages merely because they followed it. If the decision be erroneous, the supreme court is responsible for the error; and as the law shields the judges of that court from an attack of this nature, it follows, of course, and is a rule of common sense and natural justice, that the members of an inferior and humbler tribunal, which of necessity accepted their decision, and followed it, are protected by the same shield. The authorities, as well as reason, so declare. *Mechem*, Pub. Off. §§ 638, 639, 695; *Gordon v. Farrar*, 2 Doug. (Mich.) 409; *Wall v. Trumbull*, 16 Mich. 228; *Cooley*, Torts, p. 413; *Jenkins v. Waldron*, 6 Amer. Dec. 359. The demurrer is sustained.

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FULLER v. FLETCHER *et al.*

(Circuit Court, D. Rhode Island. October 18, 1890.)

1. EJECTMENT—EVIDENCE—ANCIENT RECORD.

Where it is proved that land was conveyed to J. in 1768, and has been assessed to his heirs ever since 1805, the original tax-lists of the town for the intervening years are admissible in evidence to show that J. was assessed for said land during said years, where such lists show that J. was assessed for land in said town, though they do not identify the land.

2. SAME—PRESUMPTION OF DEED.

Where the question is whether a deed is to be presumed from long possession and claim of title, evidence that the claim of the adverse claimant was notorious in the community, and that, more than 60 years after the deed, if there was a deed, was given, such claimant was too poor to sue, is irrelevant.

3. SAME—DEFENSES.

The attempt by a defendant in ejectment to prove that the will under which the plaintiff claims is invalid does not prevent him, on a second trial of the cause, to set up the defense of a presumption of a deed to his grantor.

4. ADVERSE POSSESSION—PRESUMPTION OF DEED.

There is no absolute bar against the presumption of a grant within a period short of the statute of limitations.

5. SAME—POSSESSION.

Occasional interruptions of possession during the period necessary to create a title by adverse possession, which do not impair the use to which the occupant subjects the property, and for which it is chiefly valuable, will not necessarily defeat the presumption of a grant.

6. SAME—EVIDENCE.

It is sufficient ground for the presumption of a grant to show that, by legal possibility, a grant might have issued, though the probability of its existence is not established.

7. SAME.

The facts that defendants and those from whom they derive title have claimed the land for more than 100 years; that during that time they have paid taxes on it; that for a long period of time they exercised acts of ownership over it; and that for more than 20 years they have actually used the land,—are sufficient to justify the presumption of a deed.

8. NEW TRIAL—MISCONDUCT OF JURY.

The fact that two of the jurors during the trial of a cause read the opinion of the supreme court, rendered on appeal from a former judgment of the cause, is not ground for a new trial, where it clearly appears that the opinion was not furnished by or at the instigation of the successful party, and that the opinion was not taken into the jury-room or laid before the jury.

9. SAME—AFFIDAVITS OF JURORS.

Affidavits of jurors are admissible, on motion for new trial, to prove, in support of the verdict, that a certain paper was not laid before the jury or read by them.

At Law. On motion for new trial.

Jas. C. Collins, Livingston Scott, and Elisha C. Moury, for plaintiff.

James Tillinghast and Wm. H. Greene, for defendants.

Before GRAY, Justice, and COLT, J.

GRAY, Justice. This was an action of ejectment, brought by Nathan Fuller, in his own right and as trustee, to recover 27 undivided 28 parts of a lot of land, containing about 14 acres, and situated in the town of Lincoln, formerly Smithfield, in the state of Rhode Island. The defendants pleaded the general issue and 20 years' possession under the statute of possessions of Rhode Island, and upon these pleas issues were joined. Both parties claimed title under Francis Richardson, who acquired a tract of land, including the lot in dispute, in 1750, died in

1756, and by a codicil to his will devised the land to his daughter, Abigail Fuller, wife of Ezekiel Fuller, of whom the plaintiff and his *cestuis que trust* were descendants, and in whose right they claim. In 1768 Jeremiah Richardson, a grandson of Francis Richardson, conveyed the land to Stephen Jencks, the ancestor of the defendants, and in whose right they claim. A principal question in the case was whether Jeremiah Richardson, at the time of that conveyance, was entitled to the land either by a lost grant or by inheritance. The case has been tried five times. Verdicts returned for the defendants at the first trial, and for the plaintiff at the second trial, were set aside by this court. A verdict returned for the plaintiff at the third trial was set aside by the supreme court on writ of error. 120 U. S. 534.¹ The fourth trial resulted in a disagreement of the jury. At the fifth trial, at November term, 1887, a verdict was returned for the defendants, and a bill of exceptions was tendered by the plaintiff and allowed by the presiding judge. The plaintiff filed a motion to set aside this verdict, and to order a new trial, which, so far as concerns the proceedings at the trial, has been submitted and argued upon the case as stated in the bill of exceptions. The evidence at the last trial was mostly the same as that introduced at the third trial, the substance of which is stated in the judgment of the supreme court, reported in 120 U. S. 534.¹ A recapitulation of much of the evidence is therefore unnecessary.

The court, against the plaintiff's objection, and for the purpose of showing that Stephen Jencks was assessed for and paid taxes on this land from 1770 to his death, in 1805, admitted in evidence original tax-lists of the town (being all before 1805 that the legal custodian thereof, as he testified, was able to find) for the years 1770 and 1805, and 21 of the 34 intervening years, each of which contained the name of Stephen Jencks as a person taxed, with the amount of his tax, and generally the word "land," opposite to it; as well as a list of the polls and estates, real and personal, of the proprietors and inhabitants of the town, called an estimate for taxation, for the year 1778, (being the only list found during the same period,) by which it appeared that he was listed for 32 acres designated as wood and waste land, and also for 2 acres of tillage and 10 acres of pasture land. It being in dispute whether Jencks had so much land in the town other than the land in question, the plaintiff contends that all these lists were erroneously admitted, because they did not identify this land. But the names of the Fullers did not appear upon the lists, and there was no evidence that they were taxed in the town during the period in question; and it was proved that this land had been conveyed to Jencks in 1768, and has been assessed to his heirs ever since 1805. These ancient records, therefore, were rightly submitted to the consideration of the jury. *Fletcher v. Fuller*, 120 U. S. 552, 7 Sup. Ct. Rep. 667; *Com. v. Heffron*, 102 Mass. 148, 152, 153.

Upon the question of presuming a deed to Jeremiah Richardson before 1768, the plaintiff offered evidence of the poverty of himself and his

¹7 Sup. Ct. Rep. 667.

cestuis que trust, and of those claiming under the same title, by way of showing their inability to sue. The court, after liberally admitting such evidence down to the death of Abigail Fuller, in 1834, rightly excluded like evidence since that time, as too remote and irrelevant to have any bearing upon the question of presuming a grant more than 60 years before. The testimony offered by the plaintiff to prove "the notoriety of the claim of the plaintiff, and of those under whom he claims, of the land in dispute, in and throughout the community where the land lay, extending over a period from 1822 to the present time," was equally irrelevant, even if (which we do not intimate) it would, under any circumstances, be competent. The attempts of the defendants at the former trials to prove that the will of Francis Richardson was inoperative, for want of having been proved or recorded in Rhode Island, to pass title to his daughter, Abigail Fuller, and consequently that Jeremiah Richardson took by inheritance, had no tendency to defeat the independent defense of a presumption of a deed to Richardson.

No error is shown in the refusal to charge that—

"If the jury find that Abigail Fuller, wife of Ezekiel Fuller, entered into possession under the devise in the will of Francis Richardson, then there is no sufficient evidence in the case to show an actual adverse and exclusive possession by any person under whom the defendants claim prior to the year 1800."

The bill of exceptions does not profess to state all the evidence introduced upon this point, or contain anything to restrict the application of the general rule that the sufficiency of evidence is a question for the jury.

Objection is taken to the refusal of the court to instruct the jury—

"That if they should find that the defendants, or those under whom they claimed, had had twenty years' uninterrupted adverse and exclusive possession of the premises, during which time the plaintiff, or those under whom he claimed, had been free from legal disabilities, they were justified in presuming a grant; but otherwise they must decide according to whether the evidence did or did not lead to the reasonable belief in the rightful origin of the defendants' possession, or of those under whom they claim."

But such an instruction would be entirely inconsistent with the opinion of the supreme court, in which it was distinctly affirmed that, when the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant within a period short of the statute of limitations; and also that when a proprietary right has long been exercised, although the exclusive possession of the whole property to which the right is asserted may have been occasionally interrupted, yet if the actual possession has been accompanied by other open acts of ownership, and the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim, to which the facts would otherwise lead. 120 U. S. 550, 552, 7 Sup. Ct. Rep. 667.

The instruction requested, "that if the jury should find that Jeremiah Richardson made the deed to Stephen Jencks in 1768, claiming to own

the land, not under a conveyance from Abigail Fuller, but by inheritance from his grandfather, Francis Richardson, then no presumption of a grant could arise," was rightly refused, if for no other reason, because it would have withdrawn from the consideration of the jury the evidence of the defendants' possession since 1768.

The instructions given upon the return of the jury into court for further instructions were as follows:

"With respect to the presumption of a grant or deed, it does not rest upon the fact of whether these defendants prove a lost deed as a matter of fact; for the law says to you that it is your duty, if you find that these defendants, the Fletchers and the Dexters, have claimed this property for more than a hundred years, if they have paid taxes on it for a long period of time, if they have exercised acts of ownership over it, and if they have been in possession of it for more than twenty years, then it is your duty to presume a grant: provided, the rebutting evidence on that does not overcome it. The presumption of a grant does not arise from the proof of the fact that such a lost deed in fact existed, because then it would be a mere question of proof. A presumption rests upon the infirmity of human nature. It arises from the fact that evidence, owing to lapse of time, is lost; from the fact that the muniments or the deeds of title may be lost; from the fact that parties who are entitled to a valuable possession will claim it, provided others are enjoying it. Therefore the law says that you are warranted or justified in presuming a grant, whatever your belief may be of the fact of such grant, in order to quiet a long possession. So that this is the rule: It is not necessary, in order to presume a conveyance, to believe that the conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that a conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-existence. It is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possessions. It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that a grant ever issued. It would be sufficient ground for a presumption to show that, by legal possibility, a grant might have issued. Though the presumption of a grant or deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done and the things omitted with regard to the property in controversy by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, it is the duty of the jury to presume a conveyance, and thus quiet the possession. If they find that the defendants or their ancestors in title have claimed the land for more than a century, that during that time they have paid taxes thereon, and for a long period of time exercised acts of ownership, suited to the condition of the property, and have actually used the property for twenty years or more, these things would justify you in presuming a deed from Abigail Fuller to Jeremiah Richardson, to quiet the possession of the defendants."

These instructions were "duly excepted to, so far as they relate to the right or duty of the jury to presume a grant upon the facts as developed in this case;" but they were in exact accordance with the judgment of the supreme court in 120 U. S. 534, 7 Sup. Ct. Rep. 667.

The objections urged against the instructions originally given to the

jury, so far as they are not covered by what has been already said, relate to single sentences in the charge, dealing with subordinate points, not affecting the real merits of the case or the substantial justice of the verdict. Such objections afford no ground for sustaining a motion for a new trial, which is addressed to the sound discretion of the court. *McLanahan v. Insurance Co.*, 1 Pet. 170, 183. Nor could they be drawn in question under the general exception "to the instructions which were given, as above set forth," at length in 10 printed pages of the record. *Insurance Co. v. Raddin*, 120 U. S. 183, 193, 194, 7 Sup. Ct. Rep. 500 *et seq.*

The remaining grounds assigned for the motion for a new trial are as follows:

"Because, during the trial of this cause at November term, 1887, one or more of the jurors impaneled to try the case were furnished, by parties unknown, without the knowledge or consent of the plaintiff, with a printed copy of the opinion of the supreme court of the United States delivered in this case [*Fletcher v. Fuller*] on writ of error at October term, 1886, which said printed opinion was read and examined by said juror or jurors during said trial, and before the close thereof. Because, two days before the commencement of the trial, one of the drawn jurors attending for the term, and who afterwards was accepted and sworn to try the said case, was furnished with a printed copy of said opinion of the supreme court by William H. Gooding, town-clerk of the town of Lincoln, a person pecuniarily interested in the defense of this suit, and said juror did, at said Gooding's request, read said opinion, and read the same during the said trial."

The depositions taken by a commissioner, appointed by the court with the consent of the parties, prove this state of facts: One of the defendants, before the last trial, caused to be printed 100 pamphlet copies of the opinion of the supreme court as reported in *Fletcher v. Fuller*, 120 U. S. 537-555, 7 Sup. Ct. Rep. 667, with no separate statement of facts or evidence prefixed, and with a cover entitled "Opinion of the Supreme Court of the United States, in favor of the defendants, Nathan Fuller, in his own right and as trustee, *vs.* Lucy W. Fletcher *et al.*, delivered March 7, 1887;" and distributed them among friends and relatives interested in the case, and among other persons in the neighborhood, including some who had been jurors or witnesses at former trials. Pending this trial, the foreman and another of the jury each read one of those copies, brought to his notice under the following circumstances: A copy was left, by whom did not appear, at the place of business of the foreman in Providence. Gooding, the town-clerk of Lincoln, and who held other land under the same title as the defendants, testified that two days before the last trial he called at the residence in Lincoln of another juror drawn and attending at that term, and afterwards sworn as a juror in this case, and gave him a copy, for the purpose of enabling him to understand the case better, and with no intent to influence his judgment. Gooding's conduct, though meddlesome and foolish, does not appear to have been dictated by a corrupt intent to interfere with the administration of justice, and there is not the slightest evidence that either of the defendants had a hand in

it. On the contrary, it is clearly proved by the uncontradicted testimony of the defendants that none of them had anything to do with transmitting or delivering such copies to either of those jurors, or to any other juror who sat at this trial; and it is also proved by the testimony of both those jurors that no such copy was taken into the jury-room or laid before the jury.

In order to set aside a verdict because a paper was unlawfully communicated to the jury, it must, at least, appear either that the party in whose favor the verdict was afterwards returned took some part in the communication, or that the paper was such as could be supposed to have influenced the minds of the jury; and the affidavits of jurors, though incompetent to prove the part which any of them took, or the motives by which any of them were influenced, in their discussions with each other about the case, are admissible to disprove that a certain paper was before the jury or was read by them. *Woodward v. Leavitt*, 107 Mass. 453, 466-469. The copies in question having been communicated to the two jurors out of court, and without any participation of the defendants, the case stands just as if those jurors had happened, on the way to or from court during the trial, to read the opinion in a newspaper, or in the official reports of the supreme court; and there is no such presumption that they could have been unduly influenced by their separate reading of that opinion as will justify the setting aside of the verdict subsequently returned by the jury, after being fully instructed by the court upon the law applicable to the case. *U. S. v. Reid*, 12 How. 361, 366. Judgment on the verdict.

UNITED STATES v. MURPHY *et al.*

(Circuit Court, S. D. California. November 10, 1890.)

CONTEMPT—CAUSING ARREST OF RECEIVER.

Town ordinances granted a steam-motor company the right to construct and operate its road through the streets of the town. In an action to foreclose a mortgage on the road, a receiver was appointed by the circuit court, and ordered to operate the road. Held that, even though the ordinances were void, it was a contempt of court to cause the receiver's arrest on a complaint charging him with a violation of Pen. Code Cal. § 370, declaring anything a public nuisance which obstructs the free use of a street or highway.

Proceedings for Contempt.

J. D. Bethune and *E. H. Lamme*, for receiver.

Byron Waters, for defendant Murphy.

D. G. Parker and *James Faris*, *in pro. per.*

Ross, J. In the suit of *Union Loan & Trust Co. v. Southern California Motor-Road Co.*, heretofore commenced, and since pending in this court, for the foreclosure of a certain mortgage, I. H. Polk was by the court duly appointed receiver of the property involved in the suit, con-

sisting, in part, of a steam-motor railroad, with its franchises, rights of way, etc., extending and then in operation from Riverside, in San Bernardino county, through the town of Colton to the city of San Bernardino, and directed to manage and operate the same for the benefit of the parties in interest. The receiver appointed duly qualified, and took possession of the property on the 3d day of June last. On the 16th of September he presented to this court his affidavit, setting forth, among other things, that by the provisions of the charter and franchises of the motor company it was authorized and empowered to construct and operate its road and run its trains over the same through the town of Colton, and along the streets thereof, and that the road ran and was being operated through that town without hindrance, when the affiant took possession of it under the order of this court; that on the 8th of September the affiant was arrested, and is still under arrest, by the respondent Faris, as constable of San Bernardino township, under and by virtue of a warrant of arrest issued by the respondent Parker, a justice of the peace for that township, upon the complaint of the respondent Murphy charging the affiant with a crime in the running and operating of said road along the streets of Colton pursuant to the order appointing him receiver. Upon reading and filing that affidavit this court made an order directing the said Faris, Parker, and Murphy to show cause, at a certain designated time, at the court-room of this court, why they, and each of them, should not be adjudged guilty of a contempt of this court, and directing a copy of the affidavit to be served on each of them with the order to show cause, which was done. At the time and place designated the said Faris and Parker appeared in person and the said Murphy in person and by counsel. The matter was thereupon heard, and Parker and Faris testified in their own behalf,—the former, that at the time the complaint was lodged in his office, and at the time he issued the warrant, he did not know that Polk was operating the road as the receiver of this court; and the constable, that at the time he executed the warrant he was likewise ignorant of that fact. Neither the complaint nor the warrant disclosed the official character of Polk, and both the justice and the constable expressly disclaimed any intention of interfering with the officer of this court in the discharge of his duties or of otherwise committing a contempt of court. Under such circumstances, I do not consider it necessary to decide whether the justice and constable would have been guilty of a contempt of this court had their action in the premises been with knowledge of the fact that the criminal proceedings in question were prosecuted for the official acts done by the receiver in the discharge of his duties under the order of this court. As to the respondents Parker and Faris the present proceedings will be dismissed.

At the hearing, however, it was conceded by the respective parties that the respondent Murphy did know at the time he filed the complaint against Polk with the justice that the acts therein charged against him, and for which he was arrested under the state process, were acts done by him in discharge of his duties as receiver of this court. In other words, that the respondent Murphy caused the receiver to be arrested

under a provision of the Penal Code of the state of California for doing just what this court directed him to do by the order appointing him receiver. It is contended on his behalf, however, (and his action in the premises was based upon the claim,) that the ordinances of the town of Colton, under which the road in question was constructed and was operated at the time of the appointment of the receiver, and under which the receiver has continued to operate it, and which ordinances are set out in the answer filed by respondent Murphy to this proceeding, were void, and that, consequently, the operation of the road in question by the receiver along the streets of the town of Colton constituted a public nuisance, which the respondent Murphy had the legal right to prosecute under and by virtue of section 370 of the Penal Code of California, which reads as follows:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance."

It is undoubtedly true that the position of receiver of a federal court does not afford such officer immunity from arrest for a violation of the ordinary criminal statutes of a state. But the question here is whether the court that has, in an action over which its jurisdiction is unquestioned and beyond question, taken into its possession the property involved in it and appointed a receiver to manage and operate the property for the benefit of the parties in interest, will permit its officer, who is but the hand of the court, to be arrested or otherwise interfered with in the discharge of his duties under the order of the court. It seems to me there can be but one reasonable answer to this, and that in the negative. Every court should take a sensible view of matters before it. Because the receiver of a court would not be exempt from arrest for murder or grand larceny, or any other crime committed outside and independent of his duties as such officer, it by no means follows that immunity from arrest will not extend to him for acts done in discharge of the duties imposed upon him by the order of the court having jurisdiction in the premises. If the receiver can be arrested and imprisoned for doing the very thing the court appoints him to do,—in this instance, for operating the motor road in precisely the same way it was being operated at the time of the commencement of the action in which he was appointed, and in precisely the same way in which the road has been operated ever since its construction,—it is manifest that the power of the court to appoint a receiver to take possession of the property, and manage and operate it for the benefit of the parties in interest, would be a power in many cases barren of results. The conduct of the receiver is always subject to the control of the court appointing him, and in any case where the receiver, in the exercise of the powers conferred upon him, interferes with the rights of any third person, it is to be presumed that an

appropriate application to the court having control of him will remedy the wrong, or the aggrieved party may have recourse to any appropriate civil action against him, by virtue of section 3 of the act of March 3, 1887, (24 U. S. St. at Large, p. 554.) But in my opinion no individual can be permitted to cause the arrest or imprisonment of a receiver for doing what the court, having jurisdiction in the premises and in the exercise of a power which, it seems to me, cannot be doubted, orders him to do. It is no answer to say, as does the counsel for the respondent Murphy, that, if the ordinances under which the road was constructed and operated were void, its operation along the streets of the town of Colton constituted a public nuisance, and therefore a crime under section 370 of the Penal Code of California, and that this court, in that event, had not the power to order the receiver to operate that portion of it, for the reason that that would be to order him to commit a crime. Of course, a federal court has not the power to order its receiver to violate any of the ordinary criminal statutes of a state, and such an order, if made, would afford no protection to the officer committing the offense. But there is and can be no crime about this matter. A corporation owning a railroad which it constructed and operated in part along the streets of Colton, under ordinances of that town purporting to grant it the right to do so, is sued by a mortgagee of the property to foreclose the mortgage, and the court in which the action is pending appoints a receiver to take possession of the property, and manage and operate it, pending the litigation, just as it was operated by the owner from whose possession it was taken. To say that the officer of the court, in obeying these instructions, can be arrested and imprisoned at the instance of a third party, upon the ground that the ordinances under which the road was constructed and operated were void, is, in effect, to deny to the court of equity having jurisdiction of the cause the power to protect the property it has taken into its possession, and subject the property rights it has been called upon to administer and adjudicate to the decision of the criminal courts of the state. Any view that will lead to such results, it is safe to say, cannot be sound.

None of the authorities cited by counsel are in point here, nor have I been able to find any in point. But, upon principle, I entertain no doubt that the action of the respondent Murphy constituted a contempt of this court, for which he must be punished. It appears, however, that his action was taken in pursuance of the advice of his counsel to the effect that it was in accordance with his legal rights, and without any intention on his part to commit a contempt of this court; and from the professional standing of the counsel, and my personal knowledge of him, I am satisfied that the advice was given in good faith, and in the honest belief that respondent was legally justified in his action. Under these circumstances a light punishment will be imposed, which, however, is not to be regarded as a precedent in the event of any other or further interference with the receiver in the discharge of his duties.

From the records of the court, and from the stipulation of the parties made in open court, the court finds the facts to be as stated in the fore-

going opinion, and from these facts it is by the court considered and adjudged that the respondent M. A. Murphy, in making and filing the complaint and causing the arrest in question, committed a contempt of this court, for which contempt it is by the court ordered and adjudged that he, the said M. A. Murphy, pay a fine of \$100, and that he be imprisoned by the marshal until the fine is paid.

WARD *et al.* v. CHINA MUT. INS. CO.

(Circuit Court, S. D. New York. November 5, 1890.)

MARINE INSURANCE—DENIAL OF SEAWORTHINESS—BILL OF PARTICULARS.

In a suit on a marine insurance policy seaworthiness is a matter of warranty on the part of the assured, compliance with which must be averred in the complaint, and is put in issue by a denial, and, though the defendant unnecessarily pleads unseaworthiness as a separate defense, he will not be required to furnish a bill of particulars.

At Law. Motion for bill of particulars.

B. W. Huntington, for plaintiff.

Clark & Bull, for defendant.

LACOMBE, Circuit Judge. If the alleged "unseaworthiness" were in fact a separate and affirmative defense, I should be inclined to grant this motion for a bill of particulars. Seaworthiness, however, is a matter of warranty on the part of the assured, and such warranty must be complied with to entitle him to recover. Such compliance must be pleaded by him, or his complaint does not set forth facts sufficient to constitute a cause of action. Under the state practice the averment of the fifth paragraph of the complaint may be sufficient to fulfill this requirement. If it is not, then the complaint is defective, and demurrable; and such objection may be raised on the trial by a motion to dismiss on the pleadings. If compliance with the implied warranty of seaworthiness is sufficiently averred in the complaint, issue is joined thereon by the specific denial in the answer of every allegation contained in the fifth paragraph of the complaint. Of this issue the plaintiff holds the affirmative. It has been held in this circuit (*Lunt v. Insurance Co.*, 6 Fed. Rep. 562) that upon the trial the plaintiff may rely upon a presumption to establish the affirmative of that issue, and that he is not called upon *in limine* to give evidence of his compliance with the warranty; but that does not change the issue itself. It is still one of which the defendant holds the negative, and under which he may introduce evidence showing that the vessel was not in fact seaworthy. There seems, then, to be no necessity for pleading unseaworthiness as a distinct and separate defense, and no ground, therefore, for requiring the defendant to furnish a bill of particulars.

ROSS *et ux.* v. TEXAS & PAC. RY. CO.

(Circuit Court, W. D. Texas, El Paso Division. October 27, 1890.)

1. RAILROAD COMPANIES—KILLING CHILD ON TRACK—EVIDENCE.

In an action against a railroad company for the killing of a child, a witness for plaintiff testified that the engineer saw the child on the track in time to prevent the accident; that witness called to the engineer to stop when the tender of the backing engine was within six feet of the child; and that the engine was going very slowly, and could have been stopped within four or five feet. *Held*, that the evidence was sufficient to sustain a verdict in plaintiff's favor, though substantially denied by the engineer and a switchman in defendant's employ, who both testified that it was impossible for the engineer to see the child; that no warning of its presence was given until the tender was within three to five feet of the child; and that the engineer immediately reversed the engine, but did not succeed in bringing it to a stand until it had run eight feet, and killed the child.

2. NEW TRIAL—EXCESSIVE VERDICT.

A verdict of \$2,500 in favor of the parents, for the killing of a healthy, sprightly, five-year-old child, does not clearly show that the jury committed some palpable error, or totally mistook the rule of law by which the damages are to be measured, or were swayed by passion and prejudice, so as to warrant the court in setting aside the verdict as excessive.

At Law. On motion for new trial.

W. C. Henderson and Brack & Neill, for plaintiffs.

B. G. Bidwell and Peyton F. Edwards, for defendant.

MAXEY, J. The defendant in its motion assigns the three following grounds for setting aside the verdict returned at a former day of the present term:

"(1) The verdict of the jury is contrary to and not supported by the evidence. (2) It is contrary to the law, as given in charge by the court. (3) The verdict is clearly excessive, unjust, and unreasonable."

No objection is made to the charge, but it is insisted that, under the instructions, there was no evidence upon which to predicate a finding in favor of the plaintiff. If it be true that there was an absence of testimony connecting the death of plaintiffs' son with the negligence of the engineer who was at the time operating the engine, correct practice would have authorized the court to direct a verdict for the defendant. Under such circumstances, the submission of a case to the jury would be useless formality. Says the supreme court:

"It is the settled law of this court that, where the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, would be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Randall v. Railroad Co.*, 109 U. S. 482, 3 Sup. Ct. Rep. 322; *Goodlett v. Railroad Co.*, 122 U. S. 411, 7 Sup. Ct. Rep. 1254; *Kane v. Railway*, 128 U. S. 94, 9 Sup. Ct. Rep. 16.

But it is said by the court in the case of *Goodlett v. Railroad Co.*, *supra*, that—

"Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved." *Railroad Co. v. Stout*, 17 Wall.

661. See, also, *Kirkpatrick v. Adams*, 20 Fed. Rep. 292, 293; *Davey v. Insurance Co.*, Id. 494; *Railway Co. v. Kindred*, 57 Tex. 502.

The right to a trial by jury, in cases of this character, is a constitutional right, and juries should be permitted to exercise their proper functions without interference on the part of the court. The court is not authorized to substitute its judgment for that of the jury in reference to questions of fact which it is the peculiar province of the latter to decide, and courts are not called upon to weigh, to measure, to balance the evidence, or to ascertain how they should have decided if acting as jurors. *Railroad Co. v. Stout*, 17 Wall. 663. "In no case," says the supreme court, "is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award." *Barry v. Edmunds*, 116 U. S. 565, 6 Sup. Ct. Rep. 501.

The views of the supreme court in relation to the functions of a jury, and the reasons for the value which should properly attach to their findings, are clearly stated in the following extract from the opinion delivered by Mr. Justice HUNT in the case of *Railroad Co. v. Stout*, *supra*:

"It is true, in many cases, that where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question, rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment,

thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." 17 Wall. 663, 664.

Twelve men have passed upon the issue of negligence in this case, and found in favor of the plaintiff. The defendant says the finding was contrary to the charge of the court and unsupported by the evidence. That part of the charge having direct reference to the question under consideration reads as follows:

"If the engineer who was operating the engine knew that plaintiffs' son was on the track in front of the engine, then it was his duty to use all the efforts in his power, and within his means and ability, to stop the engine to prevent and avoid the injury. And if, knowing of the peril of the child, the engineer failed to use such means to avert the threatened danger, then he was guilty of negligence; and if from such negligence the injury and death of the child resulted, the defendant would be liable for the damages thereby sustained. If, however, the engineer did not see the child, or if, seeing him, he used, as soon as he discovered him, all the efforts in his power and within his means and ability to stop the engine and prevent the accident, but that, notwithstanding such efforts, he was unable to stop the engine in time to avoid the injury, then the engineer was not guilty of negligence, and your verdict should be for the defendant."

Did the engineer see the child on the track? and, if so, did he exercise proper care to save it? Plaintiff, Francis M. Ross, testified that the engineer did see him, and discovered him in time to prevent the casualty; that when witness shouted to the engineer "to hold on for God's sake; you will run over the children," the tender of the backing engine was about six feet distant from the deceased; that the engine was going slow, and could have been stopped within four or five feet; that he had seen it stopped before within a distance of three feet, when running at about a similar rate of speed; that the rear of the tender was sloping, and the engine was used for switching purposes; that the engineer, when first warned of the danger to which the child was exposed, made no effort to stop, and did not change his position, but continued sitting on his seat, facing witness, until it was too late to stop the engine in time to save the life of the child. These statements were substantially denied by the engineer, who testified that he was not facing the witness Ross, but was looking in the opposite direction, toward the switchman; that he did not see the child until after it was struck by the tender, and, if he had been facing witness, he could not have seen deceased, because a box on the rear of the tender obstructed the view to a distance of 80 yards in that direction, notwithstanding the slope of the tender; that he heard no warning from witness Ross; that he did hear a warning of the switchman to stop the engine, and, although he did not know the child was on the track, he immediately reversed the engine, and used all means in his power to stop it, and that the engine came to a stand in six or eight feet. In essential particulars, the engineer is corroborated by the switchman, who was present, and witnessed the occurrence. The switchman, in addition, testified that the rear end of the tender is three and one-

half or four feet high; that when he shouted to the engineer, "For God's sake stop! you are about to kill a child," the rear end of the tender was three, four, or five feet from the child, and the engine was stopped within eight feet.

If the jury credited the statements of Ross there was testimony, although slight, to sustain the verdict; and, on the other hand, there was also testimony to justify a finding favorable to defendant. In either event, the court could not, without an invasion of the jury's province, disturb the finding. See *Brown v. Griffin*, 71 Tex. 659, 9 S. W. Rep. 546. The court should exercise with a firm hand its power to set aside verdicts in proper cases. But whenever the power is invoked, the judge should carefully distinguish between usurpation of the jury's functions and the legitimate exercise of his own judgment and discretion. The jury were evidently of opinion, after considering all the testimony before them, that the engineer saw the child in time to avert its injuries and death, and that he failed to exercise the care and diligence the law imposed upon him. Under such circumstances, the court does not feel warranted in disturbing the verdict.

The remaining ground of the motion asserts the damages are excessive. It was conceded by counsel for plaintiffs on the trial that the measure of recovery was the probable amount of the child's earnings during its minority, less the reasonable cost of its maintenance and support. The jury awarded plaintiffs, who were the father and mother of deceased, the sum of \$2,500. The testimony of the father shows that plaintiffs were poor; that he was 56 years old, and his wife 22, and at the time of the son's death they were keeping an hotel at Big Springs; that the child was a stout, able-bodied boy, about five years of age, with fine mind and well grown; that he was kind and dutiful, and had begun to be of some service to the parents.

Brunswick v. White was a suit brought to recover damages for the death of a child six years of age, and the supreme court of this state, in holding that the recovery must be confined to the pecuniary loss sustained by the parents, as the jury were instructed in this case, refers to certain rules and principles which should obtain touching the question of proof of damages in cases of this character. It says:

"From this citation of authorities, which in the main we approve, in connection with the statute, 'the jury may give such damages as they may think proportioned to the injury resulting from such death,' [article 2909,] we may suggest—*First*. Where the killing of the child was wrongful, etc., the parents are entitled to at least nominal damages. *Second*. Where the testimony shows the bodily health and strength, the sprightliness, or want of it, of mind; the aptitude and willingness to be useful in performing services, the mode such faculties are exercised, as in useful labor or otherwise; and when, from the age and undeveloped state of the child any estimate of value of the services until majority would be matter of opinion in which no particular or especial knowledge in the way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value,—then, upon such testimony, the sound discretion of the jury can be relied on to determine the value, without any witness naming a sum. *Third*. As the age of the child increases, and his faculties de-

velop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damage from the loss. *Fourth.* The circumstances of the parents suing, as in this case, often become necessary as evidence, not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise." 70 Tex. 511, 8 S. W. Rep. 85.

No testimony was submitted as to actual earnings of deceased, nor is it reasonable to suppose that a child five years of age could find employment by which wages might be earned. Still it cannot be said that such a child had no pecuniary value to its parents. The question of amount is one for the jury to determine, under appropriate instructions. No precise, definite rule can be laid down in this and kindred cases, "and, when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not precisely defined, we think that the law intends that the jury's estimate, rather than the equally undefined one of the judges, shall prevail." *Railway Co. v. Lehmberg*, 75 Tex. 68, 12 S. W. Rep. 838. It is said by Judge HAMMOND, in *Gaither v. Railway Co.*, 27 Fed. Rep. 546, that he was—

"Unable to even guess from the proof, and we can look nowhere else, how the jury arrived at their verdict; but here, again, the trouble is that in all such cases it is impossible to calculate the damages with accuracy from any proof. It is largely a matter of estimate by the jury from the proof, and not calculation."

The following cases are instructive as illustrating the difficulty in determining, under a statute like that of Texas, the precise amount of damages to be awarded where no definite rule can be given a jury for its guidance: *Railroad Co. v. Barron*, 5 Wall. 105, 106; *Railway Co. v. Lester*, 75 Tex. 61, 12 S. W. Rep. 955; *Railway Co. v. Ormond*, 64 Tex. 490; *Railway Co. v. Kindred*, 57 Tex. 503. In *Brunswick v. White*, *supra*, a verdict of \$1,500 was not disturbed, and in *Railway Co. v. Becker*, 84 Ill. 486, one for \$2,000 for the death of a boy between six and seven years of age was permitted to stand. Is one for \$2,500 so clearly excessive that it should be set aside? If so, why? A resort to the cold figures of mathematical calculation will not answer the question, if that were even permissible in cases like the present. If \$2,500 be excessive, what would be the proper amount? But the question is one peculiarly for the jury, and their finding should not be set aside unless it results from passion or prejudice, or the court can clearly see that the jury have committed some palpable error, or have totally mistaken the rules of law by which the damages are to be measured. The rule is thus stated by the supreme court:

"For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict. In *Whipple v. Manufacturing Co.*, 2 Story, 661, 670, Mr. Justice STORY well expressed the rule on this subject, that a verdict will not be set aside in a case of tort for excessive damages, 'unless the court can clearly see that the jury have committed some very gross and palpable error,

or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated; that is, 'unless the verdict is so excessive or outrageous,' with reference to all the circumstances of the case, 'as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.'" *Barry v. Edmunds*, 116 U. S. 565, 6 Sup. Ct. Rep. 501; *Railway Co. v. Stewart*, 57 Tex. 171; *Railroad Co. v. Randall*, 50 Tex. 261 *et seq.*

The court is unable to say the jury were actuated by other than proper motives in arriving at their estimate of damages.

The motion will be overruled; and it is so ordered.

LARISON v. HAGER *et al.*

(Circuit Court, D. Minnesota. November 11, 1890.)

JUDGMENT—RES JUDICATA—PARTY NOT SERVED.

A judgment in favor of one or more joint contractors is no bar to a suit against another of the joint contractors, who neither voluntarily appeared nor was served with process in the first action, and who was not within the jurisdiction of the court trying the same.

Demurrer to Answer.

John S. Watson, for plaintiff.

T. T. Fauntleroy, for defendant.

NELSON, J. This suit is brought to recover a balance due upon a joint contract made for the purchase of lands in Dakota, belonging to plaintiff. The defendants were copartners, doing business under the name of "D. L. Wilbur, Trustee." In 1889 the plaintiff brought an action in Dakota against all the defendants upon the same contract as that sued upon here, but personal service in such action was made upon two only of the defendants, (Nickeus and Wilbur,) and defendant Hager was not served, and did not voluntarily enter any appearance in the Dakota suit. The suit resulted in a judgment in favor of the defendants Nickeus and Wilbur, who alone appeared and answered therein. An appeal from such judgment was taken to, and said cause is now pending in, the supreme court of North Dakota. In the suit brought in this court the defendant Hager is the only defendant residing in the district of Minnesota, and none of the other defendants have been served or appear. Hager, in his answer, sets out and relies upon the Dakota judgment as a bar to this action. A demurrer is interposed by the plaintiff to such answer, which raises the issue whether or not such plea is well taken. A judgment in favor of one or more joint debtors, who were served with process, is no bar to a suit against some not served, particularly when those not served are non-residents. There is no privity between Hager and the defendants sued in the judgment pleaded by him in bar, so that he can take advantage of it. As a general rule a judgment will not op-

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erate as an estoppel unless the benefit derived from it is mutual; that is, a judgment cannot be used as evidence against a person when the opposite verdict would not have been evidence for him. In the record of the judgment pleaded by Hager the parties thereto are not the same as in this case, and he is not prejudiced, and can derive no advantage by it. If Larison had succeeded in the suit in Dakota, and obtained judgment against Wilbur and Nickens, he could not enforce it against Hager, who was not within the jurisdiction, and was not served with process. Demurrer sustained, with leave to answer.

NOTE BY JUDGE NELSON. Consult *Mason v. Eldred*, 6 Wall. 231; *Detroit v. Houghton*, 43 Mich. 459, 4 N. W. Rep. 171, 237; *McLelland v. Ridgeway*, 12 Ala. 432; *Bank v. Robinson*, 13 Ark. 214; *Hall v. Lanning*, 91 U. S. 160; *Brown v. Birdsall*, 29 Barb. 549; *Board of Pub. Works v. Columbia Coll.*, 17 Wall. 521.

ALOE *et al.* v. CHURCHILL.

(Circuit Court, E. D. Missouri, E. D. November 5, 1890.)

CUSTOMS DUTIES—OPERA-GLASSES.

Opera-glasses are dutiable as "articles composed in part of metal" under the last clause of the metal schedule, (Heyl, Dig. 216,) and not as non-enumerated articles under the similitude clause of section 2499, (Heyl, Dig. 823,) the metal frame being a necessary and important part of the opera-glass, whether we regard size or value.

At Law.

Rowell & Ferriss, for plaintiffs.

Geo. D. Reynolds, U. S. Atty., for defendant.

THAYER, J. This case has been once tried and a new trial granted. It has been resubmitted on the testimony produced at the former trial, and the sole question to be determined is whether opera-glasses, under the tariff act of March 3, 1883, are dutiable under the third clause of section 2499, (Heyl, Dig. 823,) or the last clause of the metal schedule, (Heyl, Dig. 216.) If the former view is adopted, the duty upon opera-glasses becomes variable; the most expensive glasses, those with a pearl covering, will be dutiable at 25 per cent. *ad valorem*, while the less expensive ones, covered with leather, or with no covering over the metal frames, will be dutiable at 45 per cent. *ad valorem*. On the other hand, if the view prevails that opera-glasses are dutiable under the last clause of the metal schedule, as "articles * * * not specially enumerated or provided for, * * * composed * * * in part of * * * metal," then all of such articles will pay the same duty.

Plaintiffs' chief contention is that opera-glasses are "specially provided for" under the third clause of section 2499, and, as the last clause of the metal schedule only applies to articles "not specially enumerated or provided for," that they are not dutiable thereunder. The vice of the argument is that it assumes the very point in controversy; that is to say,

it assumes that opera-glasses are "specially provided for" by section 2499. The fact is that section 2499 does not specifically enumerate any article. That section was first enacted on August 30, 1842, and, with some modifications, has ever since continued in force. It was early held, in *Stuart v. Maxwell*, 16 How. 151, that the purpose of that section was to afford a rule of construction for the tariff laws. It does not impose duties on specific articles, but enunciates a rule by which duties may be assessed when articles for any reason cannot be fairly assessed under any provision of the schedules. In *Arthur v. Fox*, 108 U. S. 128, 2 Sup. Ct. Rep. 371, Chief Justice WAITE held, in substance, that section 2499 only applies when an article is not enumerated in the schedules. He says that if an article is found not enumerated in the schedules, then the first inquiry should be whether it bears such a similitude to an enumerated article that it may be assessed under the first, or similitude, clause of section 2499, (Heyl, Dig. 822.) If nothing is found enumerated to which it bears a similitude "in material, quality, texture, or use," then an inquiry is to be instituted as to its component elements, and the third clause of section 2499 applies. This is substantially the view taken by the court in sustaining the motion for a new trial. The contention, therefore, that opera-glasses are "specially provided for" in section 2499, and therefore that the last clause of the metal schedule cannot apply by reason of the exception contained in that clause, is without merit. We are remitted, then, to this question, and it seems to be the only question worthy of consideration,—may opera-glasses be fairly termed "manufactures, articles, or wares composed in part of metal?" If they may be, then there is no occasion for invoking the provisions of section 2499, and under the authority cited it ought not to be invoked. The fact is, as disclosed by the testimony in this case, that all opera-glasses have metal frames of brass or steel, and the metal frame is not an inconsiderable or insignificant part of the article. The frame is a necessary part of an opera-glass, and generally costs more than any other component element. On the first trial of this case, for example, it took nearly a day to determine, by the testimony of experts, whether the metal frames or the shell coverings of the opera-glasses involved in the suit were the most valuable, and opinions differed widely on that point. It will not do to say, therefore, that the metal frame of an opera-glass is such an insignificant part of the article, or that it is of such trifling value when compared with other component elements, that an opera-glass ought not to be classified as "an article composed in part of metal;" on the contrary, the frame is such an important element that, even upon the plaintiffs' own theory of the law, it determines the rate of duty on the majority, perhaps of all, imported opera-glasses.

It is further urged that the phrase "articles composed in part of metal" is so general that an article not otherwise enumerated in the schedules than by such general description is not enumerated at all, and hence that section 2499 must be resorted to. This argument, if carried to its legitimate conclusion, would render the last clause of the metal schedule inoperative; for, if it is too general to serve as a description, then all ar-

ticles not specially described, though composed in part of metal, must of necessity, for want of enumeration, be dutiable under section 2499. The true view I apprehend to be this: An article composed in part of metal, and not specially described, is not dutiable under the last clause of the metal schedule, unless a substantial part thereof is composed of metal. This is a reasonable view of the meaning of the law. It also gives some effect to the last clause of the metal schedule, and answers at the same time some of the extreme illustrations put by plaintiffs' attorney. All laws should receive a reasonable interpretation. This is one of the primary canons of construction. The "nail in the box," and "the hook on the dress," would not render the box and the dress dutiable under the last clause of the metal schedule, as "manufactures composed in part of metal," because metal is not a substantial part of either article, and no reasonable person would think of describing them as manufactures of metal. But the contention that the last clause of the metal schedule is too general to be regarded as an enumeration or description of any article, is overthrown by at least two well-considered cases decided by the supreme court. Thus, in *Arthur v. Sussfield*, 96 U. S. 128, which bears a strong analogy to the case at bar, spectacles were held dutiable under a general clause of the tariff law then in force, which imposed a duty of 40 per cent. "on all manufactures of glass." The same act imposed a duty of 45 per cent. "on all manufactures of steel, or of which steel was a component part, not otherwise provided for." The court held, in substance, that as the spectacles had "steel bows," they might be classified either as "manufactures of glass" or "as manufactures of which steel formed a component part," but considered it most reasonable to classify them as manufactures of glass. It expressly held, however, that in the absence of the clause imposing a duty "on all manufactures of glass" spectacles would be dutiable as "manufactures of steel, or of which steel was a component part," and that they would not be dutiable as non-enumerated articles under the similitude clause of what is now section 2499. In *Arthur's Ex'rs v. Butterfield*, 125 U. S. 76, 8 Sup. Ct. Rep. 714, the court said, in substance, that the phrase "manufactures of which steel is a component part," is sufficiently explicit to amount to an enumeration or description of certain articles, and refer with approval to the decision in *Arthur v. Sussfield*, where it was held sufficient to embrace spectacles, and take them out of the operation of section 2499, as above shown. The case of *Benziger v. Robertson*, 7 Sup. Ct. Rep. 1169, on which so much reliance seems to be placed, may, in my judgment, be fairly distinguished from the cases above cited, on the ground that the metal part of the rosaries involved in that case was such an inconsiderable part of the article that it was deemed more reasonable to assess the duty as on beads, which are the distinguishing features of such articles.

My conclusion is that opera-glasses may be reasonably termed "articles composed in part of metal," because the metal frames are a necessary and important part thereof, whether we regard size or value. Therefore they are enumerated by the last clause of the metal schedule, and

are dutiable thereunder. This construction has the additional merit of rendering the duty on opera-glasses uniform, whereas the other view renders the duty variable, without any reason being shown why congress may be presumed to have intended that the duty should be variable.

Judgment will be entered for defendant.

STEPHENSON v. COOPER, Collector.¹

(Circuit Court, E. D. Pennsylvania. October 7, 1890.)

CUSTOMS DUTIES—SKEINING WORSTED—APPRAISAL.

Under section 7 of Act March 3, 1883, referring to section 2907, Rev. St., if skeining worsted or mohair yarns is necessary to render them merchantable yarns, the cost of skeining is a part of the value of the goods, and subject to duty. If skeining is necessary only for convenience in transportation from the producer to the consumer, it is a charge for putting up, preparing, and packing for shipment, and the extra cost of skeining is not to be added to the other costs in computing the duty.

At Law.

Plaintiff sought to recover the duty upon the cost of winding worsted and mohair yarns into skeins. Rev. St. § 2907, provides that "in determining the dutiable value of merchandise there shall be added to the cost or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country whence the same is imported into the United States, * * * all other actual or usual charges for putting up, preparing, and packing for shipment." In section 7 (Act March 3, 1883) it was expressly stated that the above-mentioned charges should no longer be added in determining the value. In plaintiff's invoice the cost of skeining, together with the cost of hanking, bundling, packing, paper, and string, were deducted. These latter were allowed, but the cost of skeining was restored by the appraiser, on the ground that skeining was part of the finishing process, and necessary to put the yarn on the market. Upon trial the testimony of plaintiff's witnesses was to the effect that the skeining process, like the hanking and bundling processes, was merely for the purposes of transportation from the manufacturer to the consumer, and was part of the actual and usual charges for "putting up, preparing, and packing for shipment" of the article mentioned in the provisions of Rev. St. § 2907. The testimony of witnesses on behalf of the government was to the effect that yarn was not in a merchantable condition when it was upon the bobbin or cops, but only after it had been skeined, hanked, and bundled. Verdict for plaintiff.

Frank P. Prichard, for plaintiff.

William Wilkins Carr, Asst. U. S. Atty, and *John R. Read*, U. S. Atty., for defendant.

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

BUTLER, J., (*charging jury orally.*) At the time this merchandise was imported into the country by the plaintiff the statute in force, imposing duties upon imported goods, confined them to the value of the goods, excluding from the taxation or duty any cost of preparing them for transportation, either across the country abroad, or across the ocean to this country. I repeat, it excluded from taxation or duty any cost incurred for putting up, preparing, and boxing the goods for carriage either abroad or across the ocean. The value of the goods, which were subject to the import duty, was the value of the goods in the market as a merchantable article of commerce. Whatever was necessary to render the goods merchantable, in other words, adaptable to the uses for which they were designed, was a part of the value of the goods, and was subject to taxation. When these goods reached the custom-house, the importer claimed that the cost of skeining (taking the yarn from the bobbins and constructing skeins) was a part of the cost of putting up and preparing the goods for transportation, and that therefore this cost should be deducted from the price or value of the goods and be excluded in ascertaining the duty. The government answered that the cost of putting the goods in this shape is a part of the cost of rendering them merchantable, of preparing them for the uses of manufacture, and that it was, therefore, properly a part of the price or value of the goods, and consequently assessed a duty upon the price of the goods in this condition. The plaintiff paid the duty and brought this suit to recover it back. The question for your consideration is whether or not the skeining of the yarn was necessary only for convenience of transportation. If it was necessary alone for this purpose, then it is not to be reckoned a part of the price or value of the yarn itself, but as the cost of putting it up for purposes of transportation; and in that view, the government was wrong in subjecting it to duty. In such case the plaintiff is entitled to your verdict for the amount claimed. If, on the other hand, the skeining was necessary to render the yarn a merchantable article, in other words, if it was necessary to render the yarn suitable for the purpose of manufacture, for which it was intended, then it is a part of the value or cost of the yarn, and is subject to duty. In that view, your verdict would be for the defendant, the government. It is clear that wool may be twisted into thread, and not be merchantable yarn. If the spinner, instead of winding it upon bobbins, should allow it to fall into confusion upon the floor, it would be yarn, but it would not be merchantable yarn—yarn in a merchantable sense; it would not be suitable for use in manufacture; it would be tangled and snarled, and virtually valueless. You can take a thread and say, "this is yarn," and it is true in one sense, but it is not yarn in a mercantile sense. The thread thus in confusion and tangle upon the floor, would at least have to be turned into a bobbin before it would be fitted for use. The question is whether it is necessary to go further to render it adaptable to the uses for which it is intended, by turning it into skeins. That is the only question before you. You have heard the testimony and the comments of counsel upon it. If you believe from this testimony that it is necessary to render yarn a

merchandise article, adapted to the uses for which it is designed, the uses of manufacture, that it shall not only be made into bobbins but shall also be turned into skeins, the defendant is entitled to your verdict. If, on the other hand, the yarn is a completed article, fitted to the purposes for which it is designed, in the bobbin, and that the skeining is only necessary for convenience in transportation, then your verdict should be for the plaintiff, for the amount of his claim.

A new trial was granted, as the verdict was against the evidence.

MEYER v. COOPER, Collector.

(Circuit Court, E. D. Pennsylvania. October 8, 1890.)

1. CUSTOMS DUTIES—CHINA-WARE—DUTY ON WRAPPERS.

Cheap cups and saucers were imported in paper boxes, closed by brass clasps, each box containing only a single pair, wrapped in tissue paper. *Held*, under United States statute, finding that the coverings on imported goods designed for use other than in the *bona fide* transportation of the goods shall pay a duty, if said coverings were intended for use in transportation only, and for no other use, and were not intended to enhance the value, increase the sale, or facilitate the selling, they were free; otherwise, they were subject to duty.

2. SAME—PAYMENT IN FOREIGN MONIES.

Austrian florins are to be received by the custom house at the rate fixed by the United States mint.

At Law.

This suit was brought to recover back duties upon certain coverings and paper boxes in which cups and saucers were imported. The invoice described the articles as decorated china-ware. They were entered under the name, and duty paid thereon. The appraiser returned the coverings as "unusual" coverings, and subject to duty of 100 per cent. *ad valorem*. These coverings consisted of boxes, closed by a brass clasp, containing a single cup and saucer of inferior grade, and tissue paper surrounding the china. The testimony as to the usual and necessary coverings for china of that grade was conflicting. The plaintiff also sued to recover the excess of duty paid by the valuation of Austrian florins at a different rate from the valuation fixed by the United States mint. To this the government offered no defense. The verdict was for defendant for the coverings and for plaintiff for the florins.

Frank P. Prichard, for the plaintiff.

W. Wilkins Carr, Asst. U. S. Atty., and John R. Read, U. S. Atty., for defendant.

BUTLER, J., (charging jury orally.) There is not very much money involved in this case, but, inasmuch as it arises out of the administration of the tariff laws, it is important that it shall receive deliberate and careful consideration; because, if it is not properly decided, it will tend to produce confusion, embarrassment and uncertainty hereafter. The case is very readily understood, and not difficult to decide. Upon the importation

of the invoice of merchandise, of which a sample is before you, the revenue officers subjected the box in which the ware was imported to a duty of 100 per cent. The amount was paid by the importer, the plaintiff here, under protest, who subsequently sued to recover back the duty assessed upon the box, claiming that it is not dutiable. Now, the question before you is: Is this box dutiable under the statute? The counsel for the plaintiff asks the court to say that, "If the article in question" (that is, the box) "was not of any material or form designed to evade the duties thereon," (there is no pretense that it is "designed to evade the duties;" the government does not so charge,) "or designed for use otherwise than in the *bona fide* transportation of the goods to the United States, the plaintiff is entitled to your verdict."

That is true. If this box was not designed for use otherwise than in the *bona fide* transportation of the goods to the United States, the plaintiff is entitled to recover. It was improperly taxed if the box was not intended for any other purpose than the transportation of the goods to the United States.

The defendant, the government, asks the court to say to you that "If you believe the box involved in this suit is of material or form designed for use otherwise than in the *bona fide* transportation of the goods to the United States, your verdict should be for the defendant." That is equally true. If the box was designed, was intended, to have any other use than that of transporting the goods, the duty was properly levied.

We are further asked to say—"If the box in suit enhanced the value of the contents and increased the facilities for selling, that is a use independent of the transportation of the merchandise and is liable to taxation as the government taxed it." That is true. If the box was intended to have any other use or purpose in connection with the goods than that of transporting them—if it was designed to have any other use or purpose,—it is liable to the tax imposed; and in that event your verdict must be for the defendant. The statute, under which the case arises provides that "The usual and necessary sack, crate, boxes or coverings of goods imported shall not be estimated as a part of their value in determining the amount of duties for which they are liable;" in other words, that the importer shall be taxed, or rendered subject to duty, only upon the value of the goods themselves, abroad, and that the boxes, crates or sacks in which the goods are packed for purposes of carriage shall not be estimated as a part of the value of the merchandise and subjected to taxation. The statute further provides that "If any package, sack, crate, boxes or coverings of any kind in which merchandise is imported shall be of material or form designed to evade the duties thereon * * *—the same shall be subject to a tax of 100 per cent." There is no charge of design to evade the statute here. I will read what is important, omitting what is not:

"That if any package, sack, crate, boxes or coverings of any kind shall be of material or form designed for use otherwise than in the *bona fide* transportation of the goods to the United States, the same shall be subject to a tax of 100 per cent."

The single question involved is, were the boxes designed for any other use than that of conveying the goods? If not, they were improperly taxed, and the plaintiff is entitled to recover back what he paid. If they were designed for any other use, then they are liable to the tax imposed by the officers, and your verdict must be for the defendant. Were they designed for any other use? The only other use for which the government claims they were designed was that of enhancing the value of the goods themselves, increasing the facilities in making sales, presenting them in an attractive form. I have no hesitation in saying to you that if the purpose of using the boxes was to enhance the value of the goods when presented for sale, to a purchaser for use, then the boxes were intended for another use than that of transportation simply. Now you will say, from the evidence, whether they were intended simply for the purposes of transportation or not. If they were, your verdict will be for the defendant. If you find they were intended for other use, that they were intended to enhance the value of the goods, to aid in obtaining a better price, to increase the value on sale, then they are liable to the duty imposed by the government.

In re VETTERLEIN.

(District Court, S. D. New York. November 5, 1890.)

1. BANKRUPTCY—PREFERENCE OF THE UNITED STATES—ACCOUNTING—PROVISIONAL ORDER—RES JUDICATA.

A dividend warrant having been drawn in 1871 in favor of H., but never delivered, and the United States having thereafter established a claim against the bankrupts which is entitled to a preference, and the circuit court having thereafter, on the application of H., directed payment by the assignee of the warrant to H. upon her executing a bond for repayment to the assignee, if it should be determined thereafter that the assignee was bound to repay the United States any moneys previously paid out on similar warrants, and the district court, in an accounting by the assignee, on application of the United States for the moneys in his hands, having directed the payment to the United States of such moneys, not including the warrants which appeared on the credit side of the assignee's account, *held*, that neither order was *res adjudicata* in favor of the petitioner, H., because (1) the circuit court order was a provisional one, and did not pass upon the merits; and (2) the order of the district court, on accounting, did not adjudicate the dividend in question to any one, but left it undisposed of; and that the subsequent determination in the circuit court, in another suit, that the United States was entitled to all such moneys, deprived the petitioner of any equity.

2. SAME—PARTNERSHIP—BRANCH HOUSES—MARSHALING ASSETS—REV. ST. § 5074.

The law has never recognized branch houses, conducting different businesses at different places, under somewhat different firm names, as constituting distinct estates, whose assets were to be marshaled for the benefit of the different sets of creditors of each branch, where the copartners, carrying on both branches, were identically the same. The object of section 5074 of the Revised Statutes was not to create distinct estates in such cases to be marshaled separately, but to admit double proofs, upon double security, for the same debt. Accordingly *held* that, in such a case, the total assets are liable *in solido* for all the partnership debts, and that a claim of the United States was entitled to a preference upon the whole assets, though its claim arose solely out of the business of one of the branch houses.

Petition of Matilda Hare, as Administratrix.
 Roger M. Sherman, for petitioner.

Edward Mitchell, U. S. Atty., and *Maxwell Everts*, Asst. U. S. Atty.,
for the United States.

John P. Clarke, for assignee.

BROWN, J. In September, 1871, a first dividend was declared in favor of creditors in the above matter, including the sum of \$1,125, to the petitioner's intestate, Thomas Hare, trustee. Warrants for all the dividends were executed, and most of them delivered. That to Hare, trustee, was not delivered, on account of some difficulty in the proper voucher to be given for it. Some considerable time afterwards the United States obtained a judgment for \$99,951 against the bankrupts upon a forfeiture of the value of goods fraudulently imported by them before the bankruptcy, and in January, 1886, commenced suit against Demas Barnes, the assignee, personally, to recover the sum of \$32,000, which he had paid out to creditors on the dividend of 1871. On the trial of the case, in February, 1886, in this court, a verdict was directed for the defendant, following the decision of GRESHAM, J., in *U. S. v. Murphy*, 15 Fed. Rep. 589. On a writ of error thereupon taken to the circuit court, the judgment was reversed, in July, 1887, and a new trial ordered. Meantime, in April, 1886, an application by petition was made by Mrs. Hare to this court for an order directing the assignee in bankruptcy to pay her the dividend of \$1,125, declared in 1871. In view of the pendency of the litigation respecting the rights of the United States as against the assignee, the motion was denied without prejudice. On a review of this order in the circuit court, in May, 1886, the order was there so modified as to direct the assignee to pay Mrs. Hare the dividend upon her furnishing the assignee an approved bond with surety for the repayment thereof, with interest, in the event of judgment being "recovered against the assignee by the United States in the pending suit." No bond was furnished, and the dividend, therefore, remained unpaid. After the reversal by the circuit court of the judgment below in the suit brought by the United States, the claim was compromised and settled between the government and the executors of the assignee, who had died in the mean time, and the action was thereupon discontinued. The reversal (24 Blatchf. 466, 31 Fed. Rep. 705) was upon the ground that the United States was not bound to come into the bankruptcy court to assert its priority, even as respects the fund being administered by the court; and that the assignee, when chargeable with notice of any existing claim on the part of the government, pays any dividend at his own peril, under sections 3466 and 3467 of the Revised Statutes, notwithstanding any order of the court in bankruptcy for such payment; and that no laches or estoppel can be imputed to the government for the assignee's protection. Subsequently to the death of Mr. Barnes a new assignee was appointed on November 17, 1888, who, upon the order of the court, dated March 18, 1890, paid all the remaining assets, including the fund in question, to the government. In October following the present application was filed for an order directing the new assignee to pay the same dividend to Mrs. Hare, upon three grounds: (1) That

the circuit court order for the payment to Mrs. Hare, on her filing a bond, was substantially an adjudication in her favor, and that, the suit of the United States having been terminated without any "judgment being recovered against the assignee," there is no longer any occasion for the filing of a bond as a condition of receiving payment; (2) because the dividend in question was, by the order of this court, dated April 22, 1884, in a proceeding in which the government was petitioner, recognized as a credit to the assignee to be paid to the proper person; (3) because, as it is said, the United States has already been paid more than the entire assets of the New York branch of the bankrupts' business, in which alone the forfeiture accrued, and that for the residue the United States had no priority over creditors of the Philadelphia branch as respects the assets there, because the business of the two branches was, as alleged, wholly distinct, and the assets must be marshaled, so that the creditors of each branch may have priority upon their respective assets. Even if the order of March 18, 1890, directing the new assignee to pay the funds in question, with other funds in his hands, to the United States, had not been made, and if the dividend in question were still in the registry, the petition could not be granted.

1. The order to pay Mrs. Hare, on her filing the bond, etc., was evidently a provisional order, intended to secure repayment of the money to the assignee in case the United States should be held entitled to a priority as respects that money, and to indemnify the assignee for his liability, in that event, to pay the same moneys to the United States. The subsequent decision in the circuit court determined that the assignee was liable for similar payments previously made, and would be liable to the United States for any such payment made to Mrs. Hare. As the order was not acted on, no bond being given, it is immaterial that the language of the condition is not literally applicable in consequence of the suit having been settled by compromise, instead of by entry of final judgment against the assignee. In the memorandum accompanying the decision of the motion, Judge WALLACE says:

"It may turn out, however, by the result of the pending suit between the United States and the assignee, that the former is entitled to priority out of the undistributed estate over the claim upon which the dividend had been declared. In that event the present claim would have no equities against the assignee."

The reversal by the circuit court of the judgment below in favor of the assignee was a direct determination that the United States was entitled to priority over the claims upon which that same dividend had been declared. The present claimant, therefore, in the language of Judge WALLACE, has "no equities against the assignee." The adjudication made in the former order was plainly not a final adjudication on the merits, and the reversal of the judgment wholly supersedes its provisions, since it was never acted upon. On application it would be canceled.

2. The order of April 22, 1884, was not an adjudication as respects the rights of Mrs. Hare, or of the United States, to the payment of this

dividend. No such question was presented to the court or determined. The application was simply an application by the United States for an order directing the assignee to pay the government the sums in his hands. On the assignee's accounting a certain amount was thereupon ordered to be paid to the government, as had been done at various times before; but there was no consideration, and no determination, as to how this dividend should be disposed of. It was not by that order adjudged to Mrs. Hare, or to any one; it simply remained undisposed of in the hands of the assignee. There was nothing, therefore, in that order to prevent the government from making its subsequent application for any other moneys in the assignee's hands, including this dividend, not already adjudicated. *Russell v. Place*, 94 U. S. 606-608; *Cromwell v. County of Sac*, Id. 351-358. A similar point as respects the force of that accounting was apparently made before Judge WALLACE in the case of *U. S. v. Barnes*, above referred to, and was overruled. 24 Blatchf. 470, 31 Fed. Rep. 708. The decision of the circuit court, in favor of the priority of the United States, and of the personal liability of the assignee for all payments of dividends made to others, in reality covers the whole ground, and, as above stated, deprives the petitioner of any equity so far as respects the foregoing grounds of her claim.

3. No authority is cited for the position, now taken for the first time 20 years after the bankruptcy, that the assets belonging to the different branches of the bankrupts' business in New York and in Philadelphia shall be marshaled separately for the benefit of the respective creditors of each, or that any such marshaling, even if allowable as respects the different creditors, would prevail against the statutory priority of the United States. For the petitioner it is urged that section 5074, U. S. Rev. St. (section 21 of the bankruptcy act of March 2, 1867) recognizes the assets of distinct businesses, though carried on by the same identical firm members, as being distinct estates to be wound up as such in bankruptcy, and hence marshaled in favor of their respective creditors. That section is as follows:

"When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

Although this section speaks of firms in whole or in part composed of the same individuals, it does not provide under what circumstances the firm estates shall be kept distinct. The argument rests upon implication only, and though the language of this section, considered by itself alone, would seem to furnish an implication that the same identical individuals might compose "two or more firms, carrying on separate and distinct trades, and having distinct estates to be wound up in bank-

ruptcy," yet it is improbable that such a change in the law previously existing would have been intended to be created by a mere implication instead of more direct language; and, when viewed historically, there is no doubt, I think, that this section was not adopted for the purpose of making any change in the law in that respect; that it does not apply at all where there are not legally distinct estates under the law as theretofore existing; and that its only object was to establish in bankruptcy the rule previously enforced in this country, that a creditor, having double security for the same debt, by distinct contracts, through the obligations of a firm, and of one or more individual members of it, singly or combined, might prove against all the distinct estates, whatever they might legally be, without being put to his election between them, as was required by the former English rule. *Emery v. Canal Bank*, 3 Cliff. 507, 7 N. B. R. 217; *Ex parte Honey*, L. R. 7 Ch. 178, 182. Where the members of the two firms are not all the same, the firm assets are necessarily distributed as distinct estates, because the firms are in part different, and the creditors of one firm are not creditors of the other. *Lewis v. U. S.*, 92 U. S. 618. Here the two firms are legally one, and identical, though the individual interests in the different branches of the business may have been different. The English cases that admit proofs of debt as between one firm and another firm containing the same partners as the former together with one or more other partners, (Lindl. Part. *997; *In re Buckhause*, 2 Low. 331,) do not establish any right to such marshaling of assets where the members of the two firms are identical, but in principle exclude it. The former English rule against double proofs was modified by section 152 of the English bankruptcy act of 1861, which was adopted for the purpose of allowing double proofs in the cases stated. Section 5074, Rev. St., in our bankruptcy act of 1867 was copied *verbatim* from section 152 of the English Act, and with the same purpose only. The perplexity in that act and in ours, occasioned by the words "having distinct estates to be wound up in bankruptcy," in connection with the words "firms in whole or in part composed of the same individuals," was in the English act got rid of by an amendment (Act 1869, § 37) dropping the former words. But, aside from this last amendment, which evidently was not intended to change the law as to when estates should be held distinct, but to avoid perplexity of construction, the English courts have repeatedly declared that section 152 of the act of 1861 (our section 5074) applies only where there are distinct estates, and that there are no distinct firm estates, when the firm consists of the same individuals, though they carry on distinct businesses, in distinct places, and under different firm names. 2 Lindl. Part. (2d Ed.) *748, 749; *Ex parte Wilson*, L. R. 7 Ch. 490; *In re Hooper*, 11 Ch. Div. 317; *Banco de Portugal v. Waddell*, L. R. 5 App. Cas. 161, 168, 173. *Ex parte Wilson*, *supra*, arose under the English act of 1861. Section 5074 of the Revised Statutes must be similarly construed.

This was a single copartnership, though with two branches. The several changes in the firm from time to time affected both branches alike. The bankruptcy was one; and the whole assets have from the

first been treated by every one hitherto, from the original voluntary assignment downward, as one estate. I find no authority in the law for treating them otherwise, however different may have been the businesses conducted at the two establishments. To do so would be to treat the two branches as independent firms, or as corporations *pro tanto*, which they are not. A judgment recovered upon the debt of one branch house would have been legally indistinguishable from a judgment upon a debt of the other branch. Both would have been against the same defendants, jointly and severally; and any assets of either branch within the jurisdiction would have been liable on either judgment to seizure upon execution, or to be reached by a bill in equity if not subject to levy. No branch of the law has ever recognized, so far as I can discover, any right to such a marshaling of the assets of the different branches of a single copartnership as is here contended for, though the different branches have a different business name, where the partners carrying on the whole business are the same. Such is the opinion expressed by WALLACE, J., in *Re Nims*, 18 N. B. R. 91, 92. The judgment of the circuit court in that case (16 Blatchf. 439) proceeded upon facts and considerations quite dissimilar and inapplicable to the present case. The application is denied.

FOSTER v. CROSSIN *et al.*

(Circuit Court, D. Rhode Island. October 18, 1890.)

PATENTS FOR INVENTIONS—JEWELRY PINS—NOVELTY.

A design for jewelry pins, consisting of a piece of metal in the shape of a spoon or fork two inches long, precisely similar in appearance to common spoons or forks six inches long, lacks the novelty necessary to support a patent.

In Equity.

Walter B. Vincent, for complainant.

John N. Brennan and Warren R. Perce, for defendants.

Before GRAY, Justice, and COLT, J.

GRAY, Justice. This is a bill in equity to restrain the infringement of two patents, applied for and issued in 1884, for designs of jewelry pins, the one representing a spoon and the other a table fork. The specification of the first patent (omitting the introductory paragraph and the description of the drawings) is as follows:

"The leading features of my design consist in a plate, the outside and front surface of which is made to represent a spoon, with the continuous outline edge of the plate turned backward for a nearly uniform distance from its front, and also having an engraved, chased, or embossed handle." "The form and style of the ornamentation may be varied without affecting the general appearance of the whole design." "I claim as my invention the design for a jewelry pin herein shown and described, the same consisting of a plate having the shape of a spoon, with the outline edge of the plate turned backward

at a nearly uniform distance from its front, and the surface of the handle of the spoon showing an embossed or engraved ornamentation."

The corresponding parts of the specification of the second patent differ only in substituting "table fork" for "spoon" in the body of the specification and in the claim. Upon the filing of the bill the district judge granted a temporary injunction, and delivered an opinion reported in 23 Fed. Rep. 400. The case has now been heard upon pleadings and proofs. There is some conflict in the testimony. Taking the whole evidence as favorably as possible for the plaintiff, the material facts appear to be as follows: Before either of these patents was applied for, common spoons and forks, as well as jewelry pins in other shapes than spoons or forks, had been made, with the edges turned over as described in these patents. But jewelry pins in the shape of spoons and forks had never been made with the edges so turned, and the plaintiff's pins, by reason of their peculiar form and appearance, resulting from the turning of the edges, were easily distinguishable from such pins of other manufacturers, and had a readier and larger sale. Under section 4886 of the Revised Statutes, authorizing a patent to be granted to "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof," it is well settled that the application of an old process or machine to a new or analogous subject, (although of very different size or material,) with no change in the manner of application, and accomplishing no result substantially different in its nature, will not sustain a patent. *Pennsylvania R. Co. v. Locomotive Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220, and cases cited; *Peters v. Manufacturing Co.*, 129 U. S. 530, 9 Sup. Ct. Rep. 389; *Peters v. Hanson*, 129 U. S. 541, 9 Sup. Ct. Rep. 393. Under section 4929 a patent for a design can only be granted to "any person who by his own industry, genius, efforts, and expense has invented and produced any new and original design for a manufacture" or other thing mentioned in this section, "or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication." A patent under this section, indeed, is for the design which is the product of the invention, and not for the process or the means by which it is produced, and has less regard to the utility of the product than to the novelty and originality of its appearance. But in order to support a patent for a design, as for any other subject, under the acts passed by congress in the exercise of its constitutional power to secure to inventors the exclusive right to their discoveries, there must be some invention, and not a mere application to a new material of something already known. The design must be new and original, and not a copy or an imitation. This is required by the clear words of the section, and has been constantly recognized in the judicial decisions under it. *Clark v. Bousfield*, 10 Wall. 133, 139; *Gorham Co. v. White*, 14

Wall. 511, 524, 525; *Wooster v. Crane*, 5 Blatchf. 282, 2 Fish. Pat. Cas. 583; *Niedringhaus's Appeal*, 8 O. G. 279; *Northrup v. Adams*, 2 Ban. & A. 567; *Theberath v. Harness Co.*, 15 Fed. Rep. 246. The decisions under the corresponding provision of the English patent act are to the same effect. *Mulloney v. Stevens*, 10 Law T. (N. S.) 190; *Lazarus v. Charles*, L. R. 16 Eq. 117; *Windover v. Smith*, 32 Beav. 200; *Adams v. Clementson*, 12 Ch. Div. 714; *Dicks v. Brooks*, 15 Ch. Div. 22, 34; *Le May v. Welch*, 28 Ch. Div. 24; *In re Bach's Design*, 42 Ch. Div. 661. In the light of the words of the statute, and of the uniform course of decision upon the subject, we can have no doubt that a design for a piece of metal in the shape of a spoon or fork two inches long, precisely similar in appearance, both generally and in form of edge, to common spoons or forks six inches long, lacks the novelty necessary to support a patent. Bill dismissed, with costs.

CAMPBELL PRINTING-PRESS & MANUF'G CO. v. EAMES VACUUM
BRAKE CO.

(Circuit Court, S. D. New York. November 18, 1890.)

1. PATENTS FOR INVENTIONS—VALVES FOR PNEUMATIC PIPES—NOVELTY—INVENTION.

Claim 1 of letters patent No. 401,680, granted to Edward S. Boynton, April 16, 1889, for an improvement in valves for pneumatic pipes, was "in combination with an external pivoted valve, a compressive helical spring inclosed within a tubular guide formed upon or attached to the valve." In a device for coupling the pipes between railroad cars previously patented, the valve was made to hold the coupling, or to fly shut by means of a torsional helical spring. *Held*, that the combination of claim 1 was but the substitution of a compressive helical spring for the torsional spring of the older structure, with the limitation that the tubular guide must be attached to the valve, and that such claim was void for want of novelty.

2. SAME.

The second claim of such letters patent was limited by stating that the tubular guide must be attached to the valve between one end of the guide and a stop at the pivoted point of the valve, and thus insured a neat, compact, and cheap structure, besides safety and durability. *Held*, that the device involved invention, and was valid.

In Equity.

Philip R. Voorhees, for complainant.

J. E. Maynadier, for defendant.

COXE, J. The complainant sues to restrain the infringement of letters patent No. 401,680, dated April 16, 1889, granted to Edward S. Boynton, assignor to the complainant, for an improvement in valves for pneumatic pipes or tubes. On the 17th of July, 1877, a patent, No. 193,078, was granted to Frederick W. Eames for a new device for coupling the pipes between railroad cars, especially designed for use in connection with the vacuum power-brake. In the Eames structure the valve is made to hold the coupling, or to fly shut upon the valve seat by means of a torsional helical spring. In the patent in hand the same result is produced by a compressive helical spring. The substitution

of the one spring for the other, with the ingenious mechanical changes made necessary thereby, constitutes the only difference between the Eames and Boynton couplings. Invention is predicated of this substitution and this only. The patentee refers, in the specification, to the Eames vacuum brake and points out various defects in the coiled torsional spring there used, which, he says, is perishable and liable to deteriorate under the influence of grit, dirt, and climatic changes. These defects he asserts are "well known," and are, he thinks, remedied by his spring, which is within a case and thus protected from the deteriorating influences referred to. The specification further states "that helical, compressive springs have been used for the automatic closing of valves and that such a combination is not broadly new; but in such cases both the springs and valves are not external to but one or both are within a valve-casing." The claims are as follows:

"(1) In combination with an external pivoted valve, a compressive helical spring inclosed within a tubular guide formed upon or attached to the valve, substantially as and for the purposes set forth. (2) In combination with an external pivoted valve, a self-closing device consisting of a compressive helical spring held within a tubular guide formed upon or attached to said valve between one end of said guide and a stop at the pivotal point of the valve, substantially as and for the purposes set forth."

Infringement is admitted. The defenses are, *first*, that the patent is void for want of novelty; and, *second*, that the defendants have an equitable license under it. The elements of the combination of the first claim are:

"(1) An external pivoted valve. (2) A compressive helical spring within a tubular guide. (3) The tubular guide must be formed upon or attached to the valve."

The combination here claimed involves nothing more than the substitution of a compressive helical spring for the torsional spring of the Eames structure, with the limitation that the tubular guide inclosing the spring must be attached to the valve. A claim so broad cannot be upheld. It is void for want of patentable novelty. It requires no argument to show that it is not invention to take a spring out of an old machine and put in its place another form of spring, equally old, to do precisely the same work. The use of the words "within a tubular guide formed upon or attached to the valve" do not aid the claim in this regard. The mention of a compressive spring in connection with the Eames coupling would naturally suggest to the skilled mechanic the use of an inclosing tube as well as the necessity of fastening the tube either to the valve or to the coupling. It must be attached to either one or the other. Fastening it to the former required no more ingenuity than fastening it to the latter. There is nothing which limits the first claim to the combination shown in the drawings. The location of the tube is not specified further than that it must be attached to the valve. The word "valve" in the claim is doubtless intended to cover the valve lever as well, for, strictly speaking, the tube in the patented structure is not formed upon or attached to the valve proper but to the web connecting

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the valve with the boss. An inclosed spring attached to the valve at any point or in any manner would, therefore, infringe. The claim is too broad.

The second claim is further limited by the statement that the tubular guide must be attached to said valve between one end of said guide and a stop at the pivotal point of the valve. This language is not entirely clear, but there is little difficulty in interpreting it as covering the precise mechanism described and shown in the specification and drawings, minus the screw plug and some other minor details. It certainly is a fair construction of this language to locate the tube as it is shown in the drawings, one end being at the stop located at the pivotal point against which stop the spring is compressed, and the other end attached to the valve proper, or connecting web. It is hardly disputed that the peculiar mechanism devised by Boynton shows some exercise of the inventive faculty. Defendant's brief, practically, admits that he is entitled to a patent limited to his peculiar details of construction. The use of the compressive spring would certainly have occurred to a skilled mechanic, but the location of the tube and the operation of the various parts, in the form and manner described by the patentee, insuring, as they do, a neat, compact and cheap structure, besides safety and durability, certainly required the exercise of ingenuity of a high order and, I am inclined to think, of invention also. It is true that this device is very near the border line which separates invention from mechanical skill. The patent should, however, have the benefit of the doubt. It is thought that the second claim can be limited to the material features of the precise combination shown in the specification and drawings and that so construed it can be upheld. The evidence does not establish a license except as conceded by the complainant. The complainant does not ask for an accounting. It follows that, upon filing a disclaimer of the first claim, the complainant can have a decree for an injunction as to the second claim, but without costs.

CONSOLIDATED SAFETY VALVE CO. v. CROSBY STEAM GAGE &
VALVE CO.

(Circuit Court, D. Massachusetts. October 7, 1890.)

1. PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT.

Defendants who infringed a patented valve by the manufacture of valves commercially worthless but for the infringed invention, are liable for the profits realized by them, though the form of their valves is different from those manufactured by complainants.

2. SAME.

Where the valves manufactured by defendants also infringed another later patent, likewise owned by complainants, no injustice is done defendants in acceding to complainants' claim that all profits realized by defendants during the life of the earlier patent were solely due to the invention covered by that patent, especially in view of the fact that defendants contended that the invention embodied in the

later patent is worthless; and hence, in an action for the infringement of the earlier patent, it is unnecessary for the master to find how much of defendants' profits are due to the later invention.

3. SAME—ESTOPPEL.

Complainants, after contending for and accepting a finding, in an action for the infringement of the earlier patent, that defendants' profits, arising from the manufacture and sale of valves infringing both patents, were due solely to the earlier invention, cannot be permitted to recover more than nominal damages in an action for the infringement of the later patent alone, brought after the expiration of the earlier one.

In Equity.

Thomas W. Clarke, for complainants.

Joshua H. Millett, (*Benjamin F. Thurston*, of counsel,) for defendants.

COLT, J. These cases now come before the court upon exceptions to the master's report. In No. 1,184, the master finds that the complainants are entitled to recover the sum of \$40,344.59 for the profits received by the defendants from the infringement of the Richardson 1866 patent, No. 58,294. In No. 1,199 the master finds that the defendants had made no more than nominal profits from the infringement of the Richardson 1869 patent, No. 85,963.

The main question raised by the defendants' exceptions relates to the method adopted by the master in estimating the profits allowed in case No. 1,184. These suits were originally brought in the circuit court, and decrees were entered dismissing the bills. 7 Fed. Rep. 768. The supreme court upon appeal reversed the decision of the circuit court, and remanded the cases to this court, with directions to enter decrees sustaining the validity of the Richardson patents, decreeing infringement of both patents, and directing an account to be taken of profits as to both patents, and to take such further proceedings as may be proper, and not inconsistent with the opinion of the court. 5 Sup. Ct. Rep. 513. In judging of the correctness of the method pursued by the master in his estimation of defendants' profits, the construction put upon the Richardson 1866 patent, and the language used in respect thereto as embodied in the opinion of the court, cannot be disregarded. It was clearly the duty of the master in his findings, as it is also the duty of the court at the present time, to give full force and effect to the opinion of the supreme court. If the contention of the defendants is sound, that the supreme court, in their interpretation of the Richardson 1866 patent, gave too much prominence to the feature known as the "huddling chamber with a strictured orifice," it is for them, upon appeal, to obtain some modification of that opinion; but, so long as it stands as the opinion of that court, the views therein expressed should be strictly carried out. The position, therefore, taken by the defendants that the complainants are only entitled to nominal damages, because, as they say, the Richardson valve of commerce does not contain the huddling chamber with a strictured orifice, or, in other words, a huddling chamber with an aperture for the exit of the steam into the open air which is of smaller area than the aperture at the ground joint, I cannot regard as sound, in view of the opinion of the supreme court. That court construed the Richard-

son patents, and it held that defendants' valve was within those patents, and it gave a broad construction to the Richardson 1866 patent. Upon this point I approve and adopt the conclusions reached by the master in the following language, taken from his report, in considering the accounting in No. 1,184, for the period from February 15, 1879, to September 25, 1883:

"I attribute the entire commercial value of the valves manufactured and sold by the defendants to the improvement covered by Richardson's patent of 1866. Richardson's invention, as described and claimed in that patent, revolutionized the art of relieving steam-boilers from steam pressure rapidly approaching the dangerous point. It made effective for that purpose,—rapidly, and with comparatively small loss of steam,—apparatus, described in other patents, which very nearly embodied Richardson's invention but did not actually contain it. The supreme court, in these cases, has defined this invention, and has declared it to be a vital one,—a life-giving principle to structures very nearly approaching, but not quite containing, an embodiment of Richardson's discovery. It was contended before me that none of the complainants' valves of commerce contained this invention of Richardson, but, upon the whole evidence, with specimens of all the different valves, put on the market by the complainants, before me, I find that they all contain Richardson's improvement of 1866. The supreme court has decided in these cases that the defendants' valves contain this invention, and it is under this decision that the accounting in No. 1,184 is before me. Eliminate this invention from the defendants' valves, and they would be commercially worthless. No substitute for this invention has been suggested to me, and I know of none, which the defendants could have used in its place to have made their valves of commercial value. The defendants claim that some of the profits which they have made are due to the peculiar form of their valves, but the form which they used in making their valves was the form in which they clothed the Richardson invention, the life of their valves, and without that life the Crosby form is worthless. The defendants claimed before me that the complainants, in the accounting in 1,184, which relates only to the Richardson patent of 1866, should prove specifically the value of the invention secured to them under that patent as used by the defendants, and that, as it was claimed by complainants (and the supreme court has so decided) that defendants used also Richardson's invention of 1869, the value of the invention secured to the complainants by the 1869 patent must be determined, and not made an element in the recovery to be had under the accounting in 1,184. I have no means of determining the value of that invention as used by the defendants from February 15, 1879, to September 25, 1883, or of stating in dollars and cents how much of the profits of the defendants during that period is due to that invention. The complainants claimed that during that period all the profits of the defendants were due to the Richardson invention of 1866, and, as the Richardson invention of 1869 belonged also to the complainants, and as the complainants and defendants were respectively the same in each case, 1,184 relating to the said invention of 1866, and 1,199 relating to the invention of 1869, and, as the said period from February 15, 1879, to September 25, 1883, was included within the period to be covered by the accounting in each case, no injustice is done the defendants in acceding to the complainants' claim in this regard; and this is especially so in view of the fact that the defendants claimed that the adjustable device as shown in the Richardson patent of 1869 is worthless as such, and that the cost of the Crosby valve is less without the said so-called adjustable ring, and is a better and more useful safety appliance."

This disposes of the principal question raised by the defendants' exceptions to the master's report. As for the objection to the findings of the master respecting expenses to be allowed for certain valves destroyed, which forms the subject-matter of the first exception, I think the master was right in the conclusion he reached. The defendants were not charged on valves which were subsequently destroyed, or, if so, they were not charged upon the new valves which replaced them. See master's note 29, page 44 of master's report. The master properly disallowed the cost of destroyed valves.

The complainants have filed two exceptions to the master's report in No. 1,184,—one relating to cost of patterns allowed to the defendants by the master, and the other to the allowance of uncollectible items, etc., in master's Schedule C. I see no sufficient reason to disturb these findings. If there is error in the allowance of any of the items of Schedule C, the suggestion of error was not made to the master in such form as to give the court the benefit of his judgment thereon.

In No. 1,199, the complainants have filed several exceptions. They except to the finding of the master that he had no means of determining, from the evidence before him, what portion of the defendants' profits were attributable to the use of the Richardson patent of 1869, and they further except to the finding of the master that the defendants have made only nominal profits from the infringement of the 1869 patent, and that the complainants have suffered only nominal damages from said infringement. Down to the expiration of the Richardson 1866 patent, or until September 25, 1883, the complainants contended, in the case brought upon that patent, that all the profits of the defendants were due to that patent, and the master so found. If the 1869 patent contributed more than a nominal value to the defendants' infringing valves during the life of the 1866 patent, it was the duty of the complainants to have shown that fact in the suit upon the 1866 patent, and to have allowed a corresponding reduction in the finding, of profits in that suit. After contending for and accepting such a finding, that the complainants were entitled to all the profits of the defendants from their infringement of the 1866 patent by the manufacture and sale of valves containing the Richardson inventions of 1866 and 1869, they cannot be permitted, upon a bill of complaint against the same defendants, to recover more than nominal profits or damages for an infringement of the 1869 patent only.

Upon the question of damages the master finds as follows:

"With regard to these claims for damages, I find, upon an examination of the evidence before me, that, if I allow any substantial portion of them, I must allow them in full as claimed. I say 'substantial portion,' because there are a few dollars that I might, perhaps, allow in No. 1,184, upon special evidence relating to a few items, but beyond a few dollars the claims stand or fall as a whole. I know no justifiable method of scaling them. The evidence in support of these claims comes from Charles A. Moore, the manager of the business of complainants so far as putting valves on the market is concerned, and the evidence against these claims comes from Francis T. Simmons, a salesman of defendants from February, 1878, to May, 1886, and George H. Eager, treasurer of the defendants. The evidence shows that the complainants ac-

quired the Richardson patents February 15, 1879. The defendants were at that time established in the valve business, and sold steam safety valves in competition with whatever valves were in the market. There were persons and firms to whom they sold their productions, and whom they considered their customers. The complainants, in 1879, soon after acquiring the Richardson patents, issued a catalogue giving their prices for safety valves, but quoted their valves in 1879, to some parties at least, at a large discount from their catalogue prices,—in one instance a discount of fifty per cent. The basis of these claims is that the complainants had an established lowest price for their several classes of valves in 1879. I do not think the evidence supports this proposition to the extent that I can find that the prices given in Mr. Moore's tables, and annexed to complainants' charges in damages, are the lowest prices of the complainants in 1879. The complainants went into active competition with all valve producers of every class. Doubtless the defendants were their chief competitors, but I cannot determine, from the evidence, how much of the reduction in prices, which the complainants made from time to time, was due to defendants' competition and how much to other causes. Doubtless both parties were trying to hold the market as against each other and as against all other competitors in the business. Under these circumstances, a general claim, even accompanied by a specification of items, cannot be maintained upon testimony relating to comparatively few instances, as in this case, and especially where some of the instances are subsequently explained in a manner to materially affect their force as evidence bearing upon the question of damages resulting from direct competition."

The complainants have filed no exception to the finding of the master in No. 1,184, that they have suffered no damages in addition to profits. Upon the whole evidence on this question of damages, I think the master was also right in finding that the complainants are entitled to recover in No. 1,199 only nominal damages.

The exceptions in both cases are overruled, and the master's report confirmed. So ordered.

WALKER v. CITY OF TERRE HAUTE.

(Circuit Court, D. Indiana. October 29, 1890.)

1. PATENTS FOR INVENTIONS—FIRE-ALARMS—REISSUE.

Letters patents issued July 13, 1875, to Robert Bragg, for the combination with a fire-alarm gong of mechanism which automatically releases the fire-engine horses from their stalls, contained the following claim: "The rod with its knob and the oscillating lever, for the purpose of releasing a suspended weight by the direct action of a gong-hammer." The reissued patent, No. 6,891, issued January 4, 1876, contained these claims: "The trip-rod and oscillating lever, for the purpose of releasing a suspended weight by the movement of a gong-hammer," and "the trip-rod, oscillating lever, and suspended weight in combination with the hammer of a gong, for the purpose of operating mechanism distant from the gong." *Held*, that the claims of the reissue were fairly embraced in the claim of the original.

2. SAME—INFRINGEMENT.

Said patent is infringed by a device whose only difference from the patented machine is that its trip-rod receives the stroke of the hammer in its backward instead of its forward motion.

In Equity.

*McDonald, Butler & Snow and Robert H. Parkinson, for complainant.
Baker & Daniels, Horace B. Jones, and D. N. Taylor, for defendant.*

GRESHAM, J. The complainant, as assignee of reissued patent No. 6,831, brings this suit for an injunction and accounting against the city of Terre Haute. The inventor, Robert Bragg, filed his application for a patent June 16, 1873, and the patent was granted July 13, 1875. The application for a reissue was filed October 9, 1875, and the reissue was granted January 4, 1876. The reissue, like the original, covers a combination with a fire-alarm gong of mechanism which operates automatically, and releases the horses from their stalls simultaneously with the alarm. The device is so arranged that the blow of the gong-hammer, announcing the alarm, also and at the same time trips the liberating mechanism, opens the stall-doors, and allows the trained horses to spring to the pole of the engine before the striking of the signal is completed. This was a great improvement on the old method of releasing the horses by hand, and leading them to the pole, and, since its introduction, engines can and do reach fires more quickly. "The object of my invention," says the specification, "is to provide a novel attachment for gongs, and it is principally valuable and applicable to fire-engine houses, where the horses which draw the engines ought to be released at the very instant of the first stroke of the alarm, so that they can take their places at the engine and hose-carriage, ready to be attached thereto by the first man who may arrive. My invention consists in the employment of an arm which is so situated that at the first stroke of the hammer upon the gong it will also strike this arm, which has attached to it any suitable mechanism, so that the force of the blow will release, through this mechanism, a weight. The falling of this weight will pull a rope which is connected with the mechanism to be operated in such a manner that the pull upon it will operate the mechanism. * * * The operation will be as follows: The gong-hammer, upon its first stroke, will strike the pad, E, and thus force the rod, D, and the arm, or lever, C, back until the roller, G, is released from the recess, F. * * * Various mechanical devices may be substituted for those herein described, as will be readily seen; but the principal point of novelty is the operating of these devices directly from the gong-hammer." Bragg did not limit himself to the precise mechanism described in his specifications and illustrated in his drawings. He had in mind that mechanism and its equivalents,—any suitable means for utilizing the force of the gong-hammer in releasing a weight (which is the equivalent of a spring) for operating any distant mechanism simultaneously with the stroke of the hammer. The claims of the reissue, which are involved in this suit, (the first and fourth,) read:

"(1) The trip-rod, D, arranged as described, and the oscillating lever, C, for the purpose of releasing a suspended weight by the movement of a gong-hammer, substantially as and for the purpose described."

"(4) The trip-rod, D, oscillating lever, C, and suspended weight, B, in combination with the hammer of a gong, for the purpose of operating mechanism distant from the gong, substantially as above described."

The claims in the original read:

"(1) The rod with its knob, E, and the oscillating lever, C, for the purpose of releasing a suspended weight by the direct action of a gong-hammer, substantially as and for the purpose herein described.

"(2) In combination with rod, D, and the recessed oscillating lever, C, pivoted as described, the weight, B, and its roller, G, for the purpose of relieving friction and removing the rod, D, from the action of the gong-hammer, substantially as herein described.

"(3) In combination with the weight, B, caused to fall, as shown, the bell-crank lever, I, cord, K, and lever, L, for releasing the slide, O, and weight, R, and thus releasing the horses by means of the cord, T, substantially as herein described."

The specifications in both patents describe the same invention. The defendant's expert found no invention referred to in either the description or the claims of the reissue not described in the original as instrumental in carrying out the object of the invention. He thought, however, that the claims of the reissue, without covering any new invention, allowed greater freedom in construction than did the claims of the original. "The rod with its knob, E," one of the elements of the combination in the first original claim, is described in the corresponding claim in the reissue as "the rod, D, arranged as described," the "knob, E," being omitted. In the reissue the rod projects in the path of the hammer, as it did in the original, and operates precisely as it did before. The claims in the original covered any rod extending within the sweep of the gong-hammer, so that, when struck, it would perform the function of tripping; as described. The knob at the end of the rod performed no function independent of the rod, and it was not an operating element in the combination. The original specification showed that the action of the gong-hammer upon the suspended weight was not immediate, or direct, but through intermediate elements, and, literally construed, the claims were not for the invention described, and, while the first claim in the reissue is more accurate, it is still limited to the combination which constitutes the invention,—“a combination of elements, operating substantially as and for the purpose described.” Obviously the patentee feared that the original first claim might be held too broad or general, and for that reason he desired the fourth claim, covering a subdivision of the invention. This claim was fairly embraced in the original first claim. It is more limited than that claim, but it is clearly within the original statement of invention. The reissue contains no claim which might not have been made and allowed upon the original record. The real invention consisted in the combination of the designated elements acting in co-operation to accomplish a specified result, and the patentee was not limited to the precise forms of the elements shown in the drawings. Elements possessing the essential qualities and performing the same functions as those described in the specifications, and illustrated in the drawings, although differing in mere mechanical construction or form, were covered by the original patent. A combination patent cannot be evaded by a mere formal variation of all or part of the elements. Even if the claims of the reissue be construed as broader than the original

claims, the former are clearly within the described invention, and the reissue was applied for in less than three months after the original was granted, and before any new rights had intervened. While an inventor may not obtain a reissue enlarging his invention, he may, under proper conditions, surrender his patent, and obtain a reissue with enlarged claims, not extending, however, beyond the bounds of his described invention. It is not claimed that Bragg obtained his reissue to cover improvements made after the date of his first patent, and the defendant's expert testified that the reissue contained no new invention. The supreme court has never so construed the statute which authorizes reissues as to deny to a patentee, on application made in due time, and before adverse rights have accrued, the right to obtain a reissue broad enough to cover his entire invention as originally described and as he intended to claim it. In *Marsh v. Seymour*, 97 U. S. 348, the supreme court say:

"The patentee may redescribe his invention, and include in the description and claims of the specification not only what was well described before, but whatever else was suggested or substantially indicated in the old specification, drawings, or patent-office model, which properly belonged to the invention as actually made and perfected. Corrections may be made in the description, specification, or claims of the patent where the patentee has claimed as new more than he had a right to claim, or where the description, specification, or claim is defective or insufficient; but he cannot, under such an application, make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or patent-office model."

The statute authorized the granting of the reissued patent.

The defense of prior use is not supported by the evidence. Brown S. Flanders testified that in 1869, while acting as engineer in connection with engine No. 8, of the Boston fire department, he constructed and put into practical use a device which operated automatically on the same principle as the device described in the patent in suit, and his statements were corroborated by four or five witnesses, who at that time were his associates in the same company. If the Flanders mechanism was in use, as claimed, as early as 1869, the patent in suit is invalid for want of novelty, and a detailed description of it is therefore unnecessary. The complainant introduced a number of witnesses, who testified that during their connection with the same company in 1869, and for several succeeding years, they never saw or heard of such an automatic device for releasing horses from their stalls. And a still larger number of witnesses, who were employed in other engine-houses in Boston, during the period of alleged prior use, some of whom visited No. 8 from time to time, testified that before the application for the patent in suit they never saw or heard of the Flanders device, or anything like it. A Philadelphia engine company sent a committee to Boston in the spring of 1869 to inspect the engines and fire department of that city, and note all improvements in apparatus and methods, should any be observed, and during the four or five days that the committee spent in Boston, engine-house No. 8 and others were visited and inspected. Flanders

testified that his automatic device was then in use at No. 8, and that it was seen by the committee, and by him explained to them, or some of them; and his statements were corroborated by several witnesses who belonged to the company in 1869, and later. The surviving members of the committee, as well as several members of their company who went with them, were subsequently called, and testified that neither the Flanders device, nor anything like it, was shown to them by him or any one else, and that they never saw or heard of that device in engine-house No. 8, or elsewhere, during their visit to Boston. The records of the Boston fire department, covering the period of alleged use, make no mention of such a device, and it is incredible that Flanders should have invented or introduced an improvement of such marked utility without bringing its merits to the attention of the fire department, or making an effort to obtain a patent for it.

The remaining question is that of infringement. The complainant's two expert witnesses testified that the device used by the defendant in its engine-houses contained the invention embraced in the first and fourth claims of the patent in suit, and the defendant's only expert witness testified, on cross-examination, to the same effect. It is true that in the defendant's device the trip-rod receives the stroke of the hammer in its backward or reflex motion, while in the device described in the Bragg patent the rod receives the blow in the forward, or direct, stroke of the hammer. But this mere alteration of the location of the trip-rod would readily occur to any skilled mechanic. The effect of the tripping is the same, whether the rod receives the blow in the forward or backward action of the hammer. Without dwelling in detail upon this and other structural differences, it is sufficient to say that I am satisfied the defendant's device embraces all the elements of the Bragg invention. The conclusions I have reached are in harmony with the decrees entered in *Bragg v. City of Portland*, in the district of Oregon, *Bragg v. City of San Jose*, in the northern district of California, and the opinion of Judge SAWYER in *Bragg v. City of Stockton*, 27 Fed. Rep. 509. Injunction granted as prayed for, and the case is referred to the master to take testimony and report the damages.

MCBRIDE v. GRAND DE TOUR PLOW Co. et al.

(Circuit Court, S. D. Iowa, C. D. November 18, 1890.)

PATENTS FOR INVENTIONS—EXTENT OF CLAIM—RIDING ATTACHMENT FOR PLOWS.

On a bill to restrain infringement of letters patent No. 284,036, for "a riding attachment for plows," complainant contends that the patent covers a combination of three wheels so arranged as to carry the downward pressure of the plow upon the earth, and thus reduce friction and lighten the draft, and also prevent the packing of the earth at the bottom of the furrow. The object actually sought, as stated in the specifications, was "to provide a simple, strong, durable carriage attachment for plows that can be more readily applied and adjusted to operate a plow steadily, and to regulate the depth and width of furrow slices by the operator seated upon

the carriage." The idea of diminishing friction by carrying the plow was not hinted at in any of the claims or specifications, and while the three wheels necessary therefor were shown by the drawings, one of them, attached to the end of the plow-beam, was not referred to in either the claims or specifications. *Held*, that the combination for the purpose claimed is not covered by the patent, and if complainant was the first to use it he is presumed to have dedicated it to the use of the public.

On rehearing. For former report, see 40 Fed. Rep. 162.

Cole, McVey & Clark, for complainant.

John G. Manahan, for defendants.

SHIRAS, J. This cause was heard on the merits at the October term, 1889, of this court, and an opinion filed, holding that the charge of infringement was not sustained. See 40 Fed. Rep. 162. Upon application of complainant, a rehearing was granted, and counsel have fully re-presented their views of the facts and authorities. On part of complainant it is urged that the court in the former opinion restricted the scope of complainant's patent unwarrantably, it being now claimed that complainant was in fact the first one to invent and perfect a practicable sulky plow, so arranged that when in operation the weight of the plow and the downward pressure are largely carried on the wheels, thus diminishing the friction that would otherwise be caused between the plow proper and the earth, and which produces two beneficial results, to-wit, the reduction of friction, already named, thereby lessening the draught upon the horses, and preventing the bottom of the furrow from becoming packed and hardened by the passage of the plow over the land, as is the case in ordinary plowing, where the whole weight and pressure is exerted on the bottom of the furrow. It cannot be well questioned that the plows actually manufactured by complainant do possess the advantages claimed. There are to be found therein the three wheels shown in the drawing attached to the letters patent, and marked therein, "d", "W," and "M," and through the co-operating effect of these three wheels the weight of the plow and of the driver, instead of being on the bottom of the furrow, is transferred to the wheels and their contact with the ground. The difficulty in the case, however, arises from the fact that the combination is not covered by the patent issued to complainant. If he was the first one who conceived the idea of thus transferring the pressure, and consequent friction, from the bottom of the furrow to the points of contact of wheels, bearing the weight of the plow and driver, with the earth, and if he was also the first to make a practicable combination of the means necessary to effectuate the idea,—questions which I do not now consider,—he should, in order to secure the fruits of his invention, have secured a patent therefor. If the specifications and drawings attached to the patent issued show the combination or means necessary to work out the result, but the same are not included in or covered by the claim or claims of the patent, the presumption is that the patentee thereby intended to dedicate the same to the public. *Miller v. Brass Co.*, 104 U. S. 350.

The patent issued to complainant comprises five claims. There is not to be found therein a reference to the wheel carried at the front end of

the plow-beam, and which is marked "*d*'" in the drawings. If every one of the parts called for in the five claims of the patent, and identified by letters referring to the drawings, are furnished, the front wheel would be wanting in the combination. It is urged that the words "plow-beam," found in the claims, are sufficient to include the front wheel, because it is attached to the front end of the plow-beam, but this construction is clearly inadmissible. This wheel is not a part of the plow-beam, nor is it immediately attached thereto. All other parts of the connections affixed to the front end of the plow-beam are specifically named in the claims, except this wheel. The omission to name this wheel as one of the co-acting parts of the combination is clearly due to the fact that it is not part of the combination sought to be patented. The devices placed at the front end of the plow-beam are intended to enable the driver to regulate the depth of the furrow, and are covered by the second claim in the patent, which is as follows:

"The clevis, *a*, the rack, *b*, the frame, *c*, the caster-wheel bearer, *d*, *d*', the lever, *g*, and the link, *g*', arranged and combined relative to each other and a plow-beam, substantially as shown and described, to operate in the manner set forth, for the purposes specified."

The depth of the furrow is regulated by elevating or depressing the front end of the plow-beam, and this is accomplished by the combination described in claim 2, and this combination does not depend in any degree upon the presence or absence of the wheel, "*d*'". As it is not one of the co-acting parts in the combination relied upon to enable the driver to regulate the depth of the furrow, it was not named in the claim, and cannot now be read into the claim for any purpose.

The same difficulty exists in regard to claim 5, which is mainly relied on in support of the broad construction now claimed in favor of the patent. It reads as follows:

"The axle-frame, *r*, *r*', *r*'', *s*, *s*, carrying a driver's seat, the rack, *r*'', the wheel, *w*, the wheel-bearer, *h*, *h*', *h*'', carrying a wheel, *m*, and the lever, *n*, arranged and combined relative to each other and a plow-beam and plow, substantially as shown and described, to operate in the manner set forth, for the purposes specified."

The combination thus described is for the purpose of enabling the driver to regulate the width of the furrow, and there is not found therein any reference to the wheel, *d*'. It does not form part of the combination relied upon by the patentee for enabling the driver to regulate the width of the furrow, and for that reason was not included in the list of parts needed to make the proposed combination. It clearly appears that the combinations described in claims 2 and 5 are those intended by the patentee to secure the object sought to be accomplished, as set forth in the specifications, to-wit:

"My object is to provide a simple, strong, durable carriage attachment for plows that can be more readily applied and adjusted to operate a plow steadily, and to regulate the depth and width of furrow slices by the operator seated upon the carriage."

It is not herein stated that it was purposed to reduce friction and pressure upon the bottom of the furrow, and thus lessen the work of the horses, and also to prevent the bottom of the furrow from being compacted and hardened. The combination described in claims 2 and 5 doubtless give a steady movement to the plow, and enable the driver to regulate the depth and width of the furrow, but they are not intended to cover the idea of carrying the weight of the plow and driver upon wheels, and thus reducing the friction, for to accomplish that purpose it is necessary to call into play the co-acting effect of the three wheels shown in the drawings. As already stated, no reference is made to the wheel "d'" in the claims, nor is any description given of the operation of this wheel in the specifications having the remotest reference to its aiding, in combination with the other wheels, to reduce the friction by transferring the weight and pressure to the three wheels named. None of the claims of the patent can be construed, either singly or in combination with the others, if that were permissible, so as to include the idea of thus reducing the friction of the plow when in operation. The patent must be construed, therefore, to cover only the combinations intended to regulate the width and depth of the furrow, and, as to these purposes, I see no reason for changing the conclusion reached upon the prior hearing that the complainant is not a pioneer in these directions, and his patent cannot, therefore, be broadly construed. By its terms, the patent is confined to the combinations intended to enable the driver to regulate the depth and width of the furrow from his seat upon the carriage of the plow, and to give the plow a steady movement when in operation. To now enlarge the scope of the patent, so as to include the idea of reducing the friction on the bottom of the furrow, and the means for accomplishing the idea, would require reading into the specifications the expression of a purpose not found therein, and into the claims an additional element not referred to or included therein, and this is not permissible, although it is true that this element is shown in the drawings of the patent. The idea of relieving the friction on the bottom of the furrow, by transferring the weight of the plow and the driver from the sled formed by the bottom of the plow in the old-fashioned methods of plowing to the wheeled carriage supporting the weight thereof, has no necessary connection with the idea of enabling the driver to regulate the depth and width of the furrow from his seat on the carriage. The construction to be given to a patent covering the means for accomplishing the latter purposes cannot be enlarged by showing that the patentee was the first to invent a means for reducing the friction of the plow. Whether he is or not a pioneer in the latter field of improvement is immaterial, when the question is, what scope is to be given to his patent covering other and distinct purposes? I can see, therefore, no sufficient reason for changing the view taken of complainant's patent in the opinion filed at the first hearing, nor upon the question of infringement, and the decree dismissing the bill must, therefore, be affirmed.

AMERICAN ROAD-MACH. Co. v. GOULD *et al.*

(Circuit Court, N. D. Illinois. July 23, 1890.)

1. PATENTS FOR INVENTIONS—NOVELTY.

The following specification of patent No. 362,679, granted May 10, 1887, to George W. Taft, is not void for want of novelty: "(13) In a machine for making roads, the combination of a carriage or body frame, supported on front and rear traveling wheels, a diagonally disposed scraper-blade extending across and supported beneath said body-frame, and an extended longitudinally adjustable rear axle, whereby one of the rear traveling wheels can be projected laterally beyond the working line of said diagonal scraper-blade, for the purpose set forth."

2. SAME—INFRINGEMENT.

Though, in addition to this long lateral, movable axle, the machine patented has a device for adjusting the frame on the axle by means of a rack and pinion, the patent is infringed by a machine having the long hind axle, on which the frame is fastened by clamps held in place by nuts, the loosening of which enables the operator to shift the frame on the axle.

In Equity.

Dupee, Judah & Willard, for complainant.

E. H. Gary, for defendants.

BLODGETT, J. In this case the defendants are charged with the infringement of patent No. 362,679, granted May 10, 1887, to George W. Taft, for a "machine for making, repairing, and cleaning roads." The scope and object of the invention, as stated in the specifications, relate "to improvements in that class of road-working machines in which a diagonally disposed scraper or plowing blade is mounted in connection with a wheeled carriage or supporting body, and provided with mechanism whereby the scraper can be adjusted to the different required working positions. * * * Another important object is to provide in a diagonal road-scraper or road-working machine a shifting rear axle, whereby the relation of the rear end of the body and the rear traveling wheels can be varied or changed to meet different conditions of work to be performed." The construction of the machine in the particular mentioned in the last paragraph consists mainly in a hind axle much longer than the width of the frame which carries the scraper, and the frame so mounted on its axle that the axle may be slid laterally in either direction, so that the frame may be nearer to one hub than the other, and the advantages of this feature in the construction are stated in the patent to be that "it in a great measure overcomes rocking action of the body of the machine as the wheels pass over uneven ground. It also permits of the rear wheel being set over, as indicated by dotted lines, (Fig. 3,) so as to brace against the bank when plowing the second round, or when moving the earth turned up by the first furrow from the shoulder of the road further in towards the center of the road. It also allows an adjustment of the wheels, so that the windrow of earth can be deposited inside the line of the wheel when desired, so that the wheel can get support against the windrow. It also allows adjustment to avoid chopping action of the blade, by reason of the wheels running over clods when the machine is cutting deep, as well as facilitating changes in the relative

position of the rear wheels and carriage body, to meet or correspond with different positions of angular adjustment." The patent has 22 claims, covering many features of the machine not now in controversy, but infringement is charged in this case only of the thirteenth claim, which is:

"(13) In a machine for working roads, the combination of a carriage or body frame, supported on front and rear traveling wheels, a diagonally disposed scraper-blade extending across and supported beneath said body frame, and an extended longitudinally adjustable rear axle, whereby one of the rear traveling wheels can be projected laterally beyond the working line of said diagonal scraper-blade, for the purpose set forth."

The defenses insisted upon are: (1) Want of patentable novelty. (2) That defendants do not infringe.

In support of their defense of want of patentable novelty defendants have introduced a large number of United States patents upon wheel plows, cultivators, seeding-machines, ditching-machines, and road-scrapers. I do not think there is any analogy between the machine now in question and the plow, cultivator, and seeding-machine patents which have been cited on the part of the defendants, as it is quite evident to me from the proof in the case that the purposes for which the movable axle of the complainant is used is widely different from that of the extensible axles in sulky plows, cultivators, etc. The proof also shows two or more patents for ditching-machines, where the frame carrying the ditching mechanism is movable upon the axles, the object of such adjustment being to allow the wheels, or a portion of them, to travel upon the bank while the cutting or ditching mechanism is working in the ditch. Several patents are also shown upon two-wheel road-scrapers, where the frame carrying the scraper is adjustable laterally upon the axle of the carrying wheels, of which the patents to Benedict & Cumming, of May, 1860, and the patent to Fleming, of June, 1883, are perhaps, all things considered, as good types as any which can be selected from the numerous exhibits introduced. There is also a patent on a four-wheel road-scraper, granted to Cook, in September, 1885, which has an extensible forward axle, that is, means for shortening and extending the forward axle for certain purposes in connection with working the machine; but this feature of construction is recognized by the patentee in the patent now before the court, and a disclaimer inserted in the patent. From the proof in the case it appears that in a four-wheel road-scraper much difficulty is encountered by the side movement, or "slewing," as it is called, of the scraper from the line of draught, by reason of the side pressure upon the scraper when working diagonally, and the chief utility of this movable axle, as covered by the thirteenth claim, is that the wheel may be made to run in a rut, or bear against the vertical side of the ditch by the roadside or a furrow, so as to prevent this slewing movement of the portion of the structure which carries the scraper, and in the working of the machine it may be adjusted to any other conformation of the ground which furnishes a guide or abutment against which the wheel may be caused to run so as to prevent this sideways or slew-

ing motion. And it also appears from the proof that this difficulty does not apply to two-wheel machines, where there is a rigid connection between the team and the frame of the machine by means of the tongue, so that the team guides and controls the line in which the scraper works. In all the older devices which have been cited and put in evidence in this case I fail to find any four-wheel machines which contain the combination of elements covered by the thirteenth claim in question, and I have no doubt from the proof that the addition of this extended and adjustable axle to the road-machine has worked a decided and valuable improvement in the efficiency of the machine. I therefore conclude that the defense of want of patentable novelty is not substantiated by the proof, although I am free to admit that the patent stands upon narrow footing, and must, under the terms of the claim, and in the light of the prior art, be strictly confined to four-wheel scrapers, containing the elements of this claim or their known equivalents.

As to the claim that defendants do not infringe. The complainant's machine not only shows this long lateral, movable axle, but it also shows a device for adjusting the frame upon the axle, by means of a rack and pinion, and it is insisted with much persistency on the part of the defendants that, inasmuch as the defendants do not use a rack and pinion for the purpose of changing the adjustment of the frame upon the axle, hence the defendants do not infringe; but it will be noticed that the claim does not cover the means by which the adjustment is effected, but only the extended longitudinally adjustable rear axle, in combination with the other elements of the claim. A model of the defendants' machine is put in evidence in the case, showing a long hind axle, upon which the frame carrying the scraper is fastened by means of clips or clamps held in place by nuts, the loosening of which enables the operator to shift the position of the frame upon the axle as readily as the complainant's frame is shifted upon the axle. It is true, the work of shifting the position of the frame on the axle must be done by hand, but that, in my estimation, makes no difference. The feature of longitudinal adjustability is in the defendants' machine as clearly and for practical purposes probably as completely as in the complainant's, and hence I am compelled to find that the defendants infringe the thirteenth claim of complainant's patent as charged. A decree may be prepared finding that defendants infringe the thirteenth claim, and ordering an accounting.

CELLULOID MANUF'G CO. v. ARLINGTON MANUF'G CO. et al.

(Circuit Court, D. New Jersey. September 23, 1890.)

PATENTS FOR INVENTIONS—CELLULOID—INFRINGEMENT.

Letters patent No. 199,908, issued to the Celluloid Manufacturing Company for improvement in the manufacture of sheets of celluloid, consisting in the use of a slab of celluloid fastened upon a grooved plate through the operation of the contractile energy of the celluloid in cooling acting upon two or more elevations or depressions in the plate, so that the mass of celluloid is held firmly in place while being planed off into thin sheets, is not infringed by a device by which the celluloid is held on a supporting base by means of atmospheric pressure.

In Equity.

Rowland Cox, William D. Shipman, and Frederic H. Betts, for complainant.

John R. Bennett, for defendants.

GREEN, J. This is a suit in equity to restrain an alleged infringement by the defendants of letters patent No. 199,908, granted to the complainant as assignee of John W. Hyatt, for "improvement in the manufacture of sheets of celluloid and other plastic compositions." Of the validity of this patent, there is no question. It has been critically examined by the circuit court of the United States for the district of Massachusetts, in the case of *Celluloid Manuf'g Co. v. American Zylonite Co.*, 31 Fed. Rep. 904, and sustained in all respects. The only question involved in the present litigation is that of infringement. The patent in question concerns itself with the manufacture of sheets of celluloid and other plastic compositions. Celluloid, as an article of commerce, had been known for years. It is a compound of which pyroxyline is the base or principal ingredient. Pyroxyline is made by subjecting vegetable fiber to the action of sulphuric and nitric acids. To the pyroxyline base is added a solvent, usually camphor and alcohol, which softens or dissolves it, and then pigment may be added to give color. The solvent converts the pyroxyline into a jelly-like mass, which, upon being subjected to heat and pressure, and to a thorough mechanical kneading, resolves itself into a solid, homogeneous mass, which is called "celluloid." It is rough and porous in texture, and somewhat brittle, when cooled. By the reapplication of heat, however, it is rendered plastic, in which condition it can readily be caused to assume any desired form or shape by moulding or pressure. In the manipulation and treatment of celluloid, however, one difficulty seemed almost insuperable. Experience had shown that for the manufacture of many articles, and for use in many respects, thin sheets of celluloid were far preferable to the more usual forms of bar or cylinder. Cutting or planing such thin sheets from a larger mass or block of celluloid had been accomplished, but not with such success as to justify the adoption of the processes. The great difficulty in the cutting or planing operation was that the plastic "material was apt to rise from the surface supporting it, and ride up the knife," thus producing a material irregularity in the cutting, or stopping the operation altogether. Evidently, the great *desideratum* was some tool or

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some process by which the slab or block of plastic material would be firmly and securely held in place upon the surface supporting it during the operation of shaving or planing it into thin sheets. It was to accomplish this purpose that the inventor, Mr. Hyatt, originated the process and the mechanism secured to the complainant by the letters patent in question. Hyatt describes his invention, generally, as an improvement in the manufacture of sheets of celluloid and other plastic compositions, and he declares that the objects of the invention are "accomplished by causing the union in a single slab of a number of sheets or pieces of celluloid, this being effected by pressure and heat, which contemporaneously amalgamate the sheets into a slab, and also force portions of the under side thereof into channels or inclined grooves in the surface upon which the slab rests, which grooves are so arranged that, upon the hardening and shrinking of the material, the portions thereof in the grooves operate as a series of hooks or clutches to retain the slab in place, after which the plate supporting the slab is placed upon a machine for planing, whereby the material is shaved or planed off in sheets or pieces of any desired thickness, the sheets being subsequently dried in open frames, whereby they acquire and retain formation." The specification in the letters patent describes an apparatus for doing this, in which the middle of the upper surface of the plate is a slightly-raised boss, wholly covered with grooves and intermediate ridges or elevations, and the grooves on either side of the central vertical longitudinal plane of which, incline inward and downward towards that plane, and again, "the purpose of retaining the slab in position may be effected, also, by vertical apertures in the plate, or, in fact, apertures or elevations of any order, in or upon or about which the plastic composition can be forced, and then permitted to harden; the essence of this element of the invention being to affix a plate of plastic composition upon a plate immovably, by combined heat and pressure and subsequent cooling." In other words, the improvement in the manufacture of celluloid sheets, invented by Hyatt, and as specifically described in his specification, consists in placing in a pile a number of rough sheets of celluloid upon a grooved plate in a chase or mould, subjecting them to a high degree of heat, and to great pressure, by which they are solidified into a compact slab, the lower portion of which is, at the same time, forced into the grooves, then cooling the material, causing it to shrink so that such part of the material as has been forced into the grooves, by reason of the shrinkage, operates as a clutch or hook grasping the metal of the tool with immense power, and holding the slab firmly by a tension towards the center against any movement or force, either lateral or upward. "Thus," to quote from the specification, "is the prime object of the invention accomplished."

Of the various and numerous "claims" of the inventor, it is now contended that the defendants are guilty of infringing the twenty-eighth, thirtieth, and thirty-first. These claims are as follows:

"(28) The within-described process of making sheets of plastic composition, which consists—*First*, in forming and causing the adhesion of a slab of the

composition to a plate; *second*, subjecting such slab to the operation of a plane to reduce it to sheets; and, *third*, drying the sheets thus produced in a frame, substantially as set forth." "(30) A slab of plastic composition fixed upon a bed or plate, by the means substantially as herein specified, for the purpose of enabling the division or planing of the slab, substantially as set forth. (31) A plate carrying a slab of plastic composition affixed thereon by means of heat and pressure, substantially as set forth, and for the purpose specified."

Upon an examination of these claims, it may be said that the twenty-eighth refers to these steps of a process of making the sheet of celluloid, the first being the formation of the slab, and causing its adhesion to a plate substantially in the manner previously described; that is, by forcing parts of the slab, while heated and plastic, by means of pressure, into grooves, apertures, or depressions in the plate, and then permitting the slab to cool, so that its shrinkage will cause the parts of the slab forced in the grooves, aptly termed "roots" by the defendants' expert, Mr. Renwick, to anchor themselves in the plate. The other steps are the subjecting this anchored and compressed slab to the knife, and the drying of the resulting sheet in an open frame. The thirtieth claim seems to be to a compound article, to-wit, the slab and the plate when they are cemented together by the means specifically described, and specified in the letters patent; that is to say, by means of heat, grooves, apertures, depressions, cooling, and shrinking. The thirty-first is not very different from the thirtieth, the only plate referred to or suggested being of that character that parts of the slab may be forced by pressure to enter grooves, apertures, or depressions therein, and there to affix themselves, as substantially set forth, to-wit, by cooling, and shrinkage. It will be noticed that in each of these claims there is a distinct reference to the previous description of the specification, as declaratory of its reach and purpose and intent. And, although not necessary to the present discussion, it may be remarked that all the claims are equally precise in referring to "grooves, depressions, or apertures in the plate," or by reference to previous description. It seems to me that the true construction of these claims and this specification is that the mechanism and the process therein referred to are limited to the manufacture of celluloid and those kindred compositions the base of which is pyroxyline, which, under the influence of heat, becomes plastic, in which condition it may be forced into the apertures, depressions, or grooves of the plate upon which it rests, where, cooling, its contractile power seizes upon the metal with great tenacity, and, so acting as a hook or clutch or anchor, fastens the whole mass to the plate. In other words, this is a patent for a mechanism and a process for fastening a slab of plastic composition (celluloid) upon a plate, having apertures, grooves, depressions, or their equivalents, immovably, by the combined action of heat and pressure and subsequent contraction upon being cooled. No other process or mechanism for accomplishing this result is suggested or hinted at. And such was the construction given to it by Mr. Justice GRAY, in the case of *Celluloid Manuf'g Co. v. American Zylonite Co.*, before referred to. I do not see how any other or different conclusion can be reached

in construing the specification and claims of the patent. The whole matter was most ably discussed in that case, and the reasoning of the learned judge who gave the opinion of the court seems to me unanswerable. Without repeating it here, I simply record my hearty concurrence in the reasons which he so lucidly assigns, and in the conclusion at which he arrived. Such construction is clearly in harmony with legal principle. Upon the argument of this case, it was contended by the counsel for complainant that the stricter rules for construction should not be invoked as against the inventor because he had failed to claim as broadly as he was lawfully entitled to in his specification and the claims under it. The insistent was that "many an inventor had builded better than he knew" when he attempted in inadequate language to describe his invention, and had been adjudged the rightful possessor of letters patent more comprehensive and far-reaching than he at the outset supposed. Such may have been the result when courts have been called upon to construe claims and specifications in which the language employed was indefinite, ambiguous, or elastic, and a broad construction seemed necessary to override technicalities interposed by infringers to defeat the just and lawful rights of an inventor, but I can see no reason for making any such departure from general principle in the case under consideration. The principle which governs a court of equity in construing the terms of a contract or a writing or an agreement differs in not even an infinitesimal degree from that which obtains in a court of law, though elements, not recognizable at law, may enter into the conception and the execution of a contract with which it is the special province of equity to deal. Of these, fraud and mistake are common examples. But, in the construction of a plain, unambiguous, clearly-defined contract, equity does not wander outside the limits well established by the canons of construction at the beck and call of sympathy. Letters patent may well be regarded in the light of a *quasi* contract, without disturbance of their character and object,—a contract between the government and the patentee. The object of the patentee is to secure to himself complete control, the monopoly of his invention, and the use of it as a certain source of income. The object sought by the government is to obtain from the inventor a clear, definite, precise description of the invention for the public good. These constitute mutual considerations for the proposed contract evidenced in the letters patent. Therefore, the letters patent should embrace both of these objects. If either be omitted, or be so disguised in language as to be wanting in preciseness, a practical fraud is committed by the one or the other party to the contract, inasmuch as the end sought is not attained. Thus it is just and proper for the protection of the patentee, and as well for the protection of the public, that in construing the terms of the specification and claims of letters patent there would be no departure from well-established rules. Any other method would but carry with it confusion and uncertainty. The application of these canons of construction to the letters patent in question, in my opinion, inevitably results in the conclusion at which Mr. Justice GRAY arrived in the Massachusetts case, and in which conclusion, as I have stated, I wholly concur.

But it is further insisted by the counsel for complainant that admitting the construction given in the Massachusetts case to have been in accordance with the law as it was then understood to be, since that decision, the supreme court have laid down, definitely, certain rules of construction, applicable to a primary patent, which were not prevailing at the time that case was determined, and which rules, if applied to the patent in question, would fully sustain that construction of the claims contended for by the complainant. The case in which this new rule was promulgated is *Sewing-Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, and the rule therein stated, and relied upon by the complainant, is this:

"When an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

And applying this rule to the case then under consideration, the court held that, Morley having been the first inventor of an automatic button sewing-machine by uniting in one organization mechanism for feeding buttons from a mass and delivering them, one by one, to sewing mechanism, and to the fabric to which they are to be secured, and sewing mechanism for passing a thread through the eye of a button and securing it to the fabric, and feeding mechanism for moving the fabric the required distances to space the buttons, another machine is an infringement in which three sets of mechanisms are combined, provided each mechanism individually considered is a proper equivalent for a corresponding mechanism in the Morley patent; and that it made no difference that in the infringing machine the button-feeding mechanism is more simple, and the sewing mechanism and the mechanism for feeding the fabric are different in mechanical construction, so long as they perform each the same function as the corresponding mechanism in the Morley machine, in substantially the same way, and are combined to produce the same results. It will be noticed that this is nothing more or less than the application to a primary machine patent of a rule of construction which has ever been used in the construction of patents for a process. To determine what effect, if any, this so-called "new" rule of construction should have upon the Hyatt patent, it will be well to recall just what that patent embraces. It is, as has been before stated, for a process combined with a mechanism. The object of the combination was the production of sheets of celluloid more surely than before. Thin sheets of celluloid were not unknown at the date of this invention. They had been produced by the process of passing plastic celluloid between rollers, and in such a degree of perfection that they did not exceed in thickness the 1-32 of an inch. From the recitals in the patent, and from the proofs, it appears that Hyatt, and perhaps others, had endeavored to produce sheets thinner and more pliable, and more adaptable to use, by shaving or cutting or planing slabs of celluloid; but in this they had met

with discouragement. The difficulty which hindered their complete success was to fasten upon a supporting base the celluloid so that it would resist the pressure of the knife. The formation of the slab or block of celluloid from which the sheet was to be cut was a mere incident to the cutting. That formation was not the object especially aimed at. The great thing to be achieved, and which up to the date of Hyatt's invention had not been achieved, was the fastening of the slab or block immovably to a base so that the plastic mass could be cut or planed with certainty. To obtain the slab of celluloid, Hyatt employed heat and pressure. This employment of heat and pressure, in dealing with celluloid, and in fitting it for commercial purposes and for use, was not novel. Celluloid had been made into "blocks," and these blocks had been made plastic and forced into moulds by the proper application of heat and pressure continuously since Hyatt's patent of October 27, 1874. So far, then, as the use, separate or in combination of heat and pressure upon celluloid in the rough, is concerned, and in view of the state of the art as described in the opinion of the court in *Celluloid Manuf'g Co. v. American Zylonite Co.*, 26 Fed. Rep. 692, the patent now under consideration can scarcely be described as a primary patent. A primary invention may be defined as one which performs a function never performed by an earlier invention. If the application of heat and pressure to celluloid was all that Hyatt's invention accomplished, it was very far from being primary in character. But he went one step further in his endeavor to improve the existing method of the manufacture of celluloid sheets, and it was an exceedingly important step to him. Bending his mind to the surmounting of the one great difficulty of fastening a plastic mass of celluloid to a supporting base, he discovered the possibility of making use, for that purpose, of the contractile energy of celluloid, developed in the chilling or cooling of a heated mass. In all probability, he was the discoverer of the existence of that energy. At least the proofs in this case point to no one as his predecessor. Beyond dispute, he was the first to utilize it, and, as a necessary consequence, he was the first to devise the machine or tool by which it became possible for him to accomplish such utilization. This was the mechanism, which in his patent he combined with heat and pressure to obtain the absolutely secure fastening of the celluloid to the supporting base. By that mechanism, specially planned for this purpose, and by the utilization of a newly-discovered force, he overcame the one great, and hitherto invincible, difficulty of fixing in place the unruly plastic mass, and subjecting it to control. To this extent, then, namely, in the use of the contractile force of celluloid developed in cooling for the purpose of fixing the plastic mass in place, and in the invention of a machine or tool enabling him to make such use of such force, Hyatt's present invention may be called a primary one, and is entitled to all the protection which the broad rule laid down in the *Morley Case* gives to it. Now, applying that rule, what is Hyatt entitled to ask? Simply that any process for improving the manufacture of sheets of celluloid wherein, as one step, the contractile power of celluloid developed in cooling a heated plastic mass is made use

of must be held an infringement; and, second, when in combination with such process a machine or tool is used whereby the use of such contractile power is rendered possible and feasible, such machine or tool must likewise be held to be an infringement, although the enabling machine or tool may be simpler or better or widely different in construction or form from the mechanism described in the patent, provided that the result of the combination of process and machine is the performance of the same function in the same way substantially as performed by the original invention. When Hyatt obtains such measure of protection, he obtains all that he is entitled to. Any process for developing and making use of the contractile power of celluloid for the purpose of affixing it in mass to a base, or any machine or tool making possible such use of such force for such purpose, constitute infringements. Further than that, I do not think the broadest, the most liberal, construction, can stretch and strain the claims of this patent within the boundaries of principle.

It follows that the defendants' combination of process and mechanism does not encroach upon, nor is it an infringement of, the complainant's invention. Such combination lacks entirely the use, on the one hand, of the contractile power of celluloid in any degree, and, upon the other, is wanting in any machine or tool which enables such use. The Curtis patent, under which the defendants manufacture sheets of celluloid, calls for the employment of a force or power in holding to the supporting base the plastic mass in form for cutting, which has been perfectly well known for hundreds of years, and the use of which was free to every one who chose to invoke its aid, namely, "atmospheric pressure." To obtain such aid, the defendants use a supporting base differing in every essential feature from that described in the claim of the complainant. There is no attempt on the part of the defendants to use or appropriate, in any degree, what was aptly termed "the essence of the invention of the patent," as stated in the first claim of the complainant's patent: "A slab of material secured upon a surface through the operation of the power it exerts in shrinkage, acting upon two or more elevations or depressions on or in the surface on which the slab is placed." Failing to show such use, the complainant's case must fall. The bill is dismissed.

MANISTEE LUMBER CO. v. CITY OF CHICAGO *et al.*

(District Court, N. D. Illinois. November 3, 1890.)

1. COLLISION—BETWEEN TOW AND DRAW-BRIDGE—LIABILITY OF TUG.

Libellant's schooner was proceeding up the Chicago river in tow of a tug at a safe speed. The tug in due time whistled for the opening of a bridge, and the bridge tender rang the bell to indicate that it would be opened. On trying to swing the draw, he discovered that the lock was out of order, and, instead of hoisting the customary signal to show that he could not swing the draw, he stopped to investigate the condition of the lock, and did not signal the tug until it was too near the bridge to be able to stop the schooner, the tug having been approaching at the same speed,

as there was yet time to swing the draw, had it been in good order, when the tender signaled his inability to do so. The tug, casting off the schooner, passed under the bridge, while the schooner collided with it, and injured her masts. There was evidence that the city superintendent of bridges had notice of the defective condition of the lock. *Held*, that the tug was not in fault for not slackening its speed as soon as it discovered that the draw was not swinging, and the city is solely liable for the collision.

2. SAME—SIGNALS TO OPEN BRIDGE—ANSWER.

Though the ringing of the bell on the bridges across the Chicago river, just before the draw is swung, is intended as a signal to persons on the street and bridge, it may be treated by an approaching vessel as an answer to her signal to open the bridge, and she is not in fault in proceeding on the strength of it, although the draw may not be swung immediately.

In Admiralty.

H. W. Wolseley, for libelant.

M. W. Robinson and Schuyler & Kremer, for respondents.

BLODGETT, J. The libelant, as the owner of the schooner *City of Toledo*, brings this suit to recover damages which the schooner sustained by a collision with the Clark-Street bridge, across the Chicago river, on the evening of Sunday, the 21st day of September, 1889, the schooner at the time of such collision being in tow of the tug *Satisfaction*, owned by the respondent the Vessel Owners Towing Company. The proof shows that the schooner was taken in tow at the entrance to Chicago harbor by the tug *Satisfaction*, and that the tug, with the schooner in tow, was proceeding up Chicago river at a safe rate of speed, and, soon after passing through the draw of State-Street bridge, whistled for the opening of Clark-Street bridge, the Dearborn-Street bridge being open, and no question is made but what this signal was given in ample time to have enabled the bridge to be opened, if in good repair. The signal of the tug was answered by the ringing of the bell upon the bridge, indicating that the bridge was about to open, and the tug proceeded with her tow, without materially slackening her speed, until near the east end of the protection of the Clark-Street bridge, when the bridge tender, who had made efforts to open the bridge, called out to the tug that he was unable to open it, whereupon the tug cast herself loose from the schooner and passed under the bridge, and the schooner came in collision with the bridge, breaking her foremast, and injuring her mainmast and standing rigging. The proof shows that the lock of the bridge was out of order, so that, when the attempt was made to swing the bridge, they were unable to unlock it, and hence were unable to swing it in response to the signal of the tug. The proof also shows that if, for any reason, the bridge tender is unable to open the bridge, or does not intend to open it, on a signal to do so from an approaching craft, a red ball should be displayed in the day-time, and a red light in the night-time. No such signal was displayed on this occasion until just an instant before the collision, and about the time the bridge tender hailed the tug and said he could not open the bridge, when a red light was hoisted on a pole on the west side of the bridge, and in such position as not to be visible to those in charge of the tug. The proof also shows that, on receiving the signal from the tug to open the bridge, the bridge tender

rung his bell, and attempted to unlock the bridge preparatory to opening it, when he found the lock out of order. He had then ample time to have run up the red light as a signal to the tug to stop, but, instead of doing so, he waited to ascertain the difficulty with the lock, and took so much time to investigate the condition of the lock that the tug with the tow was close upon the bridge before he gave up his efforts to unlock and swing the bridge. Here was the fatal mistake of the bridge tender which brought about the collision. His plain duty was to have hoisted his red light, without an instant's delay, as soon as he found the lock would not work, instead of wasting time in futile attempts to open it, or in trying to find out why the lock would not work. I conclude from the proof that the bridge tender became aware that the lock was out of order when the tug was passing the Dearborn-Street draw, and, if his red light had been promptly displayed at that time, the tug would have had no difficulty in stopping her tow before she reached the Clark-Street bridge, while it is manifest from the proof that there was not time to have stopped the schooner after those in charge of the tug were told by the bridge tender that he could not swing the bridge. In fact, any attempt by the tug to stop the schooner after the hail would only have endangered the tug. The proof also shows that this lock had been for some time out of repair before the collision in question, and that the city's superintendent of bridges had notice that it was in bad order. Under these circumstances, I can see no reason why the tug was not justified in proceeding with her tow up to the time the call was made from the bridge notifying them that the bridge could not be swung. The bridge in question is operated by steam-power, as the proof shows, and swings very rapidly, so that, even if the bridge had been unlocked, and the steam-power applied at the time when the bridge tender called out to the tug that he could not swing the bridge, it could have been swung with sufficient rapidity to have been got out of the way of the schooner, and, in the absence of any signal that the bridge would not be swung, the tugmen are excusable for not stopping. I cannot, therefore, from the proof, affix any blame to those in charge of the tug, and certainly those in charge of the schooner were in no way blameworthy, because the schooner was entirely in the hands of the tugmen. The proof, therefore, satisfies me that the fault for the collision lies wholly with the employes of the city. The fact that the lock was out of order, and was liable to fail to operate at any time, is brought home to the city by proof of the knowledge of the superintendent of the bad condition of the lock; while the failure of the bridge tender to give warning to the tug to stop as soon as he found the lock refused to work is clearly a fault attributable to the city.

It is also urged, on the part of the city, that the ringing of the bell on the bridge, on a signal from a craft to open it, is not a response to the signal from such craft and a notice to the craft that the bridge will be opened, but is a mere warning to persons on the bridge that it is to be swung. Certainly there should and must be some responding signal to that given by the approaching craft for the opening of the bridge, and

the proof shows that the ringing of the bridge bell has always been accepted by tugmen as an assurance that the bridge will be opened. And, while the ringing of the bridge bell is a signal to persons on the street to keep off, and for persons on the bridge to get off, it is also a signal that the bridge will be opened; so that, as I have already said, the ringing of the bell was properly construed by those in charge of the tug as an indication that it would be opened. A decree will, therefore, be entered dismissing the libel as against the Vessel Owners Towing Company, and finding that the collision occurred solely by the fault and negligence of the city, and that the damages sustained by the schooner be paid by the city.

THE BAY OF NAPLES.¹

HALL *et al.* v. THE BAY OF NAPLES.

(District Court, E. D. New York. November 19, 1890.)

1. SALVAGE—FIRE IN OIL CARGO.

A vessel, loaded with case oil and ready for sea, caught fire about 12 o'clock at night, while lying anchored in the harbor of New York. A passing tug went to her assistance, at the same time signaling for more help. Her signals collected seven other tugs and a ferry-boat, all of the available boats in the vicinity, and lastly came the police-boat Patrol, which had been sent for by the first tug to arrive. All of these boats pumped water on the fire, and extinguished it at about 5 o'clock in the morning. But 283 out of the 55,600 cases of oil were damaged. The saving to the owners of vessel and cargo, without considering freight, was \$31,400. There was no extraordinary labor or exposure or peril to life. *Held*, that the salvaging vessels should collectively recover \$20,000 as salvage.

2. SAME—IMMINENT PERIL—PROMPTNESS OF SALVORS.

At the outset of the fire moments being of the greatest importance, the salvage was divided among the tugs with reference to the time of their arrival at the scene of the fire, and also their capacity for pumping.

3. SAME—FERRY-BOAT AS SALVOR.

When a ferry-boat abandons a regular trip to go to the aid of a vessel in distress, the peculiar nature of her employment is to be considered in determining the amount of her award.

In Admiralty.

Suits by various tugs and a ferry-boat against the ship Bay of Naples and cargo, to recover compensation for salvage services. The different suits were consolidated on motion of claimants.

Carpenter & Mosher, for the Moran, the Garlick, and the Pratt.

Wing, Shoudy & Putnam, for the Leader, the Talisman, and the Indian.

Peter S. Carter, for the Harvey W. Temple.

McCarthy & Berier, for the John Sylvester.

R. D. Benedict, for the Charm.

Butler, Stillman & Hubbard, for claimants.

BENEDICT, J. On the night of September 2, 1889, while the ship Bay of Naples was lying in the harbor of New York, at anchor below Bedloe's

¹Reported by Edward G. Benedict, Esq., of the New York bar.

island, in the channel, and loaded for a voyage to sea, with a cargo consisting of 55,600 cases of kerosene oil contained in tin cans,—two cans being inclosed in a box of pine wood, and making a case,—fire broke out in the cargo in the between-decks near the fore-hatch. The time when the fire broke out was 11:30 or 11:40, and at this time the tugs that navigate the harbor were laid up fast to the docks for the night. The ship lay where the fire-boats of the corporations of New York and Brooklyn would not go. She was at anchor, and not at dock, and she was in imminent danger of total destruction. Shortly after the fire broke out, it was discerned by the steam-tug Moran, then bound to sea with a vessel in tow. The Moran at once abandoned her tow, and proceeded to the assistance of the ship, at the same time blowing her whistles loudly. Soon she was followed by the following named tugs, which arrived at the ship in the following order: After the steam-tug Moran, at 12:10, came the John Sylvester at 12:15; the Leader and the Talisman at 12:30; the Harvey W. Temple at 1; the Pratt at 1:15; the Indian at 1:30; the Garlick and the Charm at 1:45. All of these tugs were provided with powerful pumps, some having a greater pumping capacity than others, and each commenced to pour water into the ship as soon as possible after arrival, and continued until the fire was extinguished. The Pratt, as soon as she arrived, passed a hawser to the ship, and towed her across the harbor to the flats below Governor's island, and there began to pump water into her. The other eight tugs continued their pumping until 5 o'clock, when the fire was completely extinguished, and the tugs were dismissed. By the fire only 283 of the cases out of 55,600 composing the cargo received any damage. The oil left in the 283 damaged cases filled 211 new cases, so that the actual loss of oil was only 72 cases. It cost to restore the vessel and cargo to its original condition \$27,638. The sound value of the vessel was \$57,500, and the value of the cargo \$51,430, making a total of \$108,930. I do not include the freight. The saving to the owners was \$81,400. The nine tugs now sue for salvage compensation. Unquestionably the service rendered by the tugs to this ship was a salvage service of a high order. It seems certain that in the absence of these tugs the ship would have been destroyed by fire, or at least scuttled and sunk in deep water. In support of the contention of the claimants that 6 per cent. of the value of the property saved is sufficient compensation, it is said the evidence shows that after the arrival of the Leader, upon the suggestion of the master of the Leader, the blowing of signals was stopped on all tugs. This, it is claimed, shows an intention on the part of the salvors to suppress information as to the distress of the ship for their own benefit, and was an act of bad faith on the part of the salvors, which should greatly reduce their compensation. But as against this fact should be stated the fact that, as soon as the Moran arrived at the ship, she not only blew loud signals, and sent men in their boat to bring the Garlick, but she sent the Temple to notify the police-boat, and all the tugs blew alarm whistles until nine boats had arrived or were on their way to the ship, and, as the result showed, the assistance at hand was sufficient to save the ship. While

the evidence showing the discontinuance of those signals certainly deserves attention, still I am of the opinion that it cannot be held in the present case to prove bad faith on the part of the salvors for the reason that, at the time the signals were discontinued, the assistance which had actually arrived or was on the way was sufficient to control the fire and save the ship. As nothing was gained by the tugs, nor anything lost by the ship, through the discontinuance of the whistles, I feel able to pass over the act under the circumstances of this case.

Again, it is said in behalf of the claimants that the result in this case shows petroleum oil of high grade and in tin cans and wooden cases, such as this cargo, to be not particularly inflammable, and the peril to the ship was therefore more apparent than real; but, in my opinion, the result in this case does not touch the question whether a cargo of petroleum packed in cases is highly inflammable or not, but rather shows what control over fire in a cargo highly inflammable can be obtained by prompt application of water by powerful tugs.

Again it is said that evidence as to the presence of the police-boat Patrol should largely modify the libellant's estimation of the peril to the ship. The proofs show that the Patrol, after being notified of the fire by the Temple, started for the ship, but passed her, and did not arrive along-side of her until 1:45. Before the Patrol arrived, the vessel had grounded on the flats, and, although the fire was still burning in her, it was under complete control, and was certain to be entirely extinguished by the tugs. The Patrol was a powerful fire-boat, and by throwing three of her eight streams into the ship she no doubt hastened the end, but no more. In this case, therefore, the proofs show that the police-boat furnished no substantial assistance to the ship, and her presence cannot affect the salvage.

Again, it is said the service involved no peril to life or to the tugs themselves. They did nothing but pump, and they were constructed to do that. It is not to be denied that the service in question was rendered without peril, and without any extraordinary exertion. The time occupied was five hours. The weather was fair. There was no extraordinary labor, nor any exposure, nor peril to life. These considerations must, of course, tend to diminish the amount of the salvage award. Nevertheless, the service rendered was voluntary; it was rendered promptly to a ship in great danger; and it was eminently successful, and should be compensated by a liberal amount. The fact of controlling importance in determining the amount of award is the danger to which the vessel was exposed. Here a peculiar danger arose out of the time when the fire broke out. If the fire had broken out in the daytime, the first signal from the ship, situated where she was, would have literally filled the surface of the water about her with tugs willing and able to aid. But this fire broke out at a time when the tugs are laid up, and scarcely a vessel about, except a few ferry-boats; and, with fire in such a cargo as this, it was a question of minutes. It may well be believed that a delay of 30 minutes in obtaining aid would have given the fire a headway that would have put it beyond control. As it was, the

master expressed the opinion that the fire would in the end prevail over the tugs. I also am pleased to notice and approve the harmony that was maintained between the different tugs in their united efforts to save the ship, and their desire to remove dispute as to the facts shown by the memorandum of the times of their respective services which was signed by all the masters of the tugs. Taking all things into consideration, I am of the opinion that this ship and cargo should pay a salvage of \$20,000. I do not think that the freight should be taken into consideration. In regard to the proper distribution of this amount among the various salvors, I mention some circumstances that have led me to divide the salvage among the various boats in the manner hereafter stated. The circumstances of the ship were such that, at the outset, moments,—seconds even,—were of the greatest importance; and I consider, therefore, the time of the arrival of each tug. The necessity of the ship was a great quantity of water pumped into her in a short time. I consider therefore not only the time at which each tug arrived, but also her pumping capacity. I notice also that Capt. Cahill, of the Moran, to a certain extent, assumed direction of the efforts to save the ship, and exercised good judgment in so doing. And I consider that, when a ferry-boat abandons a regular trip to give aid to a ship in distress, the nature of the ferry-boat's employment, the inconvenience that arises from leaving a regular trip, the danger of complaint by passengers in case she does so, are things to be noticed in determining the amount of her award. In view of all the circumstances, I am of the opinion that to the owners and crew of the tug Moran should be awarded the sum of \$4,000. The Sylvester was a ferry-boat worth \$60,000, a sum far exceeding the value of any other of the vessels engaged, and from her construction more exposed to danger from fire than any. To the owners and crew of the Sylvester I award the sum of \$3,000. To the owners and crew of the Leader I award the sum of \$2,500. To the owners and crew of the Talisman I award \$2,500. To the owners and crew of the Indian I award \$2,500. The Charm, a tug of greater capacity for pumping than any other tug, arrived after the ship had grounded. To her owners and crew I award \$2,000. To the owners and crew of the tug Garlick I award \$1,500. The tug Temple was the fifth boat to arrive. Her pumping machinery soon broke down. She was absent for a time, having gone to notify the Patrol, a service of no value to the ship, as things turned out. To her owners and crew I award \$1,000. And to the owners and crew of the Pratt, which did the towing, I award \$1,000.

CROSSAN v. WOOD.¹

(District Court, S. D. New York. November 19, 1890.)

WHARVES AND WHARFINGERS—CONCEALED OBSTRUCTIONS—LIABILITY TO VESSEL.

In a suit against a wharfinger for damages alleged to have been occasioned to a vessel at the wharf by reason of obstructions under the water, the fact of the existence of such obstructions, and that the damage was occasioned by them, must be clearly proved before the ship-owner can recover.

In Admiralty. Suit against a wharfinger for damage occasioned to libellant's vessel by reason of alleged obstructions at wharf.

Wilcox, Adams & Macklin, for libellant.

R. H. Underhill, for respondent.

BROWN, J. On the night of July 21, 1888, the libellant's canal-boat Cora Bell was lying alongside the respondent's coal dock in an arm of Gowanus canal. She was damaged, as the libellant contends, by being caught at the bows, as the tide went down, upon some obstruction consisting of rocks or timbers under the water at the upper end of respondent's dock. The boat had been made fast at high tide early in the evening by three lines, with about three feet slack, as stated by the captain of the boat. The tide fell about five feet. At about 2 o'clock at night, the boat was found to have a list to starboard. The bowline was broken, and the bows somewhat elevated, as the captain says, while the other lines held fast. When the tide rose again, she righted, but leaked badly, and, after the coal was discharged, upon survey, was pronounced so badly sprung and twisted as to be practically of no value. The boat was an old one. There were heavy piles driven about 10 feet apart in front of the wharf to serve as fenders. Immediately adjacent to the wharf, there was some accumulation of coal dropped in the discharge of vessels, and it was usual for boats to breast off from the fenders a foot or two in lying up. The great weight of evidence is to the effect that there were no obstructions at the bow such as the libellant contends were there. The bottom was soft mud, with the exception of a little coal immediately adjacent to the wharf, and vessels of the same draught as the Cora Bell, or of greater draught, were in the habit of lying there, discharging at all times of tide without injury. In all the cases where the dock-owner has been held liable for obstructions, the primary fact of the existence of the obstructions alleged, and that the damage arose from that cause, has been clearly proved. *Manhattan Transp. Co. v. Mayor, etc.*, 37 Fed. Rep. 160; *Smith v. Havemeyer*, 32 Fed. Rep. 844, affirmed, 36 Fed. Rep. 927. I cannot find that this has been established in the present case, and, that wanting, no decree can be given for the libellant. The breaking of the bowline is of itself sufficient evidence that sufficient slack was not given in tying up for the night; and, as the other two lines held, that would

¹Reported by Edward G. Benedict, Esq., of the New York bar.

seem to account for the list and the consequent injury through the twist and strain resulting to so old a boat. See *Nelson v. Chemical Works*, 7 Ben. 37. The libel is dismissed.

ROSTRON *et al.* v. THE WATER WITCH.

(*Circuit Court, S. D. New York.* November 15, 1890.)

1. ADMIRALTY—MONITION—DEFAULT.

Where a libel has been filed against a vessel, and on the return-day of the monition the owner of the vessel did not appear, and his default was duly entered in the cause, such default amounts to a formal admission by him of the truth of the allegations of the libel, and a lien in favor of the libelants attaches to the proceeds of the vessel, which has been sold in the mean time under a decree in a prior suit for seamen's wages.

2. SHIPPING—BOTTOMRY BONDS—AUTHORITY OF MASTER.

In a contest between the administrator of the owner and libelants, in a suit to recover the amount of a bottomry bond, who, by the owner's default, have acquired a lien on the proceeds of the vessel sold in another suit, a letter of the owner, denying the right of the master to execute a bond "for so large an amount," is an admission that the master was justified in executing a bottomry bond, and the burden is on the administrator to show that it was for a larger sum than was required by the necessities of the vessel.

3. ADMIRALTY—SALE OF VESSEL—PAYMENT OF PROCEEDS TO PROCTORS.

Where proctors, who filed a libel 30 years before, apply for the proceeds of the vessel deposited in the registry of the district court, assuming to act under their original authority, and it is shown that the sole survivor of the libelants, when last heard from, several years before, was an old man, and "very much of a floater," somewhere in Brazil, the proceeds will not be paid over without a further application, by which it may be shown that there is some person in existence who is legally entitled to receive them.

In Admiralty.

Hyland & Zabriskie, for appellants.

S. Hanford, for appellee.

WALLACE, J. The question in this case is whether the libelants or Prince, who is administrator of the estate of the former owner of the vessel, is entitled to the sum of \$888.20, deposited in the registry of the district court, arising from a condemnation and sale of the vessel, under a decree *in rem* at the suit of one Taggert for seamen's wages. In 1859, the libelants filed a libel against the vessel to recover the amount of a bottomry bond, which set forth the bond, and that it was duly executed by the master of the brig at Pernambuco. A monition was duly issued and published, and the vessel was attached; and, upon the return-day of the process, the owner of the vessel did not appear, and his default was duly entered in the minute-book by the clerk of the district court. Within a few days subsequently, the vessel was sold under the decree in the suit by Taggert, and December 31, 1859, the proceeds of the sale were deposited in the registry. The balance, after payment of Taggert's claim, remained in the registry, and is the money now in controversy. The owner of the vessel died 13 years ago, and in January, 1889, Prince,

who had been appointed administrator of his estate, filed a petition in the district court for an order that the proceeds be paid to him. Whether the proceeds belonged to the libelants or not, it is very clear that Prince is not entitled to them. The default of the owner of the vessel to appear at the return-day of the monition was equivalent to a formal admission on his part of the truth of the matters alleged in the libel, and consequently of a lien by the libelants at that time upon the vessel, which lien of course attached to the proceeds of her sale. See *Miller v. U. S.*, 11 Wall. 268, 301. That default has never been vacated, and the amount of the lien of the libelants, which is the amount of the bottomry bond, is far in excess of the proceeds in dispute.

After the administrator petitioned that these proceeds be paid over to him, the proctors for the libelants applied for a decree condemning them. This was, in effect, an application by them to have the proceeds paid over to them. The court made an order allowing the administrator to contest the libelants' rights to the proceeds. For the libelants the execution of the bottomry bond by the master of the ship at Pernambuco, in the presence of the United States consul, and at the same time an assignment of the bond to Pickeragill & Co., of New York, for collection, were proved, and also that within about a month thereafter the owner of the vessel wrote to Pickeragill & Co. denying that the master had any authority to execute a bottomry bond "for so large an amount." This letter is an admission that the master was justified in executing a bottomry bond. When the execution of the bottomry bond was proved, the *onus* was cast upon the administrator to show that it was for a larger sum than was required by the necessities of the vessel. No evidence was offered by the administrator for this purpose. As between the two rival claimants for the proceeds it is entirely plain that the title to them is in the libelants.

The evidence taken upon the hearing shows that all but one of the libelants are dead, and the only survivor is one Patchett; and that he has not been heard of in two or three years, and when last heard from was a very old man, and "a floater, very much of a floater," somewhere in Brazil. The proctors who filed the libel are assuming to act upon their original authority, conferred 30 years ago, in applying for the proceeds. Under these circumstances, the proceeds should not be paid over without a further application, by which it may be made to appear that there is some person in existence who is legally entitled to them. A decree will be entered dismissing the petition of the administrator, and refusing the application of the libelants for a final decree, with leave to renew it upon further proof.

KEILEY v. THE ALLIANCA.

(Circuit Court, S. D. New York. November 15, 1890.)

SHIPPING—LIABILITY OF VESSEL FOR TORTS—SCALDING BOILER-CLEANER.

Where the master of a steam-ship employs a contractor to clean the inside of her boilers, the ship is liable for injuries suffered by the contractor's employe, while engaged in the work, by the negligent escape of steam and hot water into the boiler, whether those in charge of the steam let it escape or it was done by some meddling stranger in consequence of the negligent supervision of those in charge.

In Admiralty.

H. Aplington, for appellant.

Wm. B. Tullis, for appellee.

WALLACE, J. Grube, a minor, while at work inside one of the large boilers of the steam-ship Allianca, on August 17, 1889, was scalded by the escape of hot water and steam into the boiler, such hot water and steam coming from apparatus outside the boiler in charge and under the control of the engineer of the vessel. Grube at the time was in the employ of one Ryan, a contractor, who had been employed by the master of the steam-ship to clean the inside of the boilers. In consequence of his injuries, Grube suffered great pain, and was confined in the hospital for three months. The district court in its decree allowed him \$750 damages for his injuries. It is entirely clear that the libelant is entitled to recover, and that the sum awarded him in the court below was no more than a fair compensation for his injuries. The master of the steam-ship, having employed Ryan to work inside the boiler, owed an active duty to him and his employes thus invited there to see that they were not exposed to any unnecessary hazard while there. Grube was injured by an escape of steam, which was inevitably perilous to his safety, and which would not have happened if those in charge of the steam-ship had used proper diligence in taking care of the steam apparatus under their control. It is quite immaterial whether the engineer, or any of his subordinates, let the steam escape, or whether some intermeddling stranger did so. Those in charge were bound to exercise proper supervision over the apparatus for the safety of those who might be injured by any relaxation of vigilance on their part; and if a stranger meddled with the apparatus, that circumstance implies negligent supervision by those in charge. I have no doubt, however, that the presumption is that those in charge of the steam apparatus let the steam escape, and that the burden was on the steam-ship, under the circumstances, to exonerate herself from negligence. A decree is ordered for the libelant for \$750, and for the costs of the district court as taxed, with interest from the date of the decree and the costs of this court.

GIBSON v. BROWN.¹

(District Court, S. D. New York. November 20, 1890.)

1. SHIPPING—CONTRACT OF AFFREIGHTMENT—AMOUNT OF CARGO DELIVERED—LUMP SUM.

To take the case out of the rule that freight is payable only on the packages delivered, the language of the carrier's contract must express such intent with reasonable certainty.

2. SAME—BILL OF LADING—STIPULATION AS TO FREIGHT.

A bill of lading provided for freight at the rate of 32/6 per ton, "to be paid on right delivery as customary as per memo. in the margin," the memorandum in the margin being: "Imperial gallons 6,052, at 210 galls. per ton, equals 28.819; @ 32/6 per ton, £46.16.7." *Held*, that the stipulation was not such certain contract for payment of a lump sum as to entitle the carrier to recover the full amount of the freight, on a short delivery, occasioned by twice discharging at ports of distress through perils of the sea.

3. SAME—CARGO-OWNER—ALLOWANCE IN GENERAL AVERAGE—INCLUSIVE OF FREIGHT.

An allowance in general average was made to a cargo-owner for 18,000 lbs. of oil lost by sea perils, the value being calculated on the basis of the New York price, which would include the freight to New York. *Held*, that the ship was entitled to recover the freight on the 18,000 lbs.

In Admiralty. Suit for balance of freight.

Wing, Shoudy & Putnam, (C. C. Burlingham, of counsel,) for libellant.
Bangs, Stetson, Tracy & MacVeagh, for respondent.

BROWN, J. The libel is filed to recover a balance of \$428.79, freight alleged to be due upon several consignments of cocoanut oil from Cochin China, and upon the bills of lading therefor indorsed to the respondent. A considerable number of the casks were lost by sea perils. The respondent has paid the stipulated rate of freight upon the number of gallons actually received by him. The libellant contends that the freight specified in the bills of lading constitutes a lump sum which the respondent was bound to pay in full, notwithstanding the fact that a portion of the packages was lost in transportation. There were four bills of lading, all of which provided for the payment of freight as follows: "Freight for the said goods at the rate of 32/6 per ton of 210 imperial gallons to be paid on right delivery, as customary as per memo. in the margin, at port of discharge." In the margin was the following: "Memo. of freight. * * * Imperial gallons 6,052, at 210 galls. per ton, equals 28.819; @ 32/6 per ton, £46.16.7." At the bottom was a stipulation: "Not accountable for leakage or breakage, except from improper stowage." On the trial, the evidence of one witness was given, to the effect that it was customary to collect full freight, though a part of the packages were missing, if the aggregate freight was stated in the margin, as in this case. So much must depend upon the circumstances of each case, and upon the language of the bill of lading itself, and the testimony of this witness seemed to me so uncertain in several respects, that I cannot find established the existence of such a custom. The respondent, who had had equal experience in similar importations, testified that he had never

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

known or heard of such a custom; and a contrary instance was produced in dealings with the firm with which the libelant's witness was connected. Even if the words "as customary" in the bill of lading be connected, therefore, with the rate of payment per ton instead of with the word "delivery," (a doubtful construction,) I do not think the proofs sufficient to change the construction to be reasonably put upon the language of the bill of lading itself. No doubt, where a lump sum is specified as the freight to be paid on delivery, whether by charter-party or bill of lading, the consignee accepting the goods must pay the stipulated sum without deduction for what may be lost without the fault of the ship. This rule is applied because it is inferred from the language of the bill of lading or charter-party that the parties intended that the ship should receive the particular lump sum stipulated for her services, without incurring any risk of loss on freight through a loss of part of the goods without her fault. *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99, 107. In the present case, had all the casks been delivered by the ship, and it had only been a question of loss through leakage, inasmuch as it was also stipulated that the ship was not to be liable for leakage, I think she would have been entitled to recover the whole freight. All the packages having been delivered, the vessel would be entitled to compute the freight upon the whole quantity, since the delivery would have been a "right delivery" by the ship, so far as she was concerned, of all taken on board. *The Defiance*, 6 Ben. 162; *Carv. Carr. by Sea*, 578, 579. The present case seems to me substantially different. Through perils of the seas, the cargo shifted. A portion of the packages were broken. The ship made ports of distress where the cargo was discharged, and, during such discharge, other damage and breakage arose. Much oil escaped belonging to the libelant and to other shippers. What could be saved was gathered up, and, its identity being lost, it was apportioned among the different owners. Upon arrival in New York, about one-sixth of the whole quantity, and of course a greater proportion of the original packages, was missing. Upon such facts I do not think the fair construction of these bills of lading demands the payment of freight as a lump sum. In all the cases where the payment of a lump sum as freight has been enforced, the intent of the parties to that effect has been clear upon the language of the bill of lading or charter-party. *Shipping Co. v. Armitage*, *supra*; *Robinson v. Knights*, L. R. 8 C. P. 465; *The Norway*, 3 Moore, P. C. (N. S.) 245; *Querini Stamphalia*, 19 Fed. Rep. 123. Here, not only does the bill of lading state that the payment is to be "at the rate of 32/6 per ton on right delivery," but the margin, to which reference is made, repeats the same rate, viz., "32/6 per ton." This is language of quite a different significance from that used in any of the cases where the construction has been that of a stipulated lump sum, and does not seem to me to import any such intent. If the libelant's contention is correct, then either the consignee or the shipper would be bound to pay the sum named, though nearly all the goods were lost or jettisoned through sea perils. Ordinarily, freight is collectible only upon packages delivered. To take the case out of that

rule, the language of the contract must express that intent with such a reasonable certainty as does not appear upon these bills of lading. The evidence shows that in the general average adjustment, which included the expense of discharging the cargo at the ports of distress, and the loss of the respondent's oil occasioned by such discharge, an allowance was made to the respondent as a credit in general average for the oil so lost, on the basis of the New York price, which would include the price of freight to New York. This allowance was made upon 18,000 lbs. of oil, upon which the freight, at the rate specified in the bills of lading, would amount to \$———. As the respondent has the benefit of so much charge for freight, he should pay it to the ship, for which the libellant may take a decree, with interest from November 20, 1890.

NORTH-GERMAN LLOYD v. HEULE.¹

(District Court, S. D. New York. November 24, 1890.)

BILL OF LADING — AGENT AS CONSIGNEE — FREIGHT ACCORDING TO VALUE — CONCEALMENT OF VALUE.

A bill of lading recited that additional freight should be payable on the total value of certain precious stones should their real value be discovered to be greater than was declared in the bill of lading; and the consignee received the goods and paid the freight according to the value stated in the bill of lading, and entered them at the custom-house under the bill of lading, and under an invoice that stated their value at a much greater sum than that made in the bill of lading. *Held* that the stipulation for additional freight upon the actual value was valid, and that the consignee was liable for the additional freight, though he was but an agent employed by the shipper to sell the goods on commission.

In Admiralty. Action for freight.

Shipman, Barlow, Larocque & Choate, for libellant.

Stine & Calman, for respondent.

BROWN, J. The libel was filed to recover an alleged balance of freight due on an importation of diamonds received by the respondent, and entered by him at the custom-house under the bill of lading. The bill of lading stated the value as 7,000 francs, and upon receipt of the goods by the respondent the freight on that valuation was paid. The bill of lading stated that an additional freight of 5 per cent. should be paid on the total value should the real value be discovered to be greater than was declared in the bill of lading. When the freight upon the valuation of 7,000 francs, as stated in the bill of lading, was paid to the libellants, and the goods delivered by them to the respondent, they had no knowledge that the real value of the diamonds in the package was any greater. The respondent, however, had knowledge of their greater value, and entered them at the custom-house upon the same bill of lading and upon an invoice that stated the value of the diamonds to be 27,616 francs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

The libelants claim to recover the additional freight of 5 per cent. on the actual value, in accordance with the stipulation of the bill of lading.

The lawfulness of stipulations of this character in favor of common carriers, to protect them against unknown responsibilities, and to adjust the freight according to the value and the responsibilities assumed, has been repeatedly upheld. See *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442, 9 Sup. Ct. Rep. 469; *The Denmark*, 27 Fed. Rep. 141; *The Bermuda*, 29 Fed. Rep. 399, and cases there cited. For the respondent it is urged that he is not liable beyond the amount of freight paid, because he was only an agent to sell the goods on commission. The vessel, however, had no knowledge of this fact. The circumstances sufficiently show that it was the intention of all parties that the respondent, as consignee, receiving the goods under the bill of lading, should pay whatever freight was payable, according to the terms of the bill of lading. It is not a case of any claim outside of the bill of lading, but of a claim strictly pursuant to its express stipulation. The respondent had full knowledge of its terms, and of the real value of the goods, which determined the amount of freight actually payable. There was a manifest attempt by the shipper to defraud the ship of a part of its rightful freight. The consignee had notice of this, and was bound to protect himself before turning over the proceeds of sale. Under circumstances like the present it is unnecessary to discuss theoretical questions as to the liability of a mere agent as consignee to pay freight, where the circumstances are different and of doubtful import. See *Ehssell v. Skiddy*, 77 N. Y. 282; *Sanders v. Van Zeller*, 4 Adol. & E. (N. S.) 260, 294. In cases like this, where a consignee, though a factor only, has full notice of all the facts, and obtains the goods under the bill of lading, and on the obvious undertaking to pay the freight, and pays on the carriers' requirement at the time of delivery all the freight that the carriers suppose to be due, the consignee is properly held for any balance of freight, as well as demurrage, that may be actually owing according to the terms of the bill of lading upon the actual value of which he had knowledge, but which was concealed from the carriers. *The Bermuda* and *The Denmark*, *supra*; *Railroad Co. v. Barnard*, 3 Ben. 39; *Neilsen v. Jesup*, 30 Fed. Rep. 138; *Gates v. Ryan*, 37 Fed. Rep. 154, and cases there cited; *Allen v. Coltart*, 11 Q. B. Div. 782, 785. Decree for libellant for \$265.54, with costs.

THE BARACOA.¹DUMOIS *et al.* v. THE BARACOA *et al.*

(District Court, S. D. New York. October 24, 1890.)

1. CHARTER-PARTY—VESSEL NOT IN EXISTENCE—MARITIME CONTRACT.

The letting by charter of a vessel not in existence, but "to be built," is a maritime contract as respects the voyages to be made under it, and the guaranties it contains as to speed and draught.

2. SAME—VESSEL "TO BE BUILT"—BUILDING CONTRACT.

In such a contract the building of the vessel is but a preliminary to the substantial part of the agreement, viz., the delivery of the vessel for navigation as per charter, and a suit for breach of the guaranties of the charter as to speed and draught is enforceable *in rem* in the admiralty.

3. PROCEDURE—JOINDER OF SUITS IN REM AND IN PERSONAM.

In suits on charters or contracts of affreightment, proceedings *in rem* and *in personam* may be joined.

In Admiralty. On exceptions to libel.

R. D. Benedict, for libelant.

Wing, Shoudy & Putnam, for respondent.

BROWN, J. The libel is brought *in rem* and *in personam* to recover damages for the alleged non-fulfillment of the guaranties contained in a charter of the steam-ship Baracoa to the libelants. The charter stated that the owners agreed to let, and the charterers to hire, the steam-ship from the time of delivery for 36 months. The ship referred to is described as a steam-ship "to be built on specifications as per memorandum attached." The memorandum attached specified a certain draught and a guarantied speed. The steamer, when built, was tendered to the libelants within the time provided, and at the place substituted by agreement in lieu of that named in the charter, and several trips were performed under it. The libelants, finding that the draught was greater and the speed less than guarantied, refused acceptance, and filed this libel for breach of the covenants of the charter. The respondents except on the ground (1) that the contract was one for the building of a ship, of which the court has no jurisdiction; (2) that, as the ship was not in existence at the time of the charter, the contract was not a maritime one; (3) misjoinder of causes *in rem* and *in personam*, and that there is no lien for such damages.

1. The fact that the subject of the charter was a vessel that was to be built does not make the charter any the less a maritime contract, so far as respects the letting of the ship after she should be built, or as respects her performance of the voyages contracted for under the specified guaranties. The charter, indeed, contemplated a ship to be built; but that was but a mere incident, and preliminary to the essential part of the contract, which was purely maritime, viz., the delivery to the libelant, at a certain future date, of a vessel of certain draught and guarantied speed,

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

for the purposes of navigation during the charter period. The purpose of the contract was not at all the mere building of a vessel in a certain way, but the delivery of a vessel having certain guarantied qualities for service under the charter. The reference to a ship "to be built" I construe as words of mere inducement or description, specifying the vessel to be chartered. Such a contract is a maritime one, and upon the delivery of the vessel, and her running under the charter, she, as well as her owners, are bound by the guaranties contained in the contract. The breach complained of is not the breach of a contract to build, but of the guaranty that the vessel delivered for use under the charter shall be of a certain draught and speed. These guaranties speak from the time of delivery, and form a continuing contract, and the breaches are continuing breaches; and, it being admitted by the exceptions that these guaranties were broken at and from the time of the delivery of the vessel under the charter, and of her entry upon the performance of it, I see no reason why the ship should not be liable *in rem* for the breach of the charter in these respects, as much as for the breach of any other charter obligation, from the time of her entry upon the performance of it. The charter itself furnishes some evidence that it was in the mind of the parties that the ship should be bound for the performance of these guaranties, for the language of the memorandum is that "the steamer * * * guaranties to have a speed of eleven knots," etc. The case of *The Eli Whitney*, 1 Blatchf. 360, was not a case of the breach of any part of the contract contained in the charter. Parol evidence offered to prove parol guaranties was ruled out. The rest of the decision was only to the effect that misrepresentation or deceit as to the ship's capacity, by means of which the written charter had been effected, would not sustain a lien and a suit *in rem*. The present is not a case of misrepresentation or deceit outside of the terms of the charter; but of a breach of an express warranty contained in the charter, materially affecting the performance of the contract. For such breaches of warranty, after the ship has entered upon performance, the ship is liable *in rem*. *The Volunteer*, 1 Sum. 551, 571; *The Tribune*, 3 Sum. 144; *The Hermitage*, 4 Blatchf. 474, 476. Analogous cases are numerous.

2. As respects the joinder of demand for relief *in rem* and *in personam*, the provisions of the supreme court rules in admiralty do not touch libels on charters or on contracts of affreightment. It has long been the practice in this circuit in actions on charters or contracts of affreightment to admit the joinder of both forms of proceeding in the same libel. The subject has been repeatedly considered in this and other courts. *The Zenobia*, Abb. Adm. 48; *Vaughan v. Sherry Wine*, 7 Ben. 506, 508, affirmed 14 Blatchf. 517, 519; *The Monte A.*, 12 Fed. Rep. 331, 337; *The J. F. Warner*, 22 Fed. Rep. 342; *The Director*, 26 Fed. Rep. 708, 711; *Joice v. Canal-Boats*, 32 Fed. Rep. 553. The exceptions are overruled.

PADMORE v. PILTZ.

(District Court, D. Washington, W. D. August 6, 1890.)

1. SHIPPING—ASSAULT BY MASTER—DAMAGES.

In a suit *in personam* by a cook against the master of an American vessel, upon proof that the master punished the cook for willful disobedience on board of the vessel in port, by assaulting and striking him upon his head with a belaying-pin, seriously injuring him, the court awarded as damages \$1,500, besides the value of personal effects lost in consequence of the injury.

2. SAME—POWER TO PUNISH.

In such a case, the assertion by the master of the lawfulness of such punishment will be regarded as an aggravation rather than a defense; a resort to the use of a weapon or violence being only justifiable when necessary to enforce instant obedience in a case of emergency at sea.

(Syllabus by the Court.)

In Admiralty.

Taylor & Hammond, for libellant.

Applegate & Titlow, for respondent.

HANFORD, J. This is a suit *in personam* against the master of an American vessel, to recover damages for an assault and battery. The proofs satisfy me that the libellant was employed as steward and cook on board the schooner called the "Robert Searles," and while so employed, on a Sunday evening, at the port of Tacoma, in this district, on board of said vessel, the master twice requested this libellant to get him a cup of tea, and, upon said request being defiantly refused, went into the galley, and there violently assaulted the libellant, striking heavy blows upon his head with a wooden belaying-pin, from the effects of which the libellant was rendered insensible for a time and quite ill for several weeks, and there is some probability that said injuries may permanently incapacitate him from enduring continuously the fatigue and heat incident to engaging in his profession as cook. The only defense urged on the part of the master is that he acted within the limits of his lawful authority in chastising the libellant for willful disobedience of lawful commands, and that by accepting payment of the wages due him the libellant has released the master from all claims for damages.

On the facts I hold that the libellant is entitled to recover as damages such a sum as will compensate him for the injury he received, and as will also in some degree punish the master for his malicious and unwarranted conduct in resorting to extreme violence and use of a dangerous weapon. The claim set up by this master that the law authorized him, at a civilized port, to punish disobedience of a cook by resort to measures only justifiable in case of an emergency and of actual insubordination by a member of the crew at a time of peril at sea merits rebuke, and I regard it as an aggravation of the original offense. The proofs also clearly establish the libellant's claim for loss of part of his personal effects, which were in the vessel at the time of his injury, and were, in consequence of his inability to remove or secure them after being beaten until he was rendered insensible by the master, lost; the value being \$86.50.

There is not shown, either in the defense pleaded in the answer or in the proofs, any such an agreement, based upon a valid consideration, as would release the master from liability to respond in damages for the personal injury and loss of property above mentioned. The court therefore awards the libellant damages for the personal injury in the sum of \$1,500, and for loss of property in the further sum of \$86.50, and costs.

Let findings and a decree be prepared accordingly.

COSTELLO v. 734,700 LATHS, etc.¹

(District Court, E. D. New York. November 10, 1890.)

1. MARITIME LIENS — LIEN FOR FREIGHT — DELIVERY OF CARGO — WHEN LIEN NOT LOST.

A ship-master discharged a cargo of laths, according to the direction of the consignee named in the bill of lading, which were received and piled in the yard of the purchaser, about 300 feet from the vessel. After the completion of the discharge, demand was made for the freight, but, owing to disputes as to the amount, the purchaser refused to pay the freight called for by the bill of lading. The master immediately served notice that his lien for freight had never been abandoned, and afterwards seized the cargo under process in this suit. *Held*, that the lien had not been abandoned.

2. BILL OF LADING—CONFLICTING COPIES—MASTER'S COPY.

A bill of lading calling for 55 cents freight per thousand laths was delivered to the master of a vessel at Montreal, under which the voyage was performed. A bill of lading had been sent by the shipper to the consignee, which stated the freight at 50 cents per thousand. *Held*, that the bill of lading first executed and delivered to the master, and under which the voyage was performed, was the contract binding on the parties and the cargo.

3. DELIVERY OF CARGO—EXPENSE OF PILING CARGO.

A vessel cannot be charged with the expense of piling her cargo of laths in the yard of the consignee, where the bill of lading contains no provision as to such piling.

In Admiralty. Suit to recover freight and demurrage.

Hyland & Zabriskie, for libellant.

A. B. Cruikshank and Peter Carter, for claimant.

BENEDICT, J. This is an action to enforce a lien for freight and demurrage upon a cargo of laths and lumber shipped at Ottawa, on board the schooner *Nora Costello*, to be transported therein to the port of New York. It appears that the *Nora Costello* and another similar boat, owned by the same owner, having been waiting in Ottawa some time for business, were furnished a cargo by D. Murphy & Co. By direction of D. Murphy & Co., they went to a designated lumber yard and there were loaded, no agreement as to the rate of freight having been made. When the boats were loaded the shipper was, for the moment, for some reason, unable to prepare bills of lading, and it was then agreed between him and the owner of the boats that the boats should start at once upon the voyage, and that he would make out bills of lading for the cargoes,

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

and send them to his agent at Montreal, where the boats could obtain them. The boats accordingly started upon the voyage without bills of lading. On the arrival of the boats at Montreal, bills of lading for each boat, sent by the shipper at Ottawa for them, were delivered to the owners of the boats in Montreal, and the boats thereupon proceeded to New York with their cargoes. The bill of lading of the *Nora Costello* was delivered to the master of the *Nora Costello*, but was never signed by any one. It was a blank bill of lading regularly filled up, and apparently a captain's copy of the bill of lading of the cargo in question. With these bills of lading in hand, the boats proceeded to New York, and there delivered their respective cargoes. Both bills of lading received at Montreal provided for a rate of freight of 55 cents per thousand of the laths, and the other boat was paid her freight at that rate. The *Nora Costello*, upon arrival at New York, was reported to E. R. Weed, the consignee named in the bill of lading, and Weed instructed the master to tow his boat to H. S. Christian's yard, and there deliver the cargo. Accordingly, the boat proceeded to Christian's yard, as directed, and there delivered the laths to Christian, who had purchased them of Weed, and the lumber to Ross, who had purchased it also from Weed. Christian had instructions from Weed to pay the freight on the cargo, and the cargo, on arrival at his yard, was reported to him. He received the laths from the vessel in his carts, by which the laths were carted to a place in his yard some 300 feet from the vessel. There the laths were piled up by men employed by Christian, but, as he claims, for the benefit of the vessel. Immediately upon the completion of the landing of the cargo, the master made a demand on Christian for freight and demurrage. Christian, who, as already stated, had been authorized to pay the freight by Weed, the consignee named in the bill of lading held by the captain, claimed to deduct from the freight the sum he had paid for piling the laths, refused to pay any demurrage, and offered to pay the freight at the rate of 50 cents per thousand, subject to the reduction for piling, but refused to pay freight at the rate of 55 cents per thousand. The master at once notified Christian that his lien upon the cargo had never been abandoned, and that he would at once enforce it by seizing the cargo, and thereupon, after some fruitless requests, the master filed his libel against the laths and lumber, and the marshal took possession of the laths remaining in Christian's yard, and the lumber in Ross' yard. Upon these facts the contention, in behalf of the claimant of the laths, is that the lien for freight and demurrage was abandoned, and no longer exists.

My opinion, however, is that the lien for freight cannot be held, upon the facts proved, to have been abandoned. The proofs show that the laths were proceeded against while they were still in the place where they had been deposited at the time they were landed, and before any change of ownership had occurred, and that the person who received the laths was the person who, by arrangement between him and the consignee, was to pay the freight, and who concedes that the demand for freight was accompanied by notice of the lien and of an intention to en-

force it, and that this notice was given as soon as the landing of the laths was completed. So that it may properly be found that the landing of the cargo, demand of freight, notice of intention to hold the lien, and seizure for the freight, were, in substance, simultaneous. To such a case the remarks of the supreme court of the United States, when deciding the case of *Bags of Linseed*, 1 Black, 108, seem especially applicable:

"Courts of admiralty," says the court, "when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the ship-owner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery; and it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by the fault of the ship. It is his duty, and not that of the ship-owner, to provide a suitable and safe place on shore, in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel; and if the cargo cannot be unladen and placed in the warehouse of the consignee without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the ship-owner and the merchant."

The necessities of commerce, spoken of in the above extract, forbid, as it seems to me, a decision which should prevent the master of a vessel from dealing with his cargo as the master has done in the present instance; and this, whether the lien for freight be considered a maritime hypothecation, or deemed to depend upon a constructive possession of the cargo by the master. It is insisted, however, that the decision made by the court in the case of the *Bags of Linseed* was adverse to the lien, and compels a decision adverse to the lien in this case. But that case was very different from this. There, a shipment of linseed in bags was delivered, part of it into another ship for shipment to another port, and the rest to the representative of the consignee, and by him removed from the place of discharge to a public store-house, and there entered in bond in the name of the consignee, without any notice of intention to hold the lien for freight being given at any time, and when the libel for freight was filed, the goods had passed under the control of the United States, in a public store. In such a case the lien for freight could well be held to have been abandoned. Indeed, it is not seen how jurisdiction to declare the goods subject to a lien had ever been acquired, if, as the case seems to show, the goods, at the time of filing the libel, were in a bonded warehouse, in the custody of the United States, under the warehousing act, upon an entry made in the name of the consignee under that statute. But, however this may have been, it cannot be doubted

that the method of dealing with the cargo by the consignee, disclosed in that case, and which was permitted by the ship-master without notice or suggestion of an intention to enforce the lien for freight, was sufficient to warrant a decision that the lien had been abandoned. That decision cannot, however, as it seems to me, be held to cover such a case as the present. Indeed, an intention on the part of the court to prevent the decision from being held applicable to a case like the present seems to be indicated by the remarks in the opinion which had been quoted above. When closely examined, the opinion delivered permits the conclusion that the court intended to declare no more than this, namely, that the lien for freight is not lost so long as the cargo remains in the actual or constructive possession of the ship-master; that cargo may "pass into the hands" of the consignee, and still be in the constructive possession of the ship-master; and that cargo will be held to be in the constructive possession of the ship-master when the facts proved fail to show a delivery made with the intention on the part of the ship-master to abandon the lien for freight. Such seems to have been the opinion of Mr. Justice CLIFFORD, who, in the opinion delivered at the circuit shortly after the decision in the case of *Bags of Linseed*, said:

"The lien [for freight] is one that is favored by the courts, and will be enforced, unless clearly displaced by the acts of agreements of the parties." *The Anna Kimball*, 2 Cliff. 4.

It may also be noticed that Mr. Justice NELSON participated in the decision rendered in the *Bags of Linseed* case, without alluding to his prior decision made at the circuit in the case of *One Hundred and Fifty-One Tons of Coal*, 4 Blatchf. 368, where he said:

"Now, the mere manual delivery of the coal by the carrier to the consignee does not, of itself, operate, necessarily, to discharge the lien. The delivery must be made with the intent of parting with his interest in it, or under circumstances from which the law will infer such an intent. The act of the party is characterized by the intent with which it is performed, either expressly or by necessary implication."

If Mr. Justice NELSON had understood that the opinion delivered in the *Bags of Linseed* case declared a different law from that declared by him in the case of *One Hundred and Fifty-One Tons of Coal*, it may well be believed that he would not have allowed that opinion to pass without remark from him. The claimants also cite the case of *Egan v. A Cargo of Spruce Lath*, 41 Fed. Rep. 830, (decided by Judge BROWN, February 25, 1890, and since affirmed by the circuit court, 43 Fed. Rep. 480,) as an authority adverse to the lien in this case. But in that case no demand for freight was made as soon as the laths were delivered. Here, demand was so made. There, no demand for freight was made of the person to whom delivery was made. Here, demand was made of the person as soon as, and at the place where, the laths were discharged. There, the delivery was made in expectation that the freight would be paid, either by the consignee or by the shipper, and that shipper was at Quebec or Whitehall. And the court finds the facts proved in that case to be inconsistent with an intention to hold a lien for freight after the

delivery. Therefore, because an absence of intention to hold the lien was proved, the lien was held to have been abandoned. In the case at bar the facts proved justify a finding that the act of discharging the laths was accompanied by a present intention to hold the laths for freight. Such a finding compels a decision that the lien for freight had not been abandoned.

Thus far the question under discussion has been confined to the lien sought to be enforced against the laths; but the libel is filed not only against the laths, but also against some lumber that formed part of the cargo, and was bought from the consignee by a different party from the party who had bought the laths. The facts attending the discharge of the lumber differ somewhat from the facts attending the discharge of the laths. But, inasmuch as a joint answer by the owner of the laths and the owner of the lumber was permitted to be filed without objection, and a single bond was given for both laths and lumber, which bond is executed by the claimant of the laths, who, as it appears, was, by arrangement with the original consignee of the cargo, to pay the freight on both the lumber and the laths, it seems unnecessary to consider whether the lien still attaches to the lumber. Justice will be done by holding the bondsmen liable for the whole freight and dismissing the libel against the lumber without costs, without destroying the question of lien.

The next question to be considered is whether the master's demand for freight at the rate of 55 cents per thousand was justified. The bill of lading delivered to the master at Montreal, under which the voyage was thereafter performed, fixes the rate of freight at 55 cents per thousand. The original consignee, Weed, refused to pay more than 50 cents, because he had received from D. Murphy & Co. what purported to be a bill of lading in which the rate of freight was stated to be 50 cents per thousand. This bill of lading was signed by one of the firm of D. Murphy & Co. as agent of the master, but it was never exhibited to the master or the owner until after the completion of the voyage, and its execution by the shipper as agent of the master was without authority. The bill of lading first issued by the shipper and delivered by his agent at Montreal to the owner of the boat, and under which the voyage was thereafter performed, must be deemed to be the contract binding upon the parties and the cargo. It follows that the master was right in demanding freight at the rate of 55 cents.

The next question to be considered is whether the amount paid by Christian for piling the laths in his yard can be deducted from the freight. Here the provision in the bill of lading, "the consignee to have the option of unloading cargo at the rate of 20 cents per thousand feet," should, as it seems to me, control. Under this the master was bound to unload his cargo, unless the consignee elected to do it, for 20 cents per thousand. Christian refused to unload the laths under the provision of the bill of lading, and the only remaining duty upon the master was to unload it himself into the carts which the consignee provided. He was not bound to pile the laths in the rear of the consignee's yard, nor can he be charged the expense of such piling, never having agreed so to do. The libellant

is therefore entitled to recover his freight without any deduction for the expense of piling.

In addition to the claim for freight the libel also seeks to recover six days' demurrage at the rate named in the bill of lading. Upon the testimony, I am of the opinion that the master can charge for two days' demurrage, and no more. A decree will therefore be entered in favor of the libellant against the laths seized, in accordance with this opinion. The amount, as I figure it, is \$169.74, with interest from September 27, 1888.

THE AGNES MANNING.¹

THE MANHATTAN v. THE AGNES MANNING.

(District Court, E. D. Pennsylvania. October 31, 1890.)

1. COLLISION—STEAM AND SAIL—LOOKOUTS.

A steamer and a schooner were approaching in a clear night, on opposite courses. When the vessels were a few lengths apart the schooner was first seen by the steamer, though, as her lights were burning brightly, she should have been seen one and one-half miles away. The steamer had only one man on lookout and three men on deck. *Held*, the lookout was defective, and the steamer in fault for not keeping off.

2. SAME.

Where a vessel, whose duty it is to keep off, is known to respond tardily to her wheel, she is especially bound to maintain a vigilant lookout.

3. SAME—CHANGING COURSES.

The steamer acknowledged herself in fault, but claimed that porting her helm, when executed, would have carried the vessels clear but for the starboarding of the schooner. The schooner acknowledged starboarding, but claimed it was done some time before the collision. *Held*, as the evidence of the time of the schooner's starboarding was conflicting, and the probabilities were against its having been done after the steamer ported, the charge of contributory negligence was not proved.

4. SAME—CHANGE OF COURSE—IN EXTREMIS.

Where a steamer had come so close to a schooner sailing on an opposite course, without discovering her, that extreme measures were taken to port her to avoid collision, a starboarding of the schooner then made was *in extremis* and excusable.

In Admiralty.

Petition by Clarence Birdsall *et al.*, owners, to limit the liability of the schooner Agnes Manning for collision with the steamer Manhattan, and libel by the Manhattan against the Manning. The admitted facts were that the Manning, a large four-masted schooner from Baltimore to New York, and making 7 to 10 knots, and the steamer Manhattan from New York to West Point, Va., making 10 to 12 knots, collided near Fenwick light. The steamer's evidence tended to show that the schooner was seen when three-fourths of a mile off, and that the steamer ported, bringing the vessels on clearing courses, and that after the steamer ported the schooner starboarded, bringing the vessels into collision. The schooner admitted starboarding, but claimed it was done when the ves-

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

sels were far apart, and that the changes then made were slight, and that the steamer ported only immediately before the collision. The evidence showed that there was only one lookout (three men altogether) on the steamer's deck at the time of the collision, and that the porting was done very rapidly, the pilot and the wheelman both turning the wheel.

Robinson, Bright, Biddle & Ward, for libellant.

Henry R. Edmunds and Curtis Tilton, for claimant, cited—

As to the duty of an ocean-going steamer to have two lookouts: *The Colorado*, 91 U. S. 692. The duty of the steamer to see the schooner: *The Abby Ingalls*, 12 Fed. Rep. 217; *The Falcon*, 19 Wall. 75. As to the evidence necessary to show contributory negligence by the schooner: *Haney v. Packet Co.*, 23 How. 291. As to a change of course of the schooner, if made after porting of the steamer, being made *in extremis*: *The Maggie J. Smith*, 123 U. S. 355, 8 Sup. Ct. Rep. 159; *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. Rep. 468; *The Cadiz*, 20 Fed. Rep. 157; *The Norwalk*, 11 Fed. Rep. 922; *The Reading*, 43 Fed. Rep. 398.

BUTLER, J. The Manhattan was in fault. The proofs show this very distinctly,—so distinctly that her proctor admitted it on the argument. Her duty required her to keep off, and she did not. Her lookout was defective, and the Manning's approach was not observed until the vessels were so near each other as to create danger, notwithstanding the fact that her lights were burning brightly and the night was favorable to a distant view. They should have been seen readily a mile and a half away, yet they were not observed until the vessels were but a few lengths apart. This is the more reprehensible because the Manhattan was known to respond tardily to her wheel.—While admitting her fault, (which is amply sufficient to account for the disaster,) she charges the Manning with contributory negligence. Such charges, under similar circumstances, are very common. The crew of the offending vessel usually seeks to relieve itself from censure and responsibility by charging the other with improper change of course and voluntarily running into danger. To sustain such a charge the evidence should be very clear. In this case it certainly is not. While the witnesses for the Manhattan say the schooner changed after they had ported, those from the latter declare just as positively that she did not. They say a slight change was made much further back, a considerable period before the Manhattan ported, and that this was the only change made. These witnesses are most likely to be accurate respecting the fact. If the wheel was changed, as charged, they must know it, while the others might be mistaken; and they certainly have no greater motive for falsifying than the latter. Besides, they are supported by the probabilities of the case. It is improbable that she would so change after seeing the Manhattan turn in that direction and thus run into greater danger. It is quite clear, to say the least, that the charge of contributory negligence is not proved.

If it were proved, however, it would not tend to relieve the steamer. The vessels were then in peril, and the change, though erroneous, would be excusable. That the situation was perilous when the steamer ported

cannot well be doubted; the conduct of the officers shows it. They resorted immediately to extreme measures, such as are only taken to escape threatened danger. It is evident they were seriously alarmed.

The steamer's claim to damages cannot, therefore, be sustained, and a decree must be entered accordingly.

THE JERSEY CITY.¹

CORNELL STEAM-BOAT CO. v. THE JERSEY CITY.

(District Court, E. D. New York. November 11, 1890.)

COLLISION—FERRY-BOAT AND TOW—CROSSING COURSES.

A tug, with several boats in tow along-side, came down the North river, rounded to, and lay about 350 feet from the New York piers, holding herself against the ebb-tide, and waiting for the steam-boat City of N., which was coming up astern, to pass inside of her. While so waiting, a ferry-boat, bound from Jersey City to New York, attempted to pass between the tow and the City of N., and her paddle-wheel struck the outside boat on the starboard side of the tug, causing it to sink. *Held*, that the ferry-boat was liable for the damage.

In Admiralty. Suit against the ferry-boat Jersey City for damage by collision. See 43 Fed. Rep. 166.

R. D. Benedict, for libelant.

Robinson, Bright, Biddle & Ward, for claimants.

BENEDICT, J. Upon the merits of this case, it need only be said that the libelant is entitled to a decree, unless the defense set up by the ferry-boat is maintained. That defense is that there was room enough for the ferry-boat to pass between the tow and the City of Norwich in safety, on her way to her slip, but that she was prevented from passing in safety by the action of the tug in dropping down the stream, and thereby so narrowing the space between the City of Norwich and the tow as to make it impossible for the ferry-boat to pass without striking the stern of the tow as she did. This defense, however, is not supported by the evidence. The weight of the evidence is the other way. There must therefore be a decree for the libelant, with an order of reference, to ascertain the damages.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BAKER *et al.* v. HOWELL *et al.*

(Circuit Court, D. Nebraska. December 4, 1890.)

COURTS—JURISDICTIONAL AMOUNT—PROTEST FEES.

Protest fees are taxable costs within Rev. St. U. S. § 983, providing that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials" shall be taxed as costs; and though Comp. St. Neb. c. 41, § 6, provides that the holder of a note may bring "an action for principal, damages, and interest, and charges of protest," yet such fees for protest cannot be considered as part of the "matter in dispute" within Act Cong. March 3, 1887, § 1, (24 St. 552,) as corrected by Act Cong. Aug. 13, 1888, (25 St. 434,) restricting the jurisdiction of the United States circuit court to suits "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000."

At Law.

Gregory, Day & Gregory, for plaintiff.

E. M. Bartlett, for defendant.

Before CALDWELL and DUNDY, JJ.

CALDWELL, J. The act of congress of March 3, 1887, § 1, (24 St. 552,) as corrected by Act Aug. 13, 1888, (25 St. 434,) restricts the jurisdiction of this court, in respect to the amount necessary to give jurisdiction, to suits "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars." This suit is founded on a promissory note for the sum of \$2,000, and is brought against the makers and indorsers. The petition contains an allegation "that the notary fees for the due presentation and protest of said note were and are of the full sum of three and 50-100 dollars, which the plaintiffs were required to pay, and did pay;" and this is set up and relied on as an additional substantive indebtedness to make the matter in dispute exceed \$2,000. The question for decision is, are the notary's fees to be treated as "costs," within the meaning of that word as used in the act of congress, or as an independent substantive debt, which may be used to increase the sum of "the matter in dispute." The statute of this state provides that the holder of any note may bring "an action for principal, damages, and interest, and charges of protest against the drawers, makers, and indorsers" of the same. Comp. St. Neb. c. 41, § 6. The act regulating and establishing the fees of public officers in this state fixes the fees of a notary for each protest, recording the same, and giving notice of protest, (Id. c. 28, § 19,) and makes his certificate, that he demanded payment and gave notice of non-payment, presumptive evidence of these facts, (Id. c. 61, § 6.) The sum paid by the plaintiffs to the notary was for an official service performed by a public officer for a fee fixed by statute. This official act was a necessary step to be taken by the plaintiffs to fix the liability of the indorsers, and to perpetuate and procure record evidence of their cause of action against them. It is true that the demand of payment may be made, and notice of non-payment given, by any person competent to testify as a witness, but in such a case there is always the danger that the witness may

die, or that he cannot be found when wanted to prove the facts. The law, therefore, wisely makes provision for having this service performed by a public officer, who is required to keep a record of his official action, and this record the law of this state makes presumptive evidence of the facts therein stated. It is the making of this record that entitles the notary to the fees provided by law. He is entitled to no fees unless he makes this record; and, when the holder of the protested paper pays these fees, he is entitled to have them taxed as part of his costs, if he recovers judgment on the protested note. The costs of protest are incident to the recovery on the protested note, and are no part of the debt sued for. They are no such part of the "matter in dispute" as to give the court jurisdiction by increasing the amount involved. It is an error to suppose that no expense is taxable as costs save such as is incurred after suit brought. All expenses incurred by the plaintiff in procuring and perpetuating evidence of his demand against the defendant before suit brought, as well as all expenses incurred in the prosecution of the suit, which the law provides he may recover from the defendant, are costs. Section 983 of the Revised Statutes of the United States provides that—

"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where, by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

This section is conclusive of this case. Under this section, which is a part of the fee bill established by Act Cong. 1853, it is the uniform practice of the United States courts to allow the plaintiff as part of his costs the protest fees allowed by law, and paid to the notary, whether claimed in the complaint or not. I have been familiar with the practice in one district for a quarter of a century, in which it was the rule to treat the protest fees as costs, and tax them accordingly, as of course, though not mentioned in the complaint, and in all that time the correctness of the practice was never challenged. Where public records or certified copies of such records are necessary evidence for a party, he may procure the same, and the fees allowed by law to the officers making and certifying said records are, under section 983, taxable as part of his costs in the case, if he succeeds, without regard to the fact whether such records were procured before or after suit brought. *Hussey v. Bradley*, 5 Blatchf. 184; *Dennis v. Eddy*, 12 Blatchf. 195; *Gunter v. Insurance Co.*, 10 Fed. Rep. 830; *Fost. Fed. Pr.* 494; *Huntress v. Epsom*, 15 Fed. Rep. 732. The notarial protest in this case is precisely such a record, and the fees for making and obtaining it are costs, and taxable as costs. Deducting these costs, the matter in dispute in this cause, "exclusive of interest and costs," does not exceed the sum of \$2,000. On a question of jurisdiction, the court has no discretion but to give effect to the act of congress without liberality of intendment or construction.

The act of congress provides that, if it shall appear to the satisfaction of the court at any time after a suit brought or removed into this court that such suit "does not really and substantially involve a dispute or controversy properly within its jurisdiction," the court shall proceed no further, but shall dismiss the suit or remand it. In obedience to this injunction of the statute, this cause must be dismissed.

DUNDY, J., concurs.

FARMERS' LOAN & TRUST CO. v. HOUSTON & T. C. RY. CO. et al.

(Circuit Court, E. D. Texas. October 20, 1890.)

FORECLOSURE OF MORTGAGES—JURISDICTION—PARTIES—SUBSTITUTED SERVICE.

Where a railroad which is in the hands of a receiver appointed by a United States circuit court is sold under a decree of foreclosure to satisfy a junior deed of trust, and, while the property is still being administered by the court through its receiver, suit is brought in the same court against the company by the trustee in the elder deed of trust to foreclose it, the court having jurisdiction of the subject-matter has authority to make the purchaser under the first foreclosure sale, which was made subject to the prior deed of trust, a party defendant, and to order substituted service of process upon him, notwithstanding the fact that he is a citizen of the same state as complainant.

In Equity. Motion of George E. Downs to set aside substituted service of process.

Willie, Mott & Ballinger, for complainant.

Rouse & Grant, for defendant Downs.

PARDEE, J. In the case of *Nelson S. Easton and James Rintoul, Trustees, and The Farmers' Loan & Trust Company, Trustee*, vs. *The Houston & Texas Central Railway Company*, a decree was rendered on the 4th day of May, 1888, for the sale of the Houston & Texas Central Railway, including that division of said railway known as the "Waco & Northwestern Division." The decree directed this particular division (Waco & Northwestern) to be sold in satisfaction of a deed of trust carrying a lien upon the property subsequent in date to a deed of trust held by the Farmers' Loan & Trust Company, upon which last deed of trust this proceeding is based. The aforesaid decree ordered the sale to take place subject to said prior deed of trust to the Farmers' Loan & Trust Company, and the sale was so thereafter made, the present mover, Downs, becoming the purchaser. The sale under the decree aforesaid was afterwards confirmed by the court, and the deed passed to the purchaser, which deed stated that it was made subject in all respects to the lien of the first mortgage in favor of said Farmers' Loan & Trust Company. At the time the decree aforesaid was rendered, and the sale made thereunder, and at the time the Farmers' Loan & Trust Company, trustee, instituted the present suit to foreclose the first mortgage upon the Waco &

Northwestern Division, and at the time of substituted service upon Downs, the said Houston & Texas Central Railway, including the Waco & Northwestern Division, was in the hands of a receiver appointed by this court in the case of *Easton and Rintoul et al. vs. The Houston & Texas Central Railway Company*, which receiver was holding and managing the said property under the orders of this court. The present suit was instituted against the Houston & Texas Central Railway Company as the only party defendant to the suit. By subsequent amendment, it was prayed that Downs be made a defendant also, as the purchaser of the property under the decree and proceedings aforesaid. On December 3, 1889, it being made to appear to the court that this suit is one commenced to enforce a lien upon real and personal property within the jurisdiction of the court at the time of the institution of the suit, and that the defendant George E. Downs is not an inhabitant of, or found within, the eastern district of Texas, but that he is a resident citizen of the city of Brooklyn, N. Y., an order was issued requiring said Downs to appear and plead to the suit. And this order having been served upon him, he did appear at the time appointed and pleaded that, at the date of the filing of the complaint, he was, and still was, a citizen of the same state as the complainant, to-wit, the state of New York, and could not be impleaded in the cause, this court being without jurisdiction in the premises; and thereupon obtained an order staying proceedings until the questions presented could be passed upon. That this court had lawful jurisdiction for the foreclosure of the mortgages, for the satisfaction of which the sale was made under which Downs bought, is not disputed. That such sale was ordered, and the deed to Downs made and accepted by him expressly reserving the rights to the complainant, is equally clear. It is not denied that the property was in the lawful custody of this court, which was administering it through a receiver appointed in the case of *Easton and Rintoul vs. The Houston & Texas Central Railway Company* when this present suit was commenced. It is not suggested that Downs is not a necessary and proper party to the present suit. It is clear that he could voluntarily make himself a party for the protection of his rights, and that without ousting the jurisdiction of the court. The question then to be determined at this time is whether, under the circumstances of this case as stated, the court has authority to make Downs a party defendant, and direct substituted service of process upon him. If the court has jurisdiction over the property and over Downs, there can be no question of the right to substituted service under the eighth section of the judiciary act of 1875. That it has jurisdiction of the property and of Downs' rights therein, notwithstanding the said Downs is a citizen of the same state as the complainant, presents a question that has been affirmatively decided by the supreme court of the United States in a number of cases. See *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Bank v. Calhoun*, 102 U. S. 256; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355. For these reasons it is ordered that the motion of George E. Downs of January 22, 1890, be denied, and that the order of

said date staying proceedings in said cause, so far as they should affect said Downs, be vacated, and that the said Downs be ordered to plead, answer, or demur to said bill of complainant within 20 days from this date.

GEORGE *et al.* v. ST. LOUIS CABLE & W. RY. CO.

(Circuit Court, E. D. Missouri, E. D. September 28, 1890.)

1. CREDITORS' BILL—DISTRIBUTION OF PROCEEDS—LIEN OF TAXES.

Where the federal courts have appointed a receiver of the property of a judgment debtor in Missouri, and have ordered the property sold, and the receiver has been in possession thereof during the time when a levy might have been made thereon for taxes on the personalty, the court will direct the payment of such taxes out of the proceeds of the sale in preference to all other claims, though the sale was ordered to be made "subject to all liens for taxes," as taxes on personalty are not a lien thereon until levy under the tax-bill, in Missouri.

2. SAME.

But as the state has a paramount lien for taxes on realty, and the sale was subject thereto, such taxes will not be ordered paid out of the proceeds.

3. SAME—WHO MAY SHARE IN DISTRIBUTION.

Where the proceeds of a sale of a debtor's property on judgment creditors' bill are insufficient to pay the judgment creditors, and there has previously been no application to the payment of judgment creditors of any of the debtor's property which should have been applied to the payment of open accounts, the holders of such accounts cannot participate in the proceeds of the sale.

4. SAME—INTERVENTION.

Where a bill to reach property which cannot be effectively reached at law is filed by certain judgment creditors for the benefit of all judgment creditors of defendant, and no order is made requiring others to intervene by a certain time or be barred of their rights, all judgment creditors who choose to intervene may share ratably with complainants in the proceeds of a sale of the property, even though some do not intervene until after the interlocutory decree ordering the sale.

5. SAME.

It does not affect the right of such subsequent intervenors to share ratably that the bill prays that after a sale the proceeds may be distributed among the persons in whose behalf the suit is brought "according to their respective rights and equities," where the original complainants and prior intervenors had no prior lien on all the property sold when the bill was filed.

In Equity.

On the 17th of October, 1889, three non-resident judgment creditors of the St. Louis Cable & Western Railway Company filed a bill in behalf of themselves and all other judgment creditors against the railway company, to obtain the appointment of a receiver of the judgment debtor's property, and a decree for the sale of the same for the payment of their debts, according to the respective rights of the several creditors, as they might be adjudged. The bill stated, in substance, that the defendant company owned a railroad extending from a point within the city of St. Louis to Florissant, in the adjoining county of St. Louis; that it was largely indebted and insolvent, owing, among other debts, a debt of \$1,000,000, which was secured by a mortgage lien on all of the defendant company's rights, property, and franchises; that the complainants had no adequate legal remedy to reach and sell the property of the company, because its road was located partly in the city and partly in the county of St. Louis, and,

under the laws of the state, could only be sold as an entirety; and that an execution sale, if attempted, would not convey a valid title to a large portion of the property. A receiver was appointed, as prayed for, to take possession of the property on the day the suit was filed. The case was brought to a hearing on bill and answer at the last term of court, and on the 24th of April an interlocutory decree was entered, directing a sale of all the defendant's property, subject to the lien of all existing mortgages thereon, and also "subject to all liens for taxes." By the terms of the decree, judgments to the amount of \$255,214.75 were duly established as valid debts of the defendant company; that being the aggregate amount of the claims of all judgment creditors, including the original complainants, who had made themselves parties to the suit prior to the interlocutory decree. The court reserved to itself, however, the power, by further orders or decrees thereafter to be made, to determine all questions of priority, and all questions respecting the distribution of the fund that might be realized by the sale. The sale took place on the 20th of last June, and realized \$150,000. After the entry of the interlocutory decree directing a sale, other judgment creditors of the railway company, owning judgments to the amount of about \$20,000, filed intervening petitions in the cause, and asked to participate in the proceeds of the sale. Three of the petitions last mentioned were not filed until after the sale, and these represent judgments to the amount of \$7,000. In addition to the judgment debts heretofore mentioned, there are now on file a number of unliquidated demands against the defendant company, aggregating something over \$5,000. These demands, resting on open accounts against the company, were filed in this court, accompanied by intervening petitions praying an allowance and payment of the same, at various dates, both prior and subsequent to the interlocutory decree. The collector of the revenue for the city of St. Louis, on May 6, 1890, also presented an intervening petition, founded upon two tax-bills against the defendant company, for taxes assessed against it for the year 1889. One bill is for taxes on personal property, and is for the sum of \$2,138.82. The other bill is for taxes due on realty, and is for the sum of \$1,430.06. Several questions touching the right of these several classes of claimants to participate in the distribution of the fund realized by the sale of the defendant's property have been heretofore argued and are now to be determined.

Lee & Ellis and Smith & Harrison, for complainants.

Laughlin & Kern, for defendant.

Hitchcock & Finkelnburg, S. P. Galt, David Murphy, O. B. Givens, Ras-sieur & Schnurmacher, and E. C. Kehr, for intervenors.

THAYER, J., (*after stating the facts as above.*) 1. The first question in order is whether the state should be allowed a priority for either or both of the tax-bills? It seems to be the law in Missouri that for taxes assessed on personal property the state has no lien on the property until an actual levy has been made under the tax-bill. A sale made by an owner of personal property after taxes have been assessed against the same, and

prior to a levy, passes a good title to the vendee, unincumbered by a tax-lien. *State v. Goodnow*, 80 Mo. 271; *Greeley v. Bank*, 98 Mo. 460, 11 S. W. Rep. 980. Such being the local law with respect to taxation, it follows that the provision of the interlocutory decree directing a sale to be made "subject to all liens for taxes" is no obstacle in the way of allowing the state a priority as to the tax-bill against personalty, for as to such property there was no lien at the time of the sale; and, because the purchaser took the personal property unincumbered by a tax-lien, the state in all probability will lose the bill, unless the court directs its payment out of the proceeds of the sale. Inasmuch as the receiver appointed in this case had possession of the property on account of which the tax was imposed during the period within which the collector might have made, and probably would have made, a levy but for the existence of the receivership, it is plainly the duty of the court to see that the tax-bill against personalty is paid in preference to all other demands. The appointment of a receiver and sale of property by a decree of this court, in a case of this character, will not be allowed to interfere with or to defeat the collection of the public revenue. The bill against personal property will therefore be paid.

The tax-bill against real estate, as to which the state has a lien paramount to all other liens, stands on a very different footing. The property was sold on the express condition stated in the decree,—that purchasers would take "subject to all tax-liens." Bids were no doubt made with reference to that provision of the decree, and an order made at this time, directing the payment of the tax-bill in question out of the proceeds of the sale, would, in effect, change the terms of the sale. The proceedings in this court have not interfered with the collection of the bill by the state, or in any manner impaired its security for the same, which is still ample to insure payment. Under the circumstances, no obligation rests on the court to direct the payment of the tax-bill against realty out of the proceeds of the sale, and the collector will accordingly be left to enforce the lien of the state for that bill by the usual remedy.

2. The next question to be answered is whether persons who have intervened on open accounts against the railway company, either prior or subsequent to the interlocutory decree, are entitled to participate in the distribution of the proceeds of sale, the fund being inadequate to pay even the judgment creditors in full. The bill in this case must be classified as a judgment creditors' bill, to reach property that either could not be reached by execution at law, or that could not be seized and sold under such process, so as to realize the full value of the judgment debtors' interest. The fund in court, therefore, is not such a fund as is technically termed "equitable assets," and as to which the maxim applies that "equality is equity." *Trust Co. v. Earle*, 110 U. S. 710-717, 4 Sup. Ct. Rep. 226.

I understand the doctrine to be well settled that the holder of an unliquidated legal demand—that is to say, a demand not reduced to judgment—cannot maintain such a bill as this, and cannot properly intervene in such a proceeding until his demand is reduced to judgment. A court

of equity requires the validity and amount of a purely legal demand to be established by a suit at law, before lending its aid to reach property of the debtor, that cannot be effectually reached by execution or attachment. *Martin v. Michael*, 23 Mo. 50; *Dunlevy v. Tallmadge*, 32 N. Y. 459; *Turner v. Adams*, 46 Mo. 95; *Webster v. Clark*, 25 Me. 314; *Dodd v. Levy*, 10 Mo. App. 122, 123; *McDermutt v. Strong*, 4 Johns. Ch. 687.

There are one or two exceptions to the rule, covering cases where a creditor for any reason cannot sue at law; but the exceptions to the rule are unimportant so far as the case at bar is concerned.

It is not apparent to the court that the claims now under consideration derive any support from the doctrine announced by the supreme court of the United States in a series of cases beginning with *Fosdick v. Schall*, 99 U. S. 253, and ending with *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950. As already appears, this is not a bill by bondholders to foreclose a mortgage covering the entire property of a railroad company, and all of its future acquisitions of property, as well as the net income of the company. The case shows no application of earnings by the defendant company to the payment of claims of judgment creditors, that should of right have been otherwise applied to the payment of the unliquidated demands now on file. There has been no diversion of funds, such as a court of equity can remedy by using the funds in its hands to pay such demands. The fact seems to be that all the claimants stand on the same plane, save that some have been more expeditious in reducing their claims to judgment. All the demands—those that are liquidated and those that are unliquidated—are for money or materials supplied to the railway company to enable it to operate its road and discharge its duties to the public.

In cases like the one at bar, where the aid of a court of equity is sought by judgment creditors to reach property that cannot be reached by execution, the court does not proceed, when the property is in its hands, to distribute it ratably among all classes of creditors. On the contrary, it follows the law, and recognizes the priority that those judgment creditors who have moved in the cause would have obtained by the levy of an execution at the time of filing the bill, if no obstacles had stood in the way of the levy of such process. The filing of a bill by judgment creditors has often been termed an "equitable levy," entitling those who file the bill to priority. *Trust Co. v. Earle*, *supra*; *Pullis v. Robison*, 73 Mo. 201; *Rappleye v. Bank*, 93 Ill. 396; *Gordon v. Lowell*, 21 Me. 251; *Miers v. Turnpike Co.*, 13 Ohio, 197; *Jones v. Arkansas, etc., Co.*, 38 Ark. 17; *Edmeston v. Lyde*, 1 Paige, 637; *Sage v. Railroad Co.*, 125 U. S. 379, 8 Sup. Ct. Rep. 887.

I conclude, therefore, that the claimants on open account are not entitled to participate in the proceeds of the sale, inasmuch as the fund is insufficient to pay the judgment creditors.

3. The remaining question to be disposed of is one that arises between the judgment creditors themselves. The original complainants concede, or rather consent, that all judgment creditors who came in prior to the interlocutory decree, and whose judgments were established by that de-

cree, may participate *pro rata* in the distribution to be ordered; but they contest the right of those judgment creditors to participate in the distribution who did not come forward until the right to relief had been established by the interlocutory decree. In the case of *Trust Co. v. Earle*, *supra*, a judgment creditor filed a bill to obtain a sale of the judgment debtors' equity of redemption in certain land, which, by the law of Maryland, could not be levied upon or sold under execution. Subsequently, and after an interlocutory decree had been entered, another judgment creditor intervened in the cause, and claimed the right to an equal participation in the proceeds of the sale. The right in question was denied, the court holding, after a very full review of the authorities, that the first creditor was entitled to priority. This case fully sustains the contention that those judgment creditors who did not come forward until a decree was entered cannot share ratably in the distribution of the fund with those creditors whose judgments were established by the decree. It is true that the bill recites that it is filed in behalf of the three original complainants, and all other judgment creditors, but this recital cannot be fairly construed as a consent that parties may come in at any stage of the proceedings, even after a decree establishing the complainants' rights, and share equally in the fruits of the litigation. *Edmeston v. Lyde*, *supra*.

Upon the whole, I conclude that those creditors whose judgments were established by the decree are entitled to a priority. From what has been heretofore said, it follows, also, that the St. Louis Ore & Steel Company is not entitled to any preference over other judgment creditors whose demands were established by the decree. An order of distribution may be prepared, in accordance with these views, and, if deemed necessary, a reference may be made to a master to apportion the fund, and compute how much is due to each creditor after payment of all costs.

ON REARGUMENT.

(November 24, 1890.)

THAYER, J. The question considered in the third paragraph of the foregoing opinion has been reargued. In behalf of those judgment creditors who did not intervene until after the interlocutory decree had been entered, it is strenuously contended that they have the right to share in the distribution of the fund on an equality with those who intervened prior to the decree. Many authorities are cited and relied upon, particularly *Jones v. Davenport*, 19 Atl. Rep. 22, and *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619. Both of the cases last mentioned were bills filed by creditors of a deceased person against his executor, to obtain payment of their debts out of the estate of the deceased. Incidentally, the bills prayed to have certain fraudulent conveyances set aside that had been made by the deceased in his life-time, or by the executor subsequent to his death. But in both cases the object of the complainants was to obtain an account and distribution among creditors of

property properly belonging to a dead man's estate, and liable for the payment of his debts; hence, each proceeding was a "creditors' bill," technically so termed, and was so treated by the court. 1 Story, Eq. Jur. §§ 546, 547. When an estate is administered in chancery, as they were formerly very frequently administered by means of a "creditors' bill," creditors undoubtedly had the right to come in after decree, and prove their demands, and share ratably in the distribution of the fund. The usual form of decree in such cases required the master "to take an account of all assets, (*quod computet*,) and give notice to all creditors to come in and prove their claims," (Id. § 548; 2 Daniell, Ch. Pr. 1203, 1204;) and in such cases all creditors proving their claims were paid ratably out of the assets discovered and taken into the account, after prior judgment liens were satisfied. The decree in such suits was regarded as a decree for the benefit of all creditors, and in the nature of a judgment for all who subsequently proved their debts before the master. *Vide Thompson v. Brown*, 4 Johns. Ch. 620, where this subject is fully discussed. In that class of cases it sometimes happened that creditors not guilty of negligence or laches were allowed to come in and prove their demands, even after the time limited by the notice to prove claims had expired, if any part of the fund for distribution remained in the custody of the court. *Gillespie v. Alexander*, 3 Russ. 130; 2 Daniell, Ch. Pr. 1205. Counsel for intervenors also cite and appear to rely upon the cases of *Williams v. Gibbs*, 17 How. 239, and *In re Howard*, 9 Wall. 175. In the first of these cases, neither of which were creditors' bills, it was held, in substance, that after a court of equity by final decree has apportioned a fund belonging to several persons in common, among those supposed to be entitled to it, other persons having an interest in the fund, who were not parties to the original suit, and have not been guilty of negligence or laches, may maintain a bill against those who have received the fund, to recover their share; and in *Re Howard*, where a fund had been apportioned by a final decree, and other persons then filed a bill claiming a share of the fund, it was held that, inasmuch as the fund had not been actually distributed prior to the second suit, the court might properly suspend the execution of the first decree, although it had become final, until the second suit had been determined, and the right of the complainants therein had been adjudicated. Some other cases have been cited, that arose under acts for liquidating the affairs of insolvent banks and insurance companies, which are not deemed important.

Now it is true, as has been urged, that the suit at bar is not a creditors' bill, but is a proceeding by judgment creditors to reach property that either could not be reached at all, or that could not be effectively reached by execution at law; and, in such cases as is sufficiently shown by authorities heretofore cited, the filing of a bill is an equitable levy, and entitles the complainants in whose behalf such a bill is first filed to a priority. I have no doubt that the three complainants by whom the bill in this case was filed might have secured a priority by filing the same for their own benefit; but they did not do so. By the very terms of the bill, they professed to be acting, not only for themselves, but "in

behalf of, all and singular, the other judgment creditors of the respondent." The effect was to waive the advantage they might have obtained by moving in their own behalf. The result is that the suit, in contemplation of law, has from the beginning been prosecuted by the original complainants in behalf of all judgment creditors who might elect to come in and take advantage of what had been done in their behalf. The sale ordered by the court under the interlocutory decree was likewise a sale for the benefit of all judgment creditors; it was in the nature of a sale of property *pendente lite*, for the benefit of a given class of creditors; and, while the interlocutory decree determined that the original complainants, and some others who had intervened, belonged to that class, it did not undertake to determine that they were the sole beneficiaries, and that there were no other creditors belonging to the class in whose favor the suit was instituted.

Another matter that cannot be overlooked is the fact that no order had been made, prior to the interlocutory decree, requiring persons in whose behalf the bill was filed to intervene by a given day, or be barred of their rights. Under all these circumstances, and in view of the strong disposition invariably shown by courts of equity to preserve the rights of parties rather than to forfeit them, unless there has been gross negligence or laches, I am compelled to hold that those judgment creditors of the defendant, who have intervened since the 24th of April last, when the interlocutory decree was entered, are entitled to a ratable share of the proceeds of the sale, if on an examination of their judgments before the master they are found to be valid.

After a more thorough consideration of the question, I am convinced that the former ruling is indefensible. The case of *Trust Co. v. Earle*, *supra*, does not sustain the former ruling, because the bill in that case was filed in behalf of the complainant alone, in consequence of which he secured a priority.

It is suggested by complainants' counsel that, although the bill in this case was filed in behalf of all judgment creditors, yet the prayer of the bill is, that after the sale the fund realized may be distributed among the parties in whose behalf the suit was brought, "according to their respective rights and equities." By reason of the form of the prayer for relief, it is suggested that the original complainants did not waive any of their rights; and, as the original complainants and those who intervened prior to the decree all hold judgments rendered at the October term, 1889, of the St. Louis circuit court, whereas the other judgment creditors hold judgments recovered at a subsequent term, it is argued that the former are entitled, to priority on that ground. This suggestion would have some weight if it appeared that complainants, when the bill was filed, had, by virtue of their judgments, a lien under the statutes of Missouri on all of the property sold by order of this court, out of which the fund for distribution arises. But such is not the fact. The bill in this case did not allege the existence of such a lien, nor has the court by its previous decree so determined. According to the averments of the bill, the complainants were not entitled, under the laws of the state, to sell the defendant's railroad by execution under a judgment at law.

and on that ground they applied to this court for equitable aid. Now, conceding for the purposes of this case, but without deciding, that the complainants did have a judgment lien on the defendant's railroad, notwithstanding the fact that they could not sell it under execution, yet the fact remains that, by virtue of the decree obtained in this court, the defendant's franchises, and much other personal property of the judgment debtor, were sold, to which the lien of the judgments certainly did not extend. Furthermore, the fund in court which is to be distributed is made up in part of the earnings of the railroad while it was in the hands of the receiver. In view of these facts, there appears to be nothing in the suggestion last mentioned entitling the complainants, and those who intervened prior to April 24, 1890, to priority. They had no well-established legal lien when the bill was filed, affecting all of the property ultimately sold, which entitles them to any priority over subsequent judgment creditors, even though the prayer of the bill is so framed as to protect such a lien.

The previous order of distribution, made on the 23d of September, must be modified in accordance with these views.

ANDERSON v. THE ASHEBROOKE *et al.*

(Circuit Court, E. D. Texas. December 1, 1890.)

1. INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

The only way for getting into the hold of the vessel which libelant was employed in loading was by a ladder, so placed in a hatch that to reach it one was obliged first to step onto the steam-winch used in lowering the freight. The winch was out of repair, so that it would not quickly obey the lever, and was unreliable in holding a suspended load. Libelant, without giving any notice, or making any inquiry, stepped on the winch while a load was suspended on the tackle. His stepping on the winch, together with the suspended load, set it in motion, from which he received severe injuries. Libelant knew, or should have known, that it was customary to lower the freight part way, and then hold it until those below were ready for it. *Held* that, though it would not have started had it not been out of repair, libelant was still guilty of contributory negligence.

2. SAME—DEFECTIVE APPLIANCES—LIABILITY OF VESSEL.

Though the ship had been chartered for a lump sum, and by the charter-party, the charterers were to pay the stevedoring and the loading, still the owners of the vessel, having by the charter-party contracted to furnish the use of tackle in loading, and to afford charterers the same accommodation as if the ship had been loaded by the pound, were bound to the charterers, and the charterers' agents, the stevedore and his employees, to furnish proper machinery and tackle, and to use proper care to keep it in order.

3. SAME—CONTRIBUTORY NEGLIGENCE—DIVISION OF DAMAGES.

In admiralty, contributory negligence on the part of libelant is not a bar to his recovery for personal injuries, but both parties being at fault the damages are apportioned.

4. SAME—NEGLECTANCE OF FELLOW-SERVANTS.

The fact that libelant's fellow-servants were negligent, will not prevent recovery, there having been negligence on the part of the ship.

In Admiralty.

James B. & Charles B. Stubbs, for libelant.

McLemore & Campbell, for claimant.

PARDEE, J. December 28, 1888, John Anderson, cotton screwman, went to work, having been employed, with others, to load with cotton the British steam-ship *Ashebrooke*, then lying at the port of Galveston. J. Moller & Co. were the charterers of the ship for a lump sum under a charter-party which provided that the charterers were to pay for compressing cotton and stevedoring, but the vessel should furnish the use of her tackle in loading, and to trim and discharge her ballast as charterers may desire, at her expense, and to afford charterers the same accommodations as if loaded by the pound. Charterers contracted with the firm of Sweeney & Co., stevedores, to load the vessel. Sweeney & Co. hired Anderson to assist in the work. Anderson was first employed in the work of slinging cotton aboard from the wharf; but, having finished that employment, under directions, started, with others, aboard the ship to go down into the hold to assist in stowing away cotton already sent down. The means provided by the ship for Anderson and his comrades to go down below was through a hatch, which was in use for lowering cotton by means of a tackle operated by a steam-winch, or hoisting apparatus. The combing, or guard, of the hatch, was from two to three feet high, and the only means of descent from the deck into the hold was through this hatch by an iron ladder, which was fastened or bolted to the forward end of the hatch about amid-ships, and at the same end of the hatch as the winch. The winch extended almost entirely across the end of the hatch, and was so close thereto that there was no room for any one to pass between in order to reach the ladder; and any one descending into the hold was obliged to step over and upon a part of the winch. At the time, said winch was out of repair by reason of defective packing, so much so that quantities of steam escaped, and it would start unexpectedly, and would not promptly obey the lever which was used for starting and stopping, but would continue to revolve after the steam was turned off, and the lever was on the center; and was uncertain and unreliable in holding a load suspended preparatory to its dumping in the proper place. At the time Anderson went aboard, the winch was still, the steam turned off, and the lever was on the center; the tackle, being at that time loaded with bales of cotton partially lowered into the hold, stopped a short distance from the bottom, waiting for directions to dump at the proper time and place. The man at the lever of the winch was watching the foreman of the hatch for the signal to start it, and the foreman was looking down into the hold to see when the men below wanted the load lowered the rest of the way. Without giving any notice of his intention of going down into the hold, and without ascertaining whether any load was suspended on the tackle, and without being noticed by the men in charge, Anderson stepped across by and upon the winch in the usual way to reach the ladder. As he did so it suddenly started, without any act on the part of the man in charge of the winch or the foreman; probably set in motion either by the weight of the sling load of cotton suspended in the ship's hold, or by Anderson stepping upon it, or from both causes combined. When it started

it caught Anderson's leg between the projecting end of the piston-rod, as it rapidly revolved, and the combing of the hatch, and crushed and broke his leg; at the same time threw him against other parts of the machinery, tore the flesh from and lacerated the upper part of the leg, or thigh; and, in short, caused such severe injuries that, after months of pain and suffering, his leg was necessarily amputated. It further appears that, prior to the injury of Anderson, complaint was made to the engineer of the vessel of the defective state of the machine, with a request to have it repaired, which request was refused. In this case, Anderson claims damages against the ship for his injuries; and, from a decree in his favor, allowing him \$3,000, the claimant has appealed.

It seems clear from the evidence that the libellant, Anderson, was guilty of negligence and carelessness, without which he would not have been injured. He knew, or ought to have known, that while the winch was in operation, the danger of attempting to go down into the hold was largely increased; he knew, or ought to have known, that in using the winch for lowering cotton in the hold it was customary to lower the sling load of cotton part of the way, and there hold it till the men below were ready to receive it. Before he attempted to go down into the hold, he should have notified the parties in charge of the winch of his intention, and should have ascertained whether the winch was temporarily stopped because it had discharged its load, or because it was holding the load ready for discharge. Proctor for libellant contends that libellant was not guilty of negligence in not giving notice of his intention to descend into the hold, because any notice that he could have given would have been of no avail, as the starting of the winch was from causes independent of the man at the lever, and the same thing would have happened if there had been notice. It is very probable that if libellant had given notice of his intention to go down at the time, and had persisted in the intention, the result would have been practically the same; but it seems clear that if he had given notice he would have been informed of the condition in which the machinery was, and of the position in which the sling load of cotton was, and would have been directed to wait until the load had been discharged, and the machinery thus put in comparatively safe shape. If he had taken the trouble to ascertain the condition in which the winch was stopped, with a sling load of cotton suspended, common sense would have told him not to climb onto the machinery and attempt to descend into the hold until the condition of both machinery and suspended load was changed. Upon the evidence, there seems to be no difficulty in reaching the conclusion that the means provided for workmen employed, as was Anderson, to go down into the hold to work was extremely dangerous because of the location of the ladder with reference to the steam-hoisting apparatus; and because the steam-hoisting apparatus, near which it was necessary to go in order to get down into the hold, was out of repair, and not in safe and suitable condition with reference to the people who were employed to work in connection with it. Proctor for claimants contends that, although the location of the ladder

with reference to the steam-hoisting apparatus was dangerous, and although the steam-hoisting apparatus was out of repair, yet the ship is not liable, because:

"(1) The owners of the vessel are not liable to the employe of a stevedore, who has full charge of the loading of a ship, for injury to the employe caused by defective tackle and machinery furnished by the ship, when it is shown that the tackle and machinery had no such defects as were known to the owners or master of the ship; and that the stevedores were experienced, and had exclusive control of the work; and that the owners are not liable for injuries caused by defect in tackle or machinery, arising from wear and tear, unless a knowledge of such defect is brought home to them."

Reliance is placed upon the case of *The Dago*, 31 Fed. Rep. 574, and authorities there cited. Conceding the law to be as stated, the defense is not good in this case, because the improper location of the ladder and steam-hoisting apparatus was so patent that the court is bound to hold that the owners had notice of it; and the evidence in the case shows that the defective machinery, arising from wear and tear, was brought home to the agents of the owners by actual notice.

"(2) There was no privity of contract between Anderson, the libellant, and the steam-ship *Ashebrooke*, but if there had been, the master and owners are not insurers or warrantors of the machinery; their duty is to use proper care, and provide machinery and tackle fit for use."

It is true there was a charter-party for a lump sum from the owners of the ship to Moller & Co., and that under such charter-party the charterers were to pay for the stevedoring, and, inferentially, the loading of the ship. The charter-party was not a demise of the ship, but a mere contract of affreightment, and under it the loading was for the direct benefit of the ship. Moreover, under it, the owners contracted to furnish the use of tackle in loading, and to afford charterers the same accommodations as if the ship had been loaded by the pound. Under this charter-party, the appliances and tackle were furnished directly by the ship to the charterers, and to the charterers' agents, the stevedore and his employes. They were bound to furnish machinery and tackle fit for use, and to use proper care to keep the same in order. See *The Max Morris*, 24 Fed. Rep. 860, 28 Fed. Rep. 881; *The Rheola*, 19 Fed. Rep. 926; *The T. A. Goddard*, 12 Fed. Rep. 174. The evidence in this case shows that the ship did not use proper care to provide tackle and machinery fit for use, and keep the same in a proper state of repair.

"(3) The libellant, Anderson, was the immediate cause of the accident, and he cannot recover."

In the admiralty, contributory negligence does not necessarily prevent the recovery of damages by a party injured in case of maritime tort occasioned by concurring negligence. In such cases the admiralty rule is to divide the damages. This court fully considered this question in the case of *The Explorer*, 20 Fed. Rep. 135, where it is held that "in cases of marine torts it is the rule of the courts of admiralty to exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity." And in the well-considered case of *The Max Morris*, 28 Fed. Rep. 881, following *The Explorer*, it was held that—

"In suits in admiralty for personal injuries, contributory negligence on the part of the libelant is not a bar to his recovery; and that the admiralty rule apportioning damages, where both parties are in fault, extends to all causes of maritime tort occasioned by concurring negligence."

"(4) The machinery of the *Ashebrooke*, as operated, was well known to the fellow-servants of the libelant, and particularly to the foreman and employer of the libelant, and the same was continued to be operated by them and all of them; and if there had been any defect on the part of the machinery, it was negligence on the part of such fellow-servants to continue its use; and where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow-servant, no recovery can be had; and in this case, all the evidence shows that the foreman well knew that the steam had to be relied on to hold the load of cotton."

The trouble with this position is that, under the evidence in the case, the promoting cause of the injury, so far as the ship was concerned, was its defective appliances and tackle. It does not relieve the ship from fault, because fellow-servants of the libelant contributed with him to the injury. If his own contributory negligence is no bar to his recovery, it is difficult to see why the contributory negligence of his fellows should cut him off. Under all the circumstances of this case, there is no doubt that the owners of the ship were guilty of negligence in connection with the injury to the libelant, for which the ship is responsible *in rem*, (see *The A. Heaton*, 43 Fed. Rep. 592;) and the court is of the opinion that the admiralty rule in regard to the division of damages in the case of mutual fault should be followed in this case. It appears from the evidence that the libelant is a comparatively young man, with a family dependent upon him for support; that his pain and suffering were great for months; that his injury finally resulted in the loss of a leg, very greatly diminishing his capacity for labor in the future; that his earning capacity was about \$1,000 per year. Considering libelant's loss of time, (nearly a year;) his diminished earning capacity; his expenses for surgical and medical attendance, and medicines; his pain and sufferings, and the loss of his leg,—his damages clearly amount to the sum of \$6,000; and if he had been shown to have been without fault in this case, that amount would have been a proper allowance for damages. Applying the rule for the division of damages, the court is of opinion that \$3,000, the sum allowed libelant by the district court, is not excessive, but is a just and equitable allowance; and this not as a reward to libelant for his own negligence at the expense of the ship, nor as a compensation for the injury he has received, but as a just method of enforcing the admiralty rule requiring a division of damages in cases of maritime tort resulting from mutual fault, and of compelling a party, without whose fault there would have been no injury, to bear his just share of the damages. A decree will be entered in favor of libelant for \$3,000, with legal interest from the date of the decree appealed from.

UNITED STATES v. WINGATE.

*(Circuit Court, E. D. Texas. December 1, 1890.)***REVIEW ON APPEAL—EVIDENCE NOT PRESERVED IN RECORD.**

Where, in an action by the United States to recover the value of timber wrongfully taken from public land and sold by the trespasser to defendant, there is no evidence preserved in the bill of exceptions tending to show whether or not defendant's vendor was a willful or inadvertent trespasser, no error can be predicated on the refusal of the court to grant an instruction as to the damages plaintiff is entitled to recover in case the trespass and taking were willful.

Error to district court.

M. S. Jones, Special U. S. Dist. Atty.

Burnett & Handscom, for defendant in error.

PARDEE, J. The United States brought suit against the defendant alleging that one Thomas J. Carroll forcibly entered upon the land and premises of the plaintiff, without the authority, knowledge, or consent of plaintiff, and did cut and fell thereon 475 pine trees, of the value of \$4 each, and did cut said trees into logs of proper lengths to be manufactured into lumber. Said logs when so cut contained, in the aggregate, 334,602 feet (board measure) of timber of the value of \$5 per 1,000 feet before being manufactured into lumber, and of the value of \$10 per 1,000 feet after being manufactured into lumber. That said Thomas J. Carroll delivered to defendant, Wingate, at Orange, Tex., 169,442 feet of said timber, in the log, (board measure,) which said timber was by said Wingate manufactured into merchantable lumber, of the value of \$10 per 1,000 feet, and of the aggregate value of \$1,694.42. That said timber, before and after being manufactured into lumber, was the property of plaintiff, and to which defendant had no right, all of which was well known to said defendant; yet, so knowing, defendant converted said timber and said lumber to his own use, and to plaintiff's damage \$2,000, for which sum the plaintiff prayed judgment. Defendant answered pleading not guilty of the trespasses complained of, and, further, that, if he purchased the timber mentioned in plaintiff's petition, he did so in good faith, and without notice that said timber, or any portion of it, was cut off of plaintiff's land, if it was so cut, which defendant denies; that defendant not only had no notice that the timber was cut off of plaintiff's land, but has no reason to believe or suspect that it was cut or taken off of plaintiff's land; that said Carroll owned and still owns timber land in Calcasieu parish, La., and openly sold said timber as having been cut and taken from his own land, and all timber purchased by the defendant from him was purchased and paid for in good faith, and upon the honest belief that it was cut off of his own land; further, that the timber sued for is, in its unmanufactured state, worth only \$200, and the cost of the manufacture of the same into lumber is \$8 per 1,000 feet. Wherefore the defendant prays to be dismissed, with his costs, or, if it should

appear that the timber described in plaintiff's petition, or any portion of the same, was cut off of plaintiff's land, that plaintiff recover only the value of such timber in its unmanufactured state, or the value of the lumber sued for, less the cost of manufacture. A trial before the district court resulted in a verdict and judgment in favor of the plaintiff for \$132.

On the trial of the case, the following bill of exceptions was taken to the rulings of the court:

"Be it remembered," etc., "and the jury having been sworn and impaneled to try said cause, and a true verdict render, and the evidence having been adduced, and the argument of counsel heard, the honorable the judge did proceed to charge the jury as follows, to-wit: 'That the several values of the timber alleged to have been cut from the lands of the United States, described in the petition, and purchased by B. R. Wingate from the original trespasser, Thomas J. Carroll, have been shown to be in its different conditions as follows, to-wit: "Standing in the tree, fifty cents (50c.) per thousand feet; felled and lying on the ground where cut, one dollar (\$1) per thousand feet; and in the boom at Orange, where delivered to the defendant, five and twenty-five hundredths dollars (\$5.25) per thousand feet, which price it is shown was paid for said timber by defendant; and, when sawed into lumber, ten dollars (\$10) per thousand feet." That under the testimony the jury must find that the defendant purchased said timber in good faith; and, being a purchaser in good faith, should the jury find that he purchased and came into possession of the timber in question, or any portion thereof, the verdict of the jury must be for plaintiff for a sum not exceeding one dollar (\$1.00) per thousand feet,—the value of the timber when felled and lying on the ground where cut.' To which charge, plaintiffs, by their counsel, M. S. Jones, special assistant United States attorney, excepted, and requested the court to charge that if the jury found that the defendant, B. R. Wingate, had purchased the timber in good faith, their verdict should be in favor of the plaintiffs, the United States, in the amount of five and twenty-five one-hundredths dollars (\$5.25) per thousand feet, the price paid to Thomas J. Carroll, the original trespasser, by said defendant, as shown by the said Wingate's books and testimony, if the jury found said Carroll was a trespasser in bad faith; which said exception and request were overruled, and refused by the court, for the reasons following, to-wit: To which ruling plaintiffs except, and tender their bill, which was accordingly allowed and made of record in open court."

The charge of the judge as given, and the refusal of the judge to charge as requested in relation to the amount of damages plaintiff was entitled to recover, are the errors assigned upon this hearing.

In cases like the one under consideration, the rule of damages is very plainly laid down in *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398. The syllabus of that decision is as follows:

"Where the plaintiff in an action for timber cut and carried away from his land recovers damages, the rule for assessing them against the defendant is: (1) Where he is a willful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense. (2) Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value. (3) Where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase."

Cases applying this rule will be found in *U. S. v. Williams*, 18 Fed. Rep. 478; *Same v. Heilner*, 26 Fed. Rep. 82; *Same v. Ordway*, 30 Fed. Rep. 31; *Aurora Hill, etc., Min. Co. v. Eighty-Five Min. Co.*, 34 Fed. Rep. 521; *Murphy v. Dunham*, 38 Fed. Rep. 511; *U. S. v. Scott*, 39 Fed. Rep. 901. In the charge given in this case, no attention seems to have been paid to the question whether or not Carroll, the original trespasser, was a willful trespasser or an unintentional and mistaken trespasser. The good faith referred to relates only to the purchaser from the original trespasser. In the charge refused, attention is paid to the good faith of both the original trespasser and of the defendant purchaser. Whether the court erred in the charge given, and in the refusal of the charge asked for, depends upon whether or not Carroll, the original trespasser, was a willful trespasser, or an inadvertent or mistaken trespasser. Under the facts stated in the bill of exceptions, if Carroll was a willful trespasser, then the plaintiff was entitled to recover at the rate of \$5.25 per 1,000 feet, being the price paid by the defendant. If Carroll was a mistaken or inadvertent trespasser, then the plaintiff was entitled to recover the value of the timber at the time of conversion by Carroll, which conversion was, according to the facts stated in the bill of exceptions, after the timber was severed from the realty and when the logs were lying on the ground where cut. The record is silent as to whether there was any evidence showing or tending to show that Carroll was a willful trespasser. Without knowledge of this fact, this court cannot say that there was error to the prejudice of the plaintiff in either the charge given or the one refused. The bill ought to have stated the fact or the evidence tending to show the fact. "An appellate court will not look outside a bill of exceptions to determine the correctness of the instruction excepted to." *Dunlop v. Munroe*, 7 Cranch, 270; *Railroad Co. v. Hanning*, 15 Wall. 655; *Bank v. Kennedy*, 17 Wall. 29. In *Worthington v. Mason*, 101 U. S. 149, Mr. Justice MILLER, speaking for the supreme court, says:

"As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted in the court below, or by bill of exceptions. When, in the latter, complaint is made of the instructions of the court given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply. The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them."

See, also, *U. S. v. Morgan*, 11 How. 154; *Reed v. Gardner*, 17 Wall. 409; *Jones v. Buckell*, 104 U. S. 554; *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. Rep. 500; *Railroad Co. v. Madison*, 123 U. S. 524, 8 Sup. Ct. Rep. 246. Upon the record, as it comes to this court, there appears no error; and, accordingly, it is ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, affirmed.

UNITED STATES *v.* STEVENS *et al.*

(District Court, D. Minnesota. November 5, 1890.)

1. CONSPIRACY—VIOLATING CENSUS LAWS.

Persons who conspire to commit the acts made misdemeanors by section 13 of the census act, (Act U. S. March 1, 1880,) with another person who is capable of committing the offense defined therein, may be punished under Rev. St. U. S. § 5440, which provides that if two or more persons conspire to commit an offense against the United States, and one or more do any act to effect that object, all shall be liable to a penalty, though they themselves are incapable of committing the offenses defined in section 13.

2. SAME—INDICTMENT.

In an indictment for conspiring with a census enumerator to insert a certain number of false and fictitious names in the census schedules, it is sufficient to state a few only of the names alleged to have been so wrongfully inserted by the enumerator, as certainty to a common intent is all that is required in an indictment for conspiracy.

At Law. Demurrer to indictments.

This indictment charges the defendants as follows:

"District of Minnesota—ss.:

"The grand jury of the United States of America, within and for said district, on their oath present that heretofore, to-wit, on the second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, Edward A. Stevens, Thaddeus S. Dickey, Louis E. Strum, and other persons to the grand jurors aforesaid unknown, meditated and devised a scheme to procure false, exaggerated, and fictitious schedules and returns of the population of said city on the first day of June, in the year of our Lord one thousand eight hundred and ninety, to be made and forwarded to the supervisor of the second census district of Minnesota by the several enumerators employed, and to be employed, to take the eleventh census of the United States within said city. That on said second day of June one Edward J. Davenport was one of the supervisors of census, to-wit, the supervisor of census within and for the second supervisor's district of Minnesota, duly appointed, qualified, and acting as such, under and pursuant to the provisions of an act of congress of the United States, to-wit, an act entitled 'An act to provide for taking the eleventh and subsequent censuses,' approved March first, A. D. one thousand eight hundred and eighty-nine, and one Louis E. Strum was an enumerator duly employed, appointed, and qualified, and acting as such, under and pursuant to the provisions of said act, within and for a certain subdivision of and within said census district, to-wit, subdivision number 367; he, the said Louis E. Strum, lately before then, to-wit, on said second day of June, having taken and subscribed the oath required by [section eight of] said act.

"That the said Louis E. Strum on said second day of June had in his custody and possession, as such enumerator, divers, to-wit, three hundred, blank schedules of the form approved by the secretary of the interior to be filled in the course of the enumeration to be by him made, according to the provisions of said act, and being the same blank schedules that had been issued, pursuant to the provisions of said act, from the census office, and to him, the said Louis E. Strum, before then, lately, to-wit, on said second day of June, transmitted and delivered by said supervisor of census.

"And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, on the said second day of June, in the year of our Lord

one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport still being and acting as the supervisor of census within and for said census district, and the said Louis E. Strum still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, the same being of the kind and form known as 'Schedule No. 1,' and relating to and containing inquiries touching and concerning population and social statistics, Edward A. Stevens, Thaddeus S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other evil-disposed persons whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together and with each other, in and upon one of said schedules then and there unlawfully, willfully, and knowingly to put, place, insert, and write the following imaginary, false, and fictitious names of persons, that is to say: Gordon Douglas, Grace Douglas, David Douglas, Belke Douglas, Robert Douglas, Mary J. Douglas, Ann F. Douglas, William Douglas, Andrew Douglas,—in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule, and the same schedule afterwards, to-wit, on said day, with said names and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics, put, placed, inserted, and written therein in manner and form aforesaid, to willfully and knowingly duly certify, and have and procure to be duly certified, in form of law, by him, the said Louis E. Strum, as enumerator, as aforesaid, within and for said subdivision, and the same schedule filled and certified as aforesaid, afterwards, to-wit, at said city of Minneapolis on said day, to unlawfully, knowingly, and willfully forward, with other like schedules, to the said supervisor as his, the said Louis E. Strum's, returns under the provisions of said act, they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, when they conspired, combined, and confederated together as aforesaid, well knowing that the said names, answers, items of information, particulars, facts, and statistics, and each and every one of them, were imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, and fictitious persons were, on the first day of June in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's, said subdivision; and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him, the said Louis E. Strum, of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said Louis E. Strum, of his said subdivision, as they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there well knew.

"That afterwards, to-wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and acting then and there as enumerator, as aforesaid, within and for his said subdivision, and still having in his custody and possession, as such enumerator, the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census dis-

strict, in and upon one of said blank schedules, to-wit, the blank schedule last hereinbefore mentioned, did then and there unlawfully, willfully, and knowingly put, place, insert, and write the several imaginary, false, and fictitious names aforesaid, in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule.

"And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together and with each other to unlawfully, willfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport, still being and acting as the supervisor of census within and for said census district, and the said Louis E. Strum, still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, the same being of the kind and form known as 'Schedule No. 1,' and relating to and containing inquiries touching and concerning population and social statistics, Edward A. Stevens, Thaddeus S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other evil-disposed persons whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together and with each other, in and upon one of said schedules then and there unlawfully, willfully, and knowingly to put, place, insert, and write the following imaginary, false, and fictitious names of persons, that is to say: Ambrose W. Daynes, Mattie F. Daynes, John P. Daynes, William Daynes, Obedia Daynes, Lizzie Daynes,—in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule, and the same schedule afterwards, to-wit, on said day, with said names, and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics put, placed, inserted, and written therein, in manner and form aforesaid, to willfully and knowingly duly certify and have, and procure to be duly certified in form of law, by him, the said Louis E. Strum, as enumerator as aforesaid, within and for said subdivision, and the same schedule filled and certified as aforesaid, afterwards, to-wit, at said city of Minneapolis on said day, to unlawfully, knowingly, and willfully forward, with other like schedules, to the said supervisor as his, the said Louis E. Strum's, returns, under the provisions of said act, they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, when they conspired, combined, and confederated together as aforesaid, well knowing that

the said names, answers, items of information, particulars, facts, and statistics, and each and every of them, were imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, and fictitious persons were, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's said subdivision, and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him, the said Louis E. Strum, of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said Louis E. Strum, of his said subdivision, as they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there well knew.

"That afterwards, to-wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and acting then and there as enumerator as aforesaid, within and for his said subdivision, and still having in his custody and possession as such enumerator the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census district, in and upon one of said blank schedule, to-wit, the blank schedule last hereinbefore mentioned, did then and there unlawfully, willfully, and knowingly put, place, insert, and write the several imaginary, false, and fictitious names aforesaid in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule.

"And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together, and with each other, to unlawfully, willfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport still being and acting as the supervisor of census within and for said second census district, and the said Louis E. Strum still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, Edward A. Stevens, Thaddeus S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other evil-disposed persons, whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together, and with each other, in and upon one of said schedules then and there unlawfully, willfully, and knowingly to put, place, insert, and write the following imaginary, false, and fictitious names of persons, that is to say: Gordon Douglas, Grace Douglas, David Douglas, Belke Douglas, Robert Douglas, Mary J. Douglas, Ann F. Douglas, William Douglas, Andrew Doug-

las,—in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule; and in and upon one other of said schedules then and there unlawfully and knowingly to put, place, insert, and write the following names of persons not inhabitants of or within his, the said Louis E. Strum's, said subdivision, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, that is to say: Ambrose W. Daynes, Mattie F. Daynes, John P. Daynes, William Daynes, Obedia Daynes, Lizzie Daynes,—in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule, and the said schedules afterwards, to-wit, on said day, with said names and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics put, placed, inserted, and written therein, in manner and form aforesaid, to then and there willfully and knowingly duly certify, and have and procure to be certified in form of law by him, the said Louis E. Strum, as enumerator as aforesaid, within and for said subdivision, and the same schedules filled and certified as aforesaid afterwards, to-wit, at said city of Minneapolis, on said day to unlawfully, knowingly, and willfully forward, with other like schedules, to the said supervisor as his, the said Louis E. Strum's, returns under the provision of said act; they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, when they conspired, combined, and confederated together as aforesaid, well knowing that said names, answers, items of information, particulars, facts, and statistics, and each and every of them, were then and there imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, fictitious, and non-resident persons were, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's, said subdivision, and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said Louis E. Strum, of his subdivision, as they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there well knew.

“That afterwards, to-wit, on said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and then and there acting as enumerator as aforesaid, within and for his said subdivision, and still having in his custody and possession as such enumerator the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census district, in and upon one of said blank schedules did then and there unlawfully, willfully, and knowingly, insert, put, place, and write the following imaginary, false, and fictitious names, that is to say: Gordon Douglas, Grace Douglas, David

Douglas, Belke Douglas, Robert Douglas, Mary J. Douglas, Ann F. Douglas, William Douglas, Andrew Douglas,—in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule, and in and upon another one of said blank schedules, did then and there unlawfully, willfully, and knowingly put, place, insert, and write the following imaginary, false, and non-resident names, that is to say: Ambrose W. Daynes, Mattie F. Daynes, John P. Daynes, William Daynes, Obedia Daynes, Lizzie Daynes,—in the several blanks left and provided thereon for the names of persons respectively to be enumerated thereon pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedule for answers to the several inquiries respectively set forth and contained therein concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedule.

“And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together, and with each other, to unlawfully, willfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

“And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to-wit, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in this district, the said Davenport still being and acting as the supervisor of census within and for said census district, and the said Louis E. Strum still being and acting as an enumerator within and for his said subdivision, and still having in his custody and possession as such enumerator the said blank original schedules, Edward A. Stevens, Thaddeus S. Dickey, and the said Louis E. Strum, yeomen, late of said city, together with other evil-disposed persons, whose names are as yet to the jurors aforesaid unknown, did unlawfully and maliciously conspire, combine, and confederate together, and with each other, in and upon divers, to-wit, fifty, of said blank schedules then and there unlawfully, willfully, and knowingly to put, place, insert, and write divers, to-wit, three hundred, imaginary, false, and fictitious names in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules respectively, and in and upon divers, to-wit, fifty, other of said blank schedules, then and there unlawfully, willfully, and knowingly to put, place, insert, and write divers, to-wit, three hundred, names of persons not inhabitants of, or within his, the said Louis E. Strum's, said subdivision, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, in the several blanks left and provided thereon respectively for the names of persons to be enumerated

thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules, and the said schedules, and each and every of them, with said imaginary, false, pretended, fictitious, and non-resident names, and said imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics put, placed, inserted, and written therein, in manner and form aforesaid, to unlawfully, willfully, and knowingly duly certify and have, and procure to be duly certified, in form of law by him, the said Louis E. Strum, as enumerator as aforesaid, within and for his said subdivision, and the same schedules filled and certified as aforesaid afterwards, to-wit, at said city of Minneapolis on said day to unlawfully, knowingly, and willfully forward, with other like schedules, to the said supervisor as his, the said Louis E. Strum's, returns under the provisions of said act, they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, when they conspired, combined, and confederated together as aforesaid, well knowing that the said names, answers, items of information, particulars, facts, and statistics, and each and every of them, were then and there imaginary, pretended, false, and fictitious, and that none of said imaginary, pretended, fictitious, and non-resident persons were, on the first day of June, in the year of our Lord one thousand eight hundred and ninety, or ever, residents or inhabitants of his, the said Louis E. Strum's, said subdivision, and that the said names were not then and there, or ever, the names of persons having their place or places of abode, or being inhabitants, nor was either of them the name of any person having his or her place of abode, or being an inhabitant of or within his, the said Louis E. Strum's, said subdivision, on said first day of June, in the year of our Lord one thousand eight hundred and ninety, and he, the said Louis E. Strum, not having obtained said names, answers, items of information, particulars, facts, and statistics, or any or either of them, by any inquiry made by him of any one, nor by visit by him, the said Louis E. Strum, personally to any dwelling-house or family in his said subdivision, nor in the course of enumeration or canvass by him, the said Louis E. Strum, of his said subdivision, as they, the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there well knew.

"That afterwards, to-wit, on said second day of June, in the year of our Lord one thousand eight hundred and ninety, at the city of Minneapolis, in said district, pursuant to said conspiracy, and to promote and effect the object thereof, the said Louis E. Strum, he, the said Louis E. Strum, still being and acting then and there as enumerator as aforesaid within and for his said subdivision, and still having in his custody and possession as such enumerator the said schedules, and the said Davenport still being and acting then and there as supervisor of census within and for said second census district, in and upon divers, to-wit, fifty, of said blank schedules, did then and there unlawfully, willfully, and knowingly put, place, insert, and write the following fictitious names, to-wit, Grace Douglas and Mattie F. Daynes and other names, to-wit, three hundred, imaginary, false, and fictitious names in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules respect-

ively; and in and upon divers, to-wit, fifty, other of said blank schedules, did then and there unlawfully, willfully, and knowingly put, place, insert, and write divers, to-wit, three hundred, imaginary, false, pretended, and non-resident names, in the several blanks left and provided thereon respectively for the names of persons to be enumerated thereon, pursuant to the provisions of said act, and divers imaginary, false, pretended, and fictitious answers, items of information, particulars, facts, and statistics in the several blanks left and provided in said blank schedules respectively for answers to the several inquiries set forth and contained therein respectively concerning the persons to be enumerated thereon, and required by said act to be answered in and upon said schedules respectively.

"And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward A. Stevens, Thaddeus S. Dickey, and Louis E. Strum, then and there, to-wit, at the said city of Minneapolis, on the said second day of June, in the year of our Lord one thousand eight hundred and ninety, unlawfully and maliciously did conspire, combine, and confederate together, and with each other, to unlawfully, willfully, and knowingly make the fictitious returns aforesaid, in manner and form aforesaid, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States.

"GEO. N. BAXTER, Special Assist. U. S. Attorney."

There is another indictment against the same parties for conspiring to make false certificates, and which is like the above, only having "false certificates" inserted instead of "fictitious returns."

George N. Baxter, Special Asst. U. S. Atty.

John M. Shaw and *F. B. Hart*, for defendants.

NELSON, J., (*after stating the facts as above.*) The defendants are indicted for a conspiracy to make false certificates, and also for a conspiracy to make fictitious returns. The offenses which it is alleged the defendants conspired to commit are made penal by section 13 of the act entitled "An act to provide for taking the eleventh and subsequent censuses," approved March 1, 1889. The census act provides for the appointment of enumerators whose duty it is to make exact enumeration of the inhabitants within the subdivisions assigned them, and collect statistics designated, and to fill up the printed forms and schedules furnished, and forward the same, duly certified, to the supervisor of census of the district, as their returns under the act. A demurrer is interposed to all the counts of the indictments, and to sustain it the counsel for the defendants urge: (1) That Stevens and Dickey are disqualified from either jointly or severally being principal actors in the offense to which the charge of conspiracy relates, and as this incapacity arises from the peculiar nature of the offense, and the descriptive characteristics of it set forth in the statute, they cannot conspire with others to commit the offenses which they themselves are incapable of committing. This is the chief contention, and is directed against all the counts in these indictments. And, in addition, the last count is attacked (2) for the reason that it is defective in not setting forth the facts constituting the offense with sufficient certainty and definiteness. The indictments are based upon section 5440, Rev. St., which provides that if two or more persons

conspire to commit any offense against the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty, etc. The objections are considered in their order.

The defendant Strum, the enumerator, is the only one of the persons charged in the indictments who could commit the acts declared an offense by section 13 of the statute; but it does not necessarily follow that no other person could be charged and convicted as a principal in the commission of these offenses. The authorities are quite numerous that persons who are incapable personally of committing a criminal offense, if they take part as aiders and abettors, may be punished as principals, although there is no reference to them in the statute. This is particularly so in misdemeanors, as distinguished from felonies, for the old doctrine of principal and accessory does not apply. In *Rex v. Potts*, Russ. & R. 353, the defendant, a woman, was indicted and convicted under a statute making it an offense to personate and falsely assume the name of another man with intent to defraud, etc. There was no provision relating to aiders, abettors, or assisters. The indictment alleged that Mrs. Potts was an aider and abettor of one Williams to personate, and then charged the man and woman with committing the offense. It was doubted whether a conviction could be sustained when it appeared difficult to allege that a man and woman jointly personated a man, but all the judges unanimously held that the conviction was right. In *State v. Sprague*, 4 R. I. 260, the indictment charged an offense which, as described in the statute, could only be committed by a woman. Although there was a general statute of the state punishing aiders and abettors as principals according to the nature of the offense committed, it was urged that from the peculiar nature of the offense, and the descriptive characteristics of it set forth in the statute, there could be no conviction of aiders and abettors under it. The court, however, did not think the rules of the common law defective in application to such persons, (aiders and abettors,) and said:

"The argument is that none but the mother of the child can, by the descriptive terms of the statute, or by the policy of the law, be guilty, so to speak, of the principal offense; and as all guilty of a misdemeanor are, if guilty at all, principals, and must be charged as 'doers,' it follows that none but the mother can be guilty, and so legally convicted, of the offense at all, no matter upon what charge, or upon what proof. We would be sorry to come to this conclusion. It by no means follows that, because the mother alone can be guilty of the actual concealment described in the statute, * * * if she be guilty, others may not be guilty as principals present, in the sense of the law, aiding and assisting and working with her under the criminal intent."

The court further said that this question was solved by the English case, *Rex v. Potts*. To the same effect are the following cases: *Boggus v. State*, 34 Ga. 275; *U. S. v. Snyder*, 14 Fed. Rep. 554. Aiders and abettors are not exempt from punishment as principals in misdemeanors, because the act descriptive of the offense can be committed only by one person, or by one of a particular sex or class. All are principals, though some may be secondary in character. The counsel contend that although

Stevens and Dickey, if aiders and abettors of the offense defined in section 13 of the census act, might possibly be punished under the section as for that offense, still they cannot be prosecuted for another distinct and defined offense, to-wit, conspiracy, under section 5440, Rev. St.; that is to say, that a person who may be convicted of committing an offense cannot be punished for conspiring to commit it. There is nothing in section 5440 exempting any persons, and, before such a doctrine can be subscribed to, the common-law principle that conspiring to commit a crime is itself criminal must be ignored. In *Reg. v. Rowlands*, 5 Cox, Cr. Cas. 466, the parties had been charged, not with the offense they had committed, but for a conspiracy to commit it. The judge said: "The course pursued was no doubt legal." See, also, *Com. v. Warren*, 6 Mass. 74; *People v. Mather*, 4 Wend. 265; *U. S. v. Martin*, 4 Cliff. 156; *U. S. v. Bayer*, 4 Dill. 407; *U. S. v. Boyden*, 1 Low. 266; also *Queen v. Whitchurch*, 24 Q. B. Div. 420. The *gravamen* of the charge against the defendants is a conspiracy; that is the offense which, under section 5440, is punished. Until one of the conspirators does some act to effect the object of the conspiracy, all parties thereto may withdraw, and thus escape the penalty prescribed by the statute. After such act is done, all are liable. *U. S. v. Britton*, 108 U. S. 205, 2 Sup. Ct. Rep. 531. The first objection urged to the indictment is overruled.

Again, it is urged that the last count in the indictments is defective in not stating with sufficient certainty the offense which it is charged defendants conspired to commit. In other words, that the particular names which the enumerator falsely inserted should be specified, and unless that is done the act which it is alleged the defendants conspired to do, to-wit, to put 300 false and fictitious names in the blanks, etc., is too general, and does not inform the defendants with sufficient certainty to make a defense; and, in case of conviction, they could not plead it in bar of another prosecution for the same offense. Several names are stated in this count of the indictment as fictitious, and charged to have been unlawfully and wrongfully inserted in the schedules by Strum. This is sufficient; for, in stating the object of the conspiracy, the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they may make a defense. The point urged seems more refined than sound. Demurrers overruled, and it is so ordered.

NOTE BY JUDGE. The doctrine announced in this opinion, and the rules of law therein stated, apply to the demurrers to indictments in all the Census Conspiracy Cases.

STIRSAT *et al.* v. EXCELSIOR MANUF'G Co.

(Circuit Court, E. D. Missouri, E. D. October 2, 1890.)

1. PATENTS FOR INVENTIONS—BILL TO RESTRAIN INFRINGEMENT—PLEADING.

A bill to restrain the infringement of a patent must either set out the patent, or attach it, as an exhibit, or give a substantial description of the invention, else it is open to demurrer.

2. SAME—SURPLUSAGE—EXCEPTIONS TO BILL.

A clause in the bill averring that, when complainants' application was on file, another for a patent on the same device was also filed, and that upon interference declared the patent was awarded to complainants, but that a subsidiary and infringing patent was also awarded on the other application, under which patent defendant pretends to be manufacturing, is mere surplusage, that cannot be reached by demurrer, but by exceptions to the bill.

In Equity. On demurrer to bill.

Fowler & Fowler, for complainants.

Paul Bakewell, for defendant.

MILLER, Justice, (*orally*.) In this case a demurrer to the bill was submitted to us on yesterday. The first ground of demurrer is that while this is a patent case brought to restrain an infringement of complainants' patent, yet the patent itself is not set out in the bill, or attached thereto, as an exhibit, nor does the bill contain any substantial description of the complainants' invention. Of course, it is open to demurrer on that account, as has several times been decided. The complainants' counsel admitted as much on the argument, and that point of the demurrer must be sustained.

Another point of the demurrer is addressed to what appears to be a kind of second clause in the bill. In this clause complainants aver that, when their application was on file in the patent-office, O'Keefe and Filley filed an application for a patent on the same device; that an interference was declared between the two applications, and that such proceedings were had in the patent-office, that complainants' claims were sustained and a patent awarded to them; and that, subsequently, a subsidiary patent was awarded to O'Keefe and Filley covering mere details of construction. The clause of the bill in question further alleges that the defendant company now pretends to be manufacturing the alleged infringing device under the O'Keefe and Filley patent. We do not see what that clause of the bill has to do with the case. It certainly does not show any independent right to equitable relief, nor do we see that it strengthens the right to relief under the other averments of the bill. For the purpose of determining what construction or breadth should be given to the claims of the respective patents, it may be proper or even necessary, on final hearing, to consider what took place in the patent office when the interference proceedings were pending. But we see no occasion to make any mention of those proceedings in the bill. The trouble with this branch of the demurrer is, however, that the clause in question is mere surplusage, and the point attempted to be raised

cannot well be raised by demurrer. It can only be raised by way of exceptions to the bill. Although the clause in question, under the view we take of it, has no place in the bill, for the reasons above stated, yet we do not see how we can well sustain this point of the demurrer. If I were the pleader in the case I would file a new bill omitting the objectionable matter. As it is, the complainants will have to file a new bill, inasmuch as the first point of the demurrer is sustained, and we will make no order on the other point of the demurrer. Let the entry be that the first point of the demurrer is sustained, with leave to complainants to file an amended bill on or before October 20th.

THE MINEOLA.¹

MAGGIOLO v. THE MINEOLA.

(District Court, E. D. New York. November 28, 1890.)

NEGLIGENCE—PERSONAL INJURY—DAMAGES.

By admitted negligence, libellant, a sailor, 32 years old, and a sound man, earning from \$12 to \$20 per week, sustained a fracture of the ankle, and a rupture, which confined him to the hospital for 85 days, and permanently injured him, and incapacitated him for heavy work. Held, that he should recover \$6,500.

In Admiralty. Suit to recover damages for personal injuries.

Uilo & Ruebsamen, for libellant.

Converse & Kirlin, for claimant.

BENEDICT, J. This is an action to recover damages for personal injuries done to the libellant by the falling upon him, in the hold of a ship where he was working, of bags of sugar weighing about 800 pounds. The immediate result was the breaking of his ankle, and a rupture. By reason of these injuries, he was confined in the hospital for 85 days, and for 5 months after he came out of the hospital it was difficult for him to walk by the aid of a stick. He is 32 years of age; was a sea-faring man in Italy; arrived in this country five or six months before the accident, and after his arrival he worked as a longshoreman, earning from \$12 to \$20 per week. In Italy, he earned about \$16 per month and his board. Before the accident, he was a sound man. Since the accident, he suffers pain, and seems to be permanently incapacitated for heavy work. He has tried to do some easy work, but, so far, has failed, not being able to go up and down stairs without hanging on to something. Reputable physicians testify that the injured leg is smaller than the left, with a certain amount of stiffness and rigidity in the ankle-joint, which is permanent; that he is not able to do hard work; that he is able to use his hands, but is incapacitated from heavy work by the rupture. No

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

question is made as to the right of the libelant to recover. The liability of the ship is admitted, and the only question left to the decision of the court is as to the amount of the damages. Upon this question, the libelant referring to the case of *Miller v. The W. G. Hewes*, 1 Woods, 363, where \$8,000 was allowed, and to the case of *The D. S. Gregory and The George Washington*, 2 Ben. 226, where \$10,000 was allowed. If the method of determining the damages adopted in the case of *Miller v. The W. G. Hewes* was followed, it would give the libelant a decree for \$17,240, a sum which, in my opinion, would be excessive in a case like the present. The claim of the libel is \$10,000. No two cases of this character can be precisely alike, and, so far as I am able to judge from the evidence before me, the libelant's case is less severe than either of the cases referred to. I am of the opinion that an allowance of \$6,500 will be just in this case. Let a decree for that amount be entered, and the costs to be taxed.

THE TRANSFER No. 4.¹

SNOW v. THE TRANSFER No. 4.

(District Court, E. D. New York. November 11, 1890.)

COLLISION—STEAM AND SAILING VESSEL—CHANGE OF COURSE.

The tug Transfer No. 4, with a car-float on her port side, left Harlem river in the night, bound for Jersey City. The tide was ebb. She took the usual course on such a tide, crossing from the upper point of Blackwell's island to the Long island side, and went down the channel on that side. A schooner was coming up the middle of the channel, with a fair wind. As she neared the tug, she ported, ran to within 100 feet of the Long island shore, and collided with the tow. Held, that the cause of the collision was the schooner's change of course, and the tug was not liable.

In Admiralty. Suit to recover damages caused by collision.

Peter S. Carter, for libelant.

Page & Taft and *R. D. Benedict*, for claimant.

BENEDICT, J. The collision which gave rise to this action, and which resulted in the sinking of the schooner Aaron Snow by the tug Transfer No. 4, is plainly attributable to the fault of the schooner in not holding her course, as required to do by law. The libel must therefore be dismissed, and with costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In re SAN ANTONIO & A. P. RY. Co.

(Circuit Court, W. D. Texas. November 18, 1890.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

In a suit in the nature of a creditors' bill, brought in a state court by citizens of the state against a railroad company, also a citizen of the state, the trustee, under a mortgage on the railroad, who was a citizen of another state, intervened. *Held*, that there was no separable controversy within the removal act of 1888, § 2, providing that one of several defendants may remove any suit, in which "there shall be a controversy, which is wholly between citizens of different states, and which can be fully determined as between them."

In Equity. On motion to remand.

This was a suit in the nature of a creditors' bill, brought in a state court by citizens of the state of Texas against the San Antonio & Aransas Pass Railway Company, a corporation of that state. The Farmers' Loan & Trust Company is a citizen of the state of New York, and the trustee under a mortgage on the railroad. A receiver having been appointed by the state court, the trust company intervened, and removed the cause.

R. Houston and *Wm Aubrey*, for motion.

M. F. Mott, contra.

PARDEE, J., (orally.) The Farmers' Loan & Trust Company was not made a party by the plaintiffs. It has not been called in warranty. It shows no liability on its part to protect the defendant. It makes no claim to the revenues of the railway property nor to its possession. Its sole interest in the case is to assert its lien and the priority thereof. It has no interest in defeating plaintiffs' demands further than to secure priority for itself. I am therefore of the opinion that the Farmers' Loan & Trust Company, intervenor in this cause, is mainly an intervening plaintiff, and only in a very limited way can be considered as an intervening defendant. Counsel are referred on this point to *Noble v. Meyers*, 76 Tex. 280, 13 S. W. Rep. 229. In the present case I seriously doubt whether the Farmers' Loan & Trust Company can be considered a defendant at all, within the meaning of the third clause of the second section of the act of 1888, (25 St. at Large, 434.) However this may be, I am satisfied that, in the present cause sought to be removed, there is no controversy wholly between citizens of different states, which can be fully determined as between them. To the plaintiffs' suit, the defendant railway company is a necessary party. The plaintiffs' action is in the nature of a creditors' bill, and is brought to establish their rights against the railway company, as well as against all lienholders and other creditors. A determination of their rights, as against the Farmers' Loan & Trust Company, is only a small part of their case. Separate defenses do not create separate controversies, within the meaning of the removal act. For adjudicated cases directly in point, see *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733. In *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. Rep. 196, cases settling the proposition are collected and reviewed. The motion to remand is granted.

MAXEY, J., (*orally*.) I concur fully in the views expressed by Judge PARDEE in ordering the cause to be remanded to the state court. For two reasons the suit is not removable, under the act of 1888: *First*. The Farmers' Loan & Trust Company, which seeks the removal, occupies the attitude of an intervening plaintiff. It is the actor, the complaining party, the plaintiff, as to the cause of action which it seeks to enforce, and cannot be held to be within the meaning of the act a defendant who alone is accorded the right to remove by the terms of the law. *Second*. If, in legal contemplation, the trust company could be construed, or held, to be, a defendant, it would still be precluded from removing the cause, on the ground that there is not in the suit a controversy wholly between citizens of different states, which could be fully determined as between them. To the full and final determination of the controversy, Johnson and Hansen and the intervenor, the Farmers' Loan & Trust Company, the San Antonio & Arkansas Pass Railway Company is not only a proper but a necessary party. The debts claimed against the railway company by both Johnson and Hansen and the trust company, are the principal thing, and the liens but an incident; and, in order to adjudge the existence of the debts, and establish the validity of the liens, the debtor's presence before the court is indispensable. But when the debtor makes its appearance, as the railway company herein did, upon the original institution of the suit against it, we have directly presented a controversy not wholly between citizens of different states, which could be fully determined as between them. Upon the hypothesis that the trust company could be considered as a defendant, the controversy is one between a citizen of Texas, as plaintiff, and a citizen of Texas and a citizen of New York, as defendants; hence it follows that the suit is not removable under the third clause of section 2 of the statute invoked by the intervening trust company.

WOOD *et al.* v. CORRY WATER-WORKS Co. *et al.*

(Circuit Court, W. D. Pennsylvania. November 24, 1890.)

CORPORATIONS—ISSUE OF BONDS—VALIDITY—ESTOPPEL.

The Corry Water-Works Company, a corporation of the state of Pennsylvania, in accordance with a contract for the construction of its works, and with the consent of all its stockholders, expressed by vote at a meeting called only for the purpose of increasing its stock, issued to the contractors who built the works, in settlement, its bonds, payable to bearer, amounting to \$100,000, secured by a trust mortgage, and also \$125,000 of stock. The contractors sold the bonds before maturity, in the open market, for a large price, the purchaser having no knowledge of anything affecting their validity. Upon default in payment of interest, the mortgage trustee, under a power conferred by the mortgage, was proceeding to sell the mortgaged property, when the plaintiffs, who had acquired some of the stock so issued to the contractors, filed a bill to enjoin the sale upon the grounds that the debt was not authorized by a previous meeting and consent of the stockholders, as prescribed by section 7, art. 16, of the constitution of Pennsylvania, and the law of the state; that, in violation of the law, the amount of bonds issued exceeded one-half of the capital stock paid in; and that by the issue to the contractors there was a fictitious increase of indebtedness and stock, in violation of said constitutional provision.

Held, (1) That as all the stockholders of the water-works company when assembled voted in favor of the issue of the bonds, neither the corporation nor the plaintiffs had any standing to complain of a want of compliance with the directions of the constitution and statute, as to previous notice to and the consent of the stockholders at a meeting called for the purpose. (2) That the corporation having received and enjoyed the fruits of its mortgage bonds, it was not competent for it, or the plaintiffs, to assail their validity in the hands of a *bona fide* purchaser for value, on the ground that the issue was in excess of one-half the capital stock paid in. (3) That as the proofs show that the actual expenditure by the contractors was greatly in excess of the whole issue of bonds, there is really no ground for the assertion that the indebtedness so created was fictitious; and if the construction contract, as a whole, offended against the constitutional and statutory provisions here invoked, the corrective power resides in the commonwealth, which alone can now complain of the completed transaction. (4) That the bill of complaint should be dismissed.

In Equity.

Samuel Dickson and R. C. Dale, for complainants.

George Shiras, Jr., and Johns McCleave, for defendant Farmers' Loan & Trust Company.

ACHESON, J. On the 29th day of March, 1886, the firm of Samuel R. Bullock & Co. and the Corry Water-Works Company, a corporation of the state of Pennsylvania, entered into a contract whereby the former agreed to construct for the latter water-works in the city of Corry, Erie county, Pa., according to certain plans and specifications, and to pay all the expenses, legal fees, and salaries, which might be needed to maintain and operate the works for a period of six months after completion; and to pay the first six-months interest,—viz. \$3,000,—on the herein-after mentioned mortgage bonds of the water company; and, in consideration thereof, the water-works company agreed to issue and deliver to said Bullock & Co. \$100,000 in bonds, and \$125,000 in the full paid-up non-assessable stock of the water-works company. Bullock & Co. proceeded to construct the water-works, and fulfilled their part of the contract, and the water-works company issued and delivered to them the bonds and stock, as agreed on. The bonds bear date April 1, 1886, are each of the denomination of \$1,000, and are payable to Samuel R. Bullock & Co., or bearer, on the 1st day of April, 1916, with interest coupons annexed payable to bearer, semi-annually, and the bonds are secured by a mortgage, or deed of trust, of even date covering all the property, real and personal, rights, privileges, and franchises of the water-works company, executed and delivered by said company to the Farmers' Loan & Trust Company, (defendant in this suit,) a corporation of the state of New York, as trustee. The last-named company accepted the trust, and the mortgage, or trust-deed, was duly recorded in the county of Erie, Pa., on April 13, 1886. In the month of October, 1886, the National Water-Works Investment Company, a corporation of the state of New York, purchased from Samuel R. Bullock & Co. all of said bonds, together with \$50,000 of their said stock, for the cash price of \$90,000, which sum was paid to Bullock & Co. by said investment company upon the delivery of the bonds, and said bonds are still owned by that company. The water-works company made default in the payment of the interest on said bonds, due April 1, 1889, and thereupon,

and in accordance with the terms of the mortgage, or trust-deed, the National Water-Works Investment Company, the holder of the whole issue of said bonds, elected, as it had the right to do, to declare the principal of the bonds to be due and payable; and, after such election, the default still continuing, the Farmers' Loan & Trust Company, the trustee, upon the written request of the holder of the bonds, took possession of the property embraced in the mortgage, or trust-deed, for the purposes therein declared; and, in further execution of the power thereby conferred, advertised, at public sale, and was about to proceed so to sell the mortgaged property and the rights and franchises of the water-works company, when the bill in this case was filed by the plaintiffs, R. D. Wood & Co., stockholders of the Corry Water-Works Company.

The main purpose of the bill is to enjoin the exercise by the Farmers' Loan & Trust Company of the power of sale given by the said trust mortgage, on the ground that the same is an invalid instrument, and conferred no estate or rightful authority upon the trustee. In support of this proposition, three reasons were assigned and urged by the plaintiffs' counsel at the final hearing, namely:

"First. Because the issue of bonds which it attempts to secure was an increase of the corporate indebtedness without the consent of the persons holding the larger amount in value of the stock obtained at a meeting to be held after sixty days notice. *Second.* Because the amount of mortgage bonds issued exceeded one-half of the capital stock paid in, the evidence in the cause showing, substantially, that nothing was ever paid in on account of the capital stock. *Third.* Because it appears from the evidence that, by the attempted issue of stock and bonds to Bullock & Co., under the construction contract, there was a fictitious increase of stock and indebtedness, which, by the terms of the constitution, are void."

The plaintiffs rely upon the provisions of the corporation laws of the commonwealth of Pennsylvania, which limit the right of such a corporation to issue bonds secured by a mortgage to an amount not exceeding one-half the capital stock paid in, and require the previous consent of the stockholders at a meeting called for the purpose, and upon section 7 art. 16, of the constitution of the state, which provides:

"No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law."

Before approaching the consideration of the legal questions involved, certain matters of fact must be stated. It appears that the meeting of the stockholders of the water-works company, at which the issue of the mortgage bonds was authorized, was not called for that purpose, but to vote upon the proposition to increase the capital stock from \$20,000 to \$200,000. It is, however, shown that all the stockholders of the company except one,—viz., Charles S. Wallace,—were present at that meeting, and voted in favor of the issue of the bonds and the execution of the mortgage, or trust-deed, to secure them; and it is further satisfactorily

established that Wallace was only the nominal owner of the stock standing in his name, and that the real owner thereof was Ellis Morrison, who was present at the meeting and voted in favor of the issue of the mortgage bonds. Furthermore, the trust-mortgage on its face bears this recital:

"And whereas, this form of mortgage, or trust-deed, was, at a meeting of the stockholders of the water company, held on the 29th day of March, A. D., 1886, duly approved and ratified, and the proper officers directed to execute the same in the name of the water company."

The bill alleges that the cost of the construction of the said water-works was only about \$60,000, but the proofs do not sustain this allegation. On the contrary, Samuel R. Bullock testifies that the entire cost, including the expenses the contractors assumed for the first six months after completion, etc., "was in the neighborhood of \$121,000," and I do not see why this estimate should not be accepted as substantially correct. The plaintiffs claim to be the owners of 1,420 shares of the stock of the Corry Water-Works Company. The whole of this stock, however, came from Samuel R. Bullock & Co. originally, and was part of the stock that firm received from the water-works company, under their construction contract. The plaintiff's title to 920 shares of this stock is under an assignment from said firm, dated November 10, 1888, and they have possession of the stock certificate for these 920 shares. But, in fact, that certificate had been surrendered to the company for cancellation, and other certificates had been issued for at least part of this stock, and how much stock, if any, the plaintiffs are entitled to on this certificate is not shown. The plaintiffs' title to the other 500 shares of stock is good. They acquired those shares in February, 1889, from the National Water-Works Investment Company, at a valuation of one dollar per share, the transaction being this: The plaintiffs were creditors of Samuel R. Bullock & Co., and held, as collateral securities for their claims, stocks in various water-works companies; and the investment company was also the holder of such stocks which had been acquired from said firm. Upon the failure of that firm, with a view to a severance of their interests, mutual stock transfers were made between the plaintiffs and the investment company, and the plaintiffs thus acquired said 500 shares of the Corry Water-Works Company's stock at the valuation mentioned.

Upon the undisputed facts, it is very difficult to see the standing the plaintiffs have in a court of equity, in virtue of any rights of their own, to assail the transaction between the Corry Water-Works Company and Samuel R. Bullock & Co., of which they complain. *Dimpfel v. Railroad Co.*, 110 U. S. 209, 3 Sup. Ct. Rep. 573; *Appeal of Columbia Nat. Bank*, 16 Wkly. Notes Cas. 357; *Graham v. Railroad Co.*, 102 U. S. 148; *Monroe v. Smith*, 79 Pa. St. 459. They were not shareholders of the corporation at the time of the transaction, and were not injured by what took place. The contract had been fully executed long before the plaintiffs acquired their shares of stock, and they took them with full knowledge that the bonds and mortgage

of the corporation were outstanding and unpaid. Moreover, the very stock they now hold was part of the issue to Samuel R. Bullock & Co., under the construction contract which they now impugn. But in this controversy the plaintiffs may be considered as representing the corporation itself, and clothed with its rights. It is then open to the corporation to defend against the bonds and mortgage, or trust-deed, or to question their validity? At the outset of the discussion, it is to be borne in mind that the bonds are negotiable instruments, and were purchased before maturity in the open market, for a large price, by the National Water-Works Investment Company, without notice of anything affecting their validity. Furthermore, this is not a case of a total want of power in the corporation to act. Undoubtedly, the Corry Water-Works Company had the right to create an indebtedness for the purpose of constructing its works, and to issue therefor bonds secured by a mortgage, or trust-deed; and the utmost that can be said in impeachment of its action is that, in the exercise of the power, it did not conform to the requirements and limitations which the law imposed upon the company. But, in *Oil Creek, etc., R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160, it was distinctly ruled by the supreme court of Pennsylvania that where a corporation has entered into a contract which has been fully executed by the other party, and nothing remains to be done but for it to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*. And in *Wright v. Pipe Line Co.*, 101 Pa. St. 204, it was held that where a corporation, although prohibited by its charter, contracted for the purchase of stock in another corporation, and the contract was executed by the delivery of the stock, in an action on a promissory note given for the price of the stock, in the hands of a holder for value, it could not defend on the ground that the contract was beyond its corporate powers.

Turning now to the specific objections urged against the validity of the bonds and trust mortgage, we find that in the case of the *Appeal of Columbia Nat. Bank*, *supra*, in which an issue of corporate stock was involved, the supreme court of Pennsylvania held that the only object of the prescribed notice of a proposed increase of stock was to give information to the shareholders, and if they had such knowledge from any source it was enough. Now, every shareholder of the Corry Water-Works Company was present when the issue of the bonds and trust mortgage was determined on, and all voted in favor of that measure. Again, in *Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. Rep. 428, where, to a *scire facies* on a mortgage of a corporation, the receiver of the corporation made defense that the debt was not authorized by a previous meeting and consent of stockholders, as directed by section 7, art. 16 of the constitution, and the act of April 18, 1874, the defense was overruled, the court holding that when a corporation has received the benefit of money borrowed on its mortgage, and the stockholders knew of it, and made no objection within a reasonable time to the lack of authority in the corporate officers to make the loan, neither the corporation, its stockholders, nor its creditors can set up such want of authority in a suit on

the mortgage, nor can the receiver of the company do so for them. In *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. Rep. 100, it was declared by the court that a contractor who had knowledge that under a trust mortgage of a corporation the issue of bonds was in excess of the capital stock paid in, and who was a participant in the fraud of such issue, could not attack the validity of the mortgage as in violation of the statute. No more, in my judgment, is it competent for the corporation itself, which has received and enjoys the fruits of its mortgage bonds, to assail their validity in the hands of a *bona fide* purchaser for value, on such ground.

We have already seen that the consideration which passed from Samuel R. Bullock & Co. to the Corry Water-Works Company was largely in excess of the whole issue of mortgage bonds, and this, too, without taking into consideration a contractor's profit. Therefore, there is really no ground for the assertion that the indebtedness so created was fictitious, and, certainly, under the facts of this case, neither the corporation nor its stockholders can be heard so to allege to the prejudice of the innocent bondholder. If the construction contract, as a whole, offended against the constitutional and statutory provisions here invoked, the corrective power resides in the commonwealth, which alone can now complain of the completed transaction. *Appeal of Columbia Nat. Bank, supra*. This principle, which indeed is decisive of the entire case, was recognized as sound, and was enforced in *Bank v. Matthews*, 98 U. S. 621, where a mortgagor sought to enjoin a sale of the mortgaged premises under a power contained in the mortgage, on the ground that it was taken in violation of the national banking law; and in *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. Rep. 93, where a foreign corporation had purchased land, and taken a conveyance thereof in direct violation of the laws of the state in which the land was situated, it was, nevertheless, held that the corporation took the title as against its grantor and his subsequent grantee, and that it was for the state alone to question the validity of the deed of conveyance to the corporation.

Let a decree be drawn dismissing the bill of complaint, with costs.

HARTFORD FIRE INS. CO. *et al.* v. BONNER MERCANTILE CO.

(Circuit Court, D. Montana. November 6, 1890.)

1. ARBITRATION AND AWARD—MISCONDUCT OF ARBITRATORS.

An award made by an arbitrator, or an umpire between two arbitrators, as to the amount of loss upon a stock of goods damaged by fire, without any examination of the goods themselves, but merely from bills, invoice books, and inventories, is invalid.

2. SAME.

An award made by an arbitrator not upon his own judgment or by reason of any investigation which he has made, but solely at the direction of one of the parties, is invalid.

3. SAME—VACATING AWARD.

Code Civil Proc. Mont. §§ 459-468, which provide for submitting causes to arbitration, regulates the conduct of arbitrators, and provides for vacating the award by

motion upon grounds specified therein, do not apply to a submission and award which is not made a record of the court.

4. SAME—JURISDICTION IN EQUITY.

But, even if the Montana statute does apply to such a case, it cannot deprive the federal courts of any jurisdiction which they may have under the judiciary act of 1879 to entertain a bill in equity to set aside the award, since the statute was passed after the judiciary act.

5. SAME—ACTION ON AWARD.

In an action at law upon an award, no defense can be made upon the merits of the award, but only upon matters affecting the jurisdiction of the arbitrators; and, as a legal defense would not be an adequate remedy where misconduct in making the award is charged, a court of equity would have jurisdiction of a bill to set it aside.

6. EQUITY—PLEADING—MULTIFARIOUSNESS.

Where a number of insurance companies, affected by a loss, join in submitting to arbitration the question of the amount of damage, and a single award is made, a single bill brought by all the companies as parties plaintiff to set aside the award is not multifarious.

7. COURTS—JURISDICTIONAL AMOUNT.

Where it appears from the bill that the amount of insurance given by each of the plaintiffs exceeded \$2,000, and there is nothing to show that the loss was to be apportioned *pro rata* to the amount of each policy, the court cannot presume that such was the case, and has jurisdiction as to each plaintiff, even though the total insurance exceeds the loss fixed by the award, since the insured might select certain of the policies, and sue upon them for their full value.

In Equity. On demurrer to bill, and motion for injunction.

Haggin & Van Ness, (Geo. C. Gorham, Jr., of counsel,) for complainants.

Forbis & Forbis, (M. Kirkpatrick, of counsel,) for defendant.

KNOWLES, J. The plaintiffs, being 17 insurance companies, have presented to this court their bill of complaint in equity, and, among other prayers, ask for an injunction enjoining defendant from commencing or prosecuting any actions at law against plaintiffs by reason of an award hereinafter described, or in any manner taking any steps to enforce any claim under, or by virtue of, or based upon said award, pending this action, and that, upon a final hearing, said award be vacated and annulled, and the preliminary injunction be made perpetual. It appears from plaintiffs' bill that plaintiffs severally, with other insurance companies, insured certain property of defendant against loss by fire, or damage on account thereof. That there was a loss of and damage to said property on account of a fire which occurred in the vicinity of the place where the same was situated. That, as to the amount and extent of this loss, there was a dispute between plaintiffs and defendant. With a view of settling this dispute, plaintiffs and defendant entered into an agreement to submit the same to arbitration. That in this agreement it was provided plaintiffs should select one person to act as arbitrator, the defendant a second person to act as such, and that these two should select a third who should act as umpire, and decide between the other two in matters of difference only, and that the said three persons, or any two of them, should a true return and award make under oath of the sound value, and loss and damage, or loss or damage of or to said property. That in pursuance of said agreement the plaintiffs appointed one Joseph P. Treanor. The defendant, one G. E. Rockwood, and these two elected as umpire one Theodore Schurmeier. It is further set forth

in the bill that the said Rockwood and Schurmeier signed an award of the value of the loss and damage to said property, of \$60,624.73. That in making said award, and in acting as an arbitrator, the said Rockwood and the said Schurmeier were guilty of such misconduct as would avoid and render null and void said award, in this: (1) That they estimated the loss and damage to said property largely in excess of the actual loss and damage to the same. (2) That the said Rockwood did not act upon his own judgment or by reason of any investigation or examination made by him, but under the direction and in the interest of defendant, and that he agreed to the award and final making of the same under the direction and at the instigation and in the interest of defendant. (3) That said Schurmeier did not act with either of the other arbitrators in estimating the loss or damage to the property injured, and that he did not act with the other arbitrators, but by himself, in making his estimates, and that he did not in fact examine the property damaged, but waited until the other two had completed their examination, and, having obtained their separate estimates of damage and loss, separated himself from said other two arbitrators, and each of them, and by himself, and without the advice, counsel, or assistance of such other arbitrators or either of them, proceeded to determine arbitrarily, and without examination of said damaged property, the loss and damage to the same; that in arriving at the value of said loss and damage he procured from defendant its bills, invoice books, and inventories, and in the absence of his co-arbitrators, and the representatives of plaintiffs and defendant, and other insurers, arbitrarily and unjustly fixed and determined the amount of loss and damage to said property. (4) That the said Rockwood and Schurmeier did not fully examine into the matter of said loss and damage, and did not take into consideration the age, location, or condition of said damaged property at the time of said fire, and did not make proper or any deductions for depreciation, or of property saved, and did not find the damage to be the sum awarded by them. The allegations amount to about this: Rockwood acted under the direction of defendant, and not as an arbitrator, nor upon his own judgment, and upon his own investigation; Schurmeier did not make up his own estimate from an examination of the property injured; and did not act with the other arbitrators, but by himself, in making his estimates. And, lastly, that the award was not what the said Rockwood and Schurmeier found was the damage or loss to said property on account of said fire. The defendant demurred to the bill of complaint on grounds, in substance, as follows: (1) That the bill did not contain any matter of equity whereon this court can ground any decree, or give to plaintiffs any relief against defendant; (2) that there appears in said bill that there is a misjoinder of plaintiffs; (3) that it appears from the bill that the plaintiffs have a complete and adequate remedy at law, and that this court has no jurisdiction of the cause; (4) that the bill contains not any matter of equity wherein to sustain such writ of injunction as is sought and prayed for in and by said bill. The demurrer admits all the allegations of the bill well pleaded to be true, and hence all the above

facts must be taken as true in considering the demurrer and motion before it. An award made by arbitrators may be set aside and declared null and void when it clearly appears that the arbitrators who signed the award were guilty of misconduct, partiality, or fraud. *Sullivan v. Frink*, 3 Iowa, 66; 1 Amer. & Eng. Enc. Law, tit. "Arbitration," p. 707, and cases cited. Does the bill show such a misconduct on the part of the arbitrators or either of them as would justify a court in setting aside their award? If Rockwood acted as alleged under the direction of the defendant, and signed the award under its direction, and did not act upon his own judgment, or by reason of any investigation he had made, then he cannot be said to have acted as an arbitrator in the case at all, but as the mouth-piece of defendant. It has been decided that, when an arbitrator makes up his award on account of any private conversation with one of the parties to the cause to be arbitrated, it should avoid his award. *Moshier v. Shear*, 102 Ill. 169. Much more should it avoid his award when he acts, not upon his own volition and investigation, but under the direction of one of the parties. The facts alleged show such misconduct on the part of Rockwood as should render void any award he made. If Schurmeier did not examine the damaged goods, but procured the separate estimates of each of the other arbitrators, and then obtained the bills, invoice books, and inventories of defendant, and made up his estimate of damage and loss from these, he was guilty of misconduct which should avoid his award. It is evident from what appears in the bill that it was intended the arbitrators should make a personal examination of the damaged property. At all events, they should take some evidence upon this subject such as would qualify them to form some just estimate of the damage sustained. In this case it was not contemplated that they were to act without evidence. How could Schurmeier tell which was right in his estimate of damage without some evidence bearing upon the issue presented. He does not seem to have consulted either of the other arbitrators. Bills, invoice books, and inventories would not seem to be proper evidence alone upon which to base an estimate of the damages or loss to the property on account of the fire. When an arbitrator acts without sufficient evidence, or without a full hearing, or any hearing, of a case submitted to him, his award is void for misconduct. *Halstead v. Seaman*, 82 N. Y. 27; *Fudickar v. Insurance Co.*, 62 N. Y. 405; *Alexander v. Cunningham*, 111 Ill. 511; *Day v. Hammond*, 57 N. Y. 479; *Ingraham v. Whitmore*, 75 Ill. 24; *Van Cortlandt v. Underhill*, 17 Johns. 405. There allegations in the bill show that Schurmeier acted without consulting the other arbitrators, but alone. If he was what is called a "third arbitrator," this was misconduct. *Haven v. Winnisimmet Co.*, 11 Allen, 377. If he was an umpire, as distinguished from a third arbitrator, it was proper for him to act alone, and make up his decision alone. *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339; *Ingraham v. Whitmore*, 75 Ill. 24. The allegations in the bill are:

"That the amount of loss and damage to said property, [that is, the property of defendant,] by reason of said fire, should be estimated, appraised, and determined in detail by G. E. Rockwood and Joseph P. Treanor, together with

a third person, to be mutually selected and appointed by said Rockwood and Treanor, who should act as umpire to decide between them, the said Rockwood and Treanor, in matters of difference only, and that the said three persons, or any two of them, should a true return and award make under oath."

Perhaps an examination of the agreement of submission would make this matter more clear. I am inclined to hold that, under the allegations of the bill, Schurmeier should be considered as an umpire, and not as a third arbitrator. If he was to decide between them in matters of difference, neither of the others could take any part in his deliberations. He was to decide between them, not with them; and he would certainly be required to arrive at his conclusions alone. There is only one thing that seems contrary to the view that he was an umpire and not a third arbitrator, and that is that one or both of the other arbitrators was or were to sign the award with him. An umpire, properly such, signs his award alone.

Has this court, sitting as a court of chancery, jurisdiction to determine the issue presented in the bill?—that is, the jurisdiction, as such court, to set aside the award of the arbitrators for the above misconduct? The plaintiffs are not citizens of Montana. The defendant is a citizen thereof. This sufficiently appears in the bill. This is sufficient to give the court jurisdiction if it has jurisdiction of the subject-matter of the action. If the plaintiffs have a plain and adequate remedy at law, this court, as a court of chancery, has no jurisdiction of this case. *Thompson v. Railroad Cos.*, 6 Wall. 134. The jurisdiction of a court of equity to set aside and cancel awards was settled at an early day. 2 Pom. Eq. Jur. § 919. And formerly such relief could be obtained only in a court of equity. *Emmet v. Hoyt*, 17 Wend. 410; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 366; *Burchell v. Marsh*, 17 How. 344; *Doke v. James*, 4 N. Y. 568. The statutes of Montana (Code Civil Proc. §§ 459–468) provide for submitting causes to arbitration, and regulates in some particulars the conduct of the arbitrators, and provides for vacating on motions, awards upon grounds stated in the statute. If this action was in a state court, it might be urged that under the statute there was a plain and adequate remedy at law, and that there was no need of resorting to a court of chancery. It may be true, however, that the setting aside of an award on motion is confined to those cases in which the submission is a rule of court, and a judgment may be entered upon the award. This was the case under the statute of Wm. III., (see *Emmet v. Hoyt*, 17 Wend. *supra*,) and there is much in the statute of Montana to indicate that the setting aside of awards should be confined to cases where the submission is made a record of the court. See, also, *Burroughs v. David*, 7 Iowa, 155. In this case the submission was not made a record of the court, and it is doubtful if it is of that class of awards which it is contemplated by the statute should be made a record of court. It is then an arbitration according to common-law rules, and not governed by the statute. But, if it was, this statute could not take away the equity jurisdiction of this court, having been passed since the grant of jurisdiction to the courts of the United States made by the judiciary act of 1879. *Mc-*

Conihay v. Wright, 121 U. S. 201, 7 Sup. Ct. Rep. 940. Generally, it may be said, state statutes cannot affect the equity jurisdiction of the United States courts.

It is true, as is claimed by the defendant, that the plaintiffs could have set up, in an answer or counter-claim, in an action in the state courts, the fact set up in their bill of complaint herein. But this would not be a "legal defense," as I understand that term. It would be an equitable defense to an action at law, which is permitted under the Civil Code. In the case of *Day v. Hammond*, 57 N. Y. 479, it is held that under the statute the application to set aside an award is an appeal to the equitable powers of the court. Several cases have been cited to the effect that, where arbitrators fail to give notice of the time and place of hearing before them, the award made by them is absolutely void, and that these facts may be set up in defense to an action at law upon the award. *Elmendorf v. Harris*, 23 Wend. 628; *Curtis v. Sacramento*, 64 Cal. 102-106; *Emery v. Owings*, 48 Amer. Dec. 580; and others cited by defendant. In these cases the want of this notice is treated as something akin to a want of service on a defendant in an action at law. It is considered that the arbitrators have no jurisdiction in such a case to hear and determine the cause submitted to them, and that as a want of jurisdiction is good as a defense to a judgment at law, so is this plea of a want of notice a good defense to an action upon an award. The courts, however, make a distinction between an award which is absolutely void, and one which is only voidable. Where the arbitrators are guilty of misconduct which does not affect what may be called their "jurisdiction," and which does not appear upon the face of the award, then, prior to the statutes above named, the award could be set aside only in a court in equity upon a proper bill. *Truesdale v. Straw*, 58 N. H. 207; 2 Story, Eq. Jur. §1452. In *Hamilton v. Cummings*, 1 Johns. Ch. 517, Chancellor KENT held that "a bill in chancery will be entertained when the instrument sought to be set aside is liable to abuse from its negotiable nature, or because the defense not arising on its face may be difficult or uncertain at law, or from some other circumstance peculiar to the case, and rendering a resort here"—that is, to a court of equity—"highly proper." In this case the allegations of misconduct do not go to the jurisdiction to hear the dispute, and it does not appear that the misconduct appears on the face of the award. It is also alleged that defendant threatens to commence an action on the award. And I am satisfied that this misconduct could not be set up in defense to an action at law in any United States district or circuit court. In the case of *Insurance Co. v. Stanchfield*, 1 Dill. 425, the United States circuit court of the eighth circuit say that the misrepresentations and fraud complained of were a good defense to an action at law on the policy, and available as such to the company; "and, again, the company has a full, plain, and perfect defense to the policy at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper." In that case the allegations in the bill were that the policies of insurance sought to be canceled were obtained from the insurance company by fraudulent representations. Such a defense would

have been a good defense to any action at law upon those policies. Fraud in procuring an instrument can always be set up as a legal defense to any action on the same. *Smith v. McIver*, 9 Wheat. 532. In this case I have shown that the misconduct complained of could not be set up as a legal defense to an action at law on the award, and hence that the plaintiffs had no plain and perfect defense at law to the award; and hence that case cannot be a guide in this action.

I cannot see from the allegations in plaintiffs' bill, which are admitted, what equities the defendant has which should require of the plaintiffs a performance thereof before they should be awarded the relief they ask. There may appear equities of defendant which should be allowed before this suit is terminated, but I can see none now. The plaintiffs in their reply brief cite many authorities to the effect that, if the award was obtained by the fraud of defendant, it has no equities in this case. If fraud is claimed on the part of the defendant, I do not think the facts constituting the fraud are set forth with sufficient clearness to entitle them to any relief on this ground. The facts constituting fraud should always be fully set forth. *Goodwin v. Goodwin*, 59 Cal. 560.

The award in the case was the result of a joint submission made by all the plaintiffs in company with other insurance companies and defendant. The award is one instrument. Each of the plaintiffs is interested in the award, and is interested in the question of its cancellation. Hence, I think the bill cannot be said to be multifarious. The plaintiffs have a common interest in the suit. Story, Eq. Pl. §§ 537, 537a. It does not appear from the bill whether each one of the plaintiffs would be liable to defendant for the full amount it insured the property of defendant on this award; that is, it does not appear but the defendant might sue and recover of each one of the plaintiffs on this award, the full amount of the sum such plaintiff insured defendant's property. It appears from the bill that the insurance given on the property of defendant by each plaintiff exceeds \$2,000. It is true that it shows that the amount of all the insurance policies on this property exceeds the amount of the loss specified in the award. The defendant cannot recover certainly more than the amount of the award; but, unless there is some provision in the policies that defendant can recover, where the insurance exceeds the amount of the loss, only a *pro rata* sum of each insurer, it might select certain of the plaintiffs, and sue each for the full amount of insurance it gave. *Cromie v. Insurance Co.*, 15 B. Mon. 432. If it should turn out, however, that the conditions of the policies given by each plaintiff provided that, where there was a loss less than the full amount of the insurance, then each plaintiff would be liable only for a *pro rata* sum proportioned to the loss and damage, and the full amount of insurance, then it may appear that some of the plaintiffs are not interested to the amount of \$2,000 in having the award canceled; and then the question would arise as to the jurisdiction of this court to try this cause as to such plaintiff. The point presented in some of its aspects would be similar to that decided in the case of *Hawley v. U. S.*, 108 U. S. 549, 2 Sup. Ct. Rep. 846, and *Seaver v. Bigelows*, 5 Wall. 208. I do

not think the court can go beyond the pleadings and find even from statements of counsel, or presume that the insurance policies given defendant by plaintiffs had a *pro rata* clause therein. This court, then, up to this time, it would appear, has jurisdiction to try this cause as to all the plaintiffs. It was not necessary to make the arbitrators parties to this action. Arbitrators constitute a tribunal selected by the contending parties which in its nature is judicial. Most of the cases treat an award in the nature of a judgment, and I cannot see why there is any more reason for making the arbitrators parties to this suit than there would be in making a court a party to an action to set aside its judgment. The demurrer of defendant is overruled, and the motion of the plaintiffs for an injunction pending this action will be granted until the further order of this court. Before issuing the injunction, the plaintiffs must execute to defendant, with two or more sufficient sureties, a good and sufficient bond, to be approved by this court, or a judge thereof, to secure the defendant against any loss or damage on account of the issuing of said injunction, in the sum of \$75,000.

FIRST NAT. BANK OF WILMINGTON v. HERBERT, State Treasurer.

(Circuit Court, D. Delaware. October, 1890.)

NATIONAL BANKS—TAXATION OF STOCK.

Under Rev. St. U. S. § 5219, providing that shares of national bank stock may be taxed as part of the personalty of the owner, and that each state may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other moneyed capital owned by citizens of the state, a state may tax national bank shares held by its corporate or individual citizens as an investment, subject to the restriction that the tax shall not exceed the burden upon similar property in the state.

In Equity.

Levi C. Bird, Andrew E. Sanborn, and John Beggs, for complainant.

Benjamin Nielsds, for defendant.

McKENNAN, J. This suit is brought to relieve the complainant from the levy and collection of a tax imposed by the state of Delaware upon certain of its shares as a national bank, incorporated under the laws of the United States, and held by corporate or individual citizens of the state. This question is to be resolved by the true meaning and construction of the act of congress defining and limiting the power of the states in taxing national bank shares. The only portion of the act of congress to which it is necessary to refer at length is section 5219 of the Revised Statutes, which is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking as-

sociations located within the state, subject only to the two restrictions,—that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The only property in the state of Delaware which is the subject of taxation is real estate, live-stock, and national bank shares; and the object of this section of the act of congress, as was said by Mr. Justice MILLER in *People v. Weaver*, 100 U. S. 539, was to confer upon the states a power which they would not otherwise have had, and limiting its exercise so as to prevent a discrimination against national bank shares as compared with other moneyed capital. "In permitting the states to tax these shares,—that is, the shares of national banks,—it was foreseen that the authorities might be disposed to tax the capital invested in these banks oppressively." So therefore in *Mercantile Nat. Bank v. City of New York*, 121 U. S. 155, 7 Sup. Ct. Rep. 826, where the construction and meaning of the act of congress came before the supreme court, and it was necessary to interpret it as it related to the taxation of national bank shares, the court says:

"A tax upon the money of individuals invested in the form of shares of stock in national banks would diminish their value as an investment, and drive the capital so invested from this employment, if, at the same time, similar investments and similar employments under the authority of state laws were exempt from an equal burden."

The main purpose of congress, therefore, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy. Applying this rule of construction, we are led, in the first place, to consider the meaning of the words "other moneyed capital," as used in the statute. Of course it includes shares in national banks; the use of the word "other" requires that. If bank shares were not moneyed capital, the word "other" would be without significance. This case may then be regarded as impressing a determinate import upon the words of the act of congress. By this judicial definition of them, "moneyed capital" means national bank shares held by individuals as an investment, and the tax complained of is subject to the restricted power of the state to impose a tax upon it, not exceeding the burden upon similar property in the state. It is undeniable that national bank shares are subject only to a tax of one-fourth of 1 per cent., which is the same rate imposed upon each share of the cash value of the shares of the capital stock of every banking institution incorporated by or organized under the laws of the state of Delaware. It follows, therefore, that the complainant is not entitled to the relief prayed for, and its bill is dismissed, with costs; and it is so ordered.

DIECKERHOFF *et al.* v. ROBERTSON, Collector.

(Circuit Court, S. D. New York. November 25, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—"PINS, SOLID HEAD OR OTHER."

"Mourning pins," "hat pins," "bonnet pins," "shawl pins," being articles composed of a steel or hardened-iron shank, varying in length according to the specific designation of the article, from one inch to five inches, pointed at one end, and having a round or cut head of glass or jet, either polished or dull, and "safety pins," being an article composed of brass, having a shank of about one inch and a quarter in length, the point being protected by a shield or guard of the same material, are "pins, solid head or other," dutiable at 30 per cent. *ad valorem* under Schedule C of the tariff act of March 3, 1883, (Tariff Ind. par. 209,) and not "manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured," dutiable at 45 per cent. *ad valorem*, (same schedule, Tariff Ind. par. 216.)

At Law.

Action to recover back duties alleged to have been illegally exacted by the defendant, collector of the port of New York. The goods involved in the present suit were imported by the plaintiffs from Germany and England in 1883 and 1884, and were invoiced in the English and German languages as "mourning pins," "hat pins," "bonnet pins," "shawl pins," and "safety pins," and were classified by the collector as to the mourning, hat, bonnet, and shawl pins as "manufactures of glass and steel," dutiable at 45 per cent. *ad valorem*, under Schedule C of the tariff act of March 3, 1883, (Tariff Ind. par. 216,) and as to the safety pins as "manufactures of brass," dutiable at 45 per cent. *ad valorem*, under the same schedule and paragraph. The plaintiffs duly protested in the case of each entry, claiming the articles to be dutiable at 30 per cent. *ad valorem*, under the provision of Schedule C of said tariff, (Tariff Ind. par. 209,) as "pins, solid head or other," and duly appealed from the decision of the collector to the secretary of the treasury, who affirmed the classification of the collector. The plaintiffs' witnesses gave testimony showing that the articles in question, with the exception of the safety pins, were manufactured of steel or hardened iron, with glass or jet heads, the mourning pins varying in length from one to two inches, the shawl pins being somewhat longer, and the hat pins reaching, as to some of the articles included in the invoices, a length of five inches; that the mourning pins were used for the purpose of pinning articles of wearing apparel of black or dark colors; that the shawl pins were used for fastening ladies' shawls or belts; and that the hat or bonnet pins were used to fasten ladies' hats or bonnets upon the head; that the safety pins included in the invoices were an article of brass having a sharpened shank of about one and a quarter inches in length, furnished with a shield or guard of the same material, not having strictly any head at all, but used for many of the purposes, in fastening the clothing of children and adults, to which the ordinary pin of wholesale and retail trade was used. The plaintiffs also produced a number of witnesses from the wholesale trade in the city of New York, who testified that the general designation of "pins," as understood in trade and commerce in this

country, at and immediately prior to the passage of the tariff act of March 3, 1883, included all the articles in the plaintiffs' invoices. In support of his classification of the merchandise for duty, the defendant collector introduced the evidence of a number of representatives of the leading American manufacturers of the ordinary "*ne plus ultra*" or "adamantine" pin, known in the trade at the time of the passage of said tariff act, which article was shown to have been designated as "pins," with the further definition of "*ne plus ultra*," "adamantine," etc.; that this article was composed of brass or iron wire about one inch in length, made by machinery, having a sharpened point and a solid head made from the same piece of wire as the pin itself; that these pins were commonly white, but that there was a class of them known as "jet pins," or "mourning pins," made in the same way, and of the same sizes, but coated with black japan; that the *ne plus ultra* and adamantine pins came stuck upon papers, and were sold on such papers; that an article essentially the same as the American *ne plus ultra* pin was imported from England, and sold in this market as *ne plus ultra* pins of various makes; that there was also known to the trade, at that time, an article called a "German pin," being made of brass wire, and having a head composed of a fine wire coil about the blunt end of the pin, and consequently not being solid headed. The defendant also produced a number of witnesses in the commission and notions trade, who testified that the trade term, "pins," designated primarily the *ne plus ultra* or adamantine pin, as commonly sold in the wholesale and retail trade. These witnesses admitted, on cross-examination, that different varieties of brass and iron wire pins, made by machinery and having solid heads, from the diminutive "Lill pin," of not more than one-half an inch in length, to a brass-wire solid-headed shawl pin of three inches in length, and the solid-headed wire jet pins, or mourning pins, last above referred to, were included, in their opinion, in the general trade term of "pins." The safety pins were shown to have been also known in the trade by the names of "nursery pins," "diaper pins," and "toilet pins."

Edgar Ketchum and Edward Hartley, for plaintiffs.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*charging jury*.) *Gentlemen of the Jury*: In the tariff act of 1883 there is a schedule, lettered C, and headed "Metals," including a great many different paragraphs, running in number from 144 to 216. When these goods arrived, the collector classified them under the last paragraph of this metal schedule, 216, which reads as follows:

"Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*."

That particular paragraph, as you will see from its phraseology, is a catch-all clause put at the foot of the metal schedule in order to cover
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any manufactures of metal which may, by some deficient enumeration, or by some failure to enumerate, have escaped inclusion in one or other of the preceding paragraphs; and the rate of duty fixed by it is a high one in order that if an article which has thus escaped is one which should properly pay a high rate of duty, it will find itself in the catch-all clause paying at least the duties that it should. In view of the fact, however, that this paragraph is a catch-all clause, and with a high rate of duty affixed to it, no article should be included within it which, upon a fair and reasonable interpretation of the preceding paragraphs, may be found properly included in one or the other of them. It is the plaintiffs' contention in this case that their articles should not be included in this catch-all clause because, as they say, they are to be found specially provided for in paragraph 209, under this phraseology: "Pins, solid head or other, thirty per centum *ad valorem*." Now, laws imposing duties upon importations are intended for practical use and application by men engaged in commerce; and the denominations of merchandise under those laws are to be understood in a commercial sense. In other words, it is assumed that congress is fully conversant touching all the nomenclature of trade in every variety of merchandise dealt in in this country, and about which it legislates some tariff duty; and it is for that reason that the testimony of gentlemen in the trade is put before you in evidence in this case. You are to understand that congress, when it legislated about these articles, understood the trade and commerce in this country to be just exactly what you have heard it to be detailed to you from the witness chair; and in interpreting the words which have been used by congress, you are to give to them the same meaning which the trade and commerce of this country would have understood that they had in 1883, when congress used those words. Therefore, in determining whether these articles here are solid-head pins, or are other pins, (for the act, you will remember, reads "Pins, solid head or other,") in determining whether they are included in one or the other of those groups, you are to decide that point, enlightened by the information which you have received from witnesses here as to what was the understanding and nomenclature of trade and commerce in this country in 1883. In other words, suppose that at the close of the labors of the committee, and at the moment when the act was up for final passage, some one had raised one of these articles before congress and had said: "Have we not omitted this article?" What, if they had at that time turned to the trade and commerce of this country, would have been the answer? Would it have been answered: "No; because it is included in paragraph 209, which provides for solid-head pins or other pins?" If that would have been the answer made at that time, then we must assume that congress intended to cover these articles by the phrase it employed in paragraph 209. If, however, that were not the answer, if the trade, if consulted at that time, would have said: "No; these articles here are not known to us as 'pins,' either as solid pins, or as other pins, in our trade nomenclature,"—if that had been the answer which the trade and commerce of this country would have given in 1883 to such a question, then

you are to understand that congress did not include this article in paragraph 209. The question, as you see, is wholly and entirely one of fact. It rests with you to determine whether the phrase "pins, solid head or other" was, in 1883, understood in trade in this country as covering articles like these which the plaintiffs have imported. If it was so understood, your verdict will be for the plaintiffs; if it was not so understood, then your verdict must be for the defendant. The jury are entitled to consider the interest of any of the plaintiffs' witnesses, or of the firms with which such witnesses may be connected as importers of any of the articles involved in this suit, in the classification of such articles for duty, as bearing upon the testimony of such witnesses as to the trade designation of the articles in question. And I will add, generally, that any interest which any witness may have you are of course entitled to take into consideration in weighing his testimony.

Mr. Van Rensselaer. If your honor will permit me, there is one request which I did not put in writing, and which I will state to your honor verbally. I request your honor to charge that, in considering trade designation, the jury should take into consideration not only the trade as represented by the importers, but also trade as represented by the manufacturers of and dealers in domestic articles.

The Court. The trade and commerce of this country is the trade which buys and sells the particular article, whether it comes from abroad or is made here; and the trade and commerce which makes a designation is the trade and commerce between individuals where the buyer and seller are both engaged in that as their business, not where an individual retails to a consumer, but where both the parties to the transaction are trade men. That being so, it is immaterial whether the goods which they buy and sell are made abroad or made here. It is the whole trade and commerce in this country, wherever the goods it handles are made, which is to be considered.

Mr. Van Rensselaer. I would like to make a motion, and to ask for your honor's ruling thereon in connection with my first request to charge, that is, that the clause "Pins, solid head or other" in the statute must be understood by the jury to mean only such pins, solid head or other headed, as were known as such in trade and commerce at the time of the passage of the tariff act of 1883. I move your honor to direct the jury to find a verdict for the defendant as to the article "safety pin" on the ground that, in addition to its not being included in the general term "pins," it is an article which all the testimony shows has no head at all. I claim the construction of the statute to be "pins, solid head or other headed;" there being no comma after "solid-head," it means "solid headed or other headed." And on that ground I move your honor to direct a verdict in favor of the defendant as to the safety pins.

The Court. I shall deny that motion.

Mr. Van Rensselaer. Your honor will give me the benefit of an exception.

The jury thereupon rendered a verdict in favor of the plaintiffs.

EIFFERT *et al.* v. CRAPS *et al.*

(Circuit Court, D. South Carolina. November 7, 1890.)

DEPOSITION—SUPPRESSION

A commission to take testimony duly issued and executed under Eq. Rule 67 will not be suppressed because, when received by the clerk, the envelope containing the testimony was open at one end, presenting the appearance of having been worn in the mail, the clerk having noted the facts on the package and filed it, since which time it has remained undisturbed in his office.

At Law. Motion to suppress a commission.

E. W. Hughes, for the motion.

B. A. Hagood, *contra*.

SIMONTON, J. A commission was duly issued in this case directed to certain persons in Wytheville, Va. On the 29th September last, a package was received by the clerk of this court through the mail, bearing the name of this cause, with the names of the commissioners and their seals across the flap of the envelope. Upon the package is the certificate of one of the commissioners that he deposited it in the mail at Wytheville, Va., on 27th September, 1890. It reached Charleston on 29th September, 1890, and one end of the envelope was open, presenting the appearance of having been worn in the mail, the opposite corner of the envelope presenting the same appearance. On its receipt, the clerk indorsed on the package this fact, filed it, and it has been undisturbed in his office. This commission was issued under the authority of Eq. Rule 67, and is in accordance with the well-established rule of the court of chancery. The commissioners did their duty in all respects as to the certification and mailing of the package. There is no reason to suspect that the contents of the package were seen by any one. I am satisfied that the abrasion of the envelope occurred in the transmission in mailbags. No special provision is made respecting the transmission or custody of commissions in the equity rules except in rule 69, which provides for the publication of all the testimony. Our own rule 65 says that, when a commission is returned, it may be opened by leave of the clerk, upon consent of parties, in writing, indorsed on the commission. The rule which applies to depositions requiring rigid observance of every formality does not apply to commissions. In the natural course of things, without fault of the party taking out the commission or of the commissioners, the abrasion has occurred. It would be going very far to deprive the plaintiff of his testimony for this abrasion. The motion is refused. The parties can, if they choose, open the commission, and publish the contents of it; or, if they do not desire it, the clerk will seal it in an unbroken package with his own seal.

LEWIS v. WITHERS.

(Circuit Court, S. D. Mississippi. November 25, 1890.)

TAXATION—ASSESSMENT—ALTERATION OF RETURN.

The unauthorized alteration by assessor of tax-payer's return for assessment, made according to original survey, to a description in new survey, whereby acreage of lots returned are decreased, and lots are added to cover balance, and assessed to unknown, without notice, and a payment on lots as returned, with offer to pay all taxes due, invalidates sale of such added lots.

(Syllabus by the Court.)

At Law.

Baker & Reneau, and Nugent & McWillie, for plaintiff.

Calhoun, Green & Carson, for defendant.

HILL, J. This is an action of ejectment, brought by the plaintiff against the defendant in the circuit court of Wilkinson county, and removed into this court, to recover the land described in the declaration, to which the defendant interposed the general issue. By written stipulation, a jury trial is waived, and the questions of fact, as well as the questions of law, are submitted to the court. The 80 acres of land for which this action is brought have been owned by the defendant for many years, and are included in lots 3 and 4 of section 22, township 3, range 5 west, in Wilkinson county, as shown by the tract-book of original entries, and were so entered by defendant's grantor in 1833 and 1835. The whole section was subdivided into lots 1, 2, 3, and 4. Lot No. 1 has never belonged to defendant, but lot No. 2 is, and long has been, owned by him. Lots 2, 3, and 4 were estimated to contain 262 acres, and were usually assessed by that description, and as containing that number of acres, except that in 1883 the number of acres was estimated at 260, and were given in by the agent of the defendant to the assessor for 1887 by the description of lot 2, 62 acres, lot 3, 80 acres, lot 4, 120 acres, making, together, 262 acres. There is marked in brackets on the line of lot No. 3 the figures 40 and letter A, and on the line of lot No. 4 the figures 80, letter A, but by whom placed there, or when, does not appear. The proof is that it is not in the handwriting of defendant, or his agent, and must have been by the assessor's deputy, or some one else. Some time in 1848 or 1849, the surveyor general was directed to resection the lands in Wilkinson county, which was done, and a map thereof filed in the land-office in Jackson, and by which lots 2, 3, and 4, above mentioned, were described as lots 2, 3, 4, 5, and 6, and by which the land in controversy was described as lots 5 and 6, each containing 40 acres, and being contained in lots 3 and 4, as described in the entry tract-book. In 1884, a copy of this map was procured, and placed in the office of the chancery clerk of said county, and, as the proof shows, has since been regarded as the official map of the county, for the guidance of the assessors, and others, but no order of the board of supervisors has ever been made adopting it, or requiring assessments

for taxes to be made of the land in the county, according to the designations and descriptions upon it. The first time any change was made in the description of the land in controversy was by the assessors in 1887, when it was described as lots Nos. 5 and 6, each containing 40 acres. Of this change, neither the defendant nor any agent of his had notice. Lots Nos. 2, 3, and 4 were assessed to defendant, and lots 5 and 6 to an unknown owner. Lots 2, 3, and 4 were valued at \$9 per acre, and lots 5 and 6 at \$1 per acre. Defendant paid the tax in due time, by his agent, on lots 2, 3, and 4. Other lands belonging to defendant were not put on the assessment roll or tax-book, but through the neglect or oversight of whom does not appear. But, the amount of the taxes for that year being so much less than usual, Mr. Koontz, the agent of defendant, supposing there must be some mistake about it, requested Mr. Carson, defendant's attorney, to go to Wilkinson county and look into the matter, and to ascertain the taxes due, if any, and pay the same, and for which he took the money with him, and ascertained the taxes due on other lands of the defendant, which had not been assessed to him, and paid the same. On the examination of the tax-books by Mr. Miller, the sheriff and tax collector's deputy, who was in charge of that business, and to whom Mr. Carson was referred by the sheriff as knowing more about it than himself, it was found that the taxes had been paid on lots 2, 3, and 4, the number of acres being described as 182, which Carson ascertained on the examination of the tax receipt, and called Miller's attention to it. Miller got the map in the office from which the assessor had made his description in making out his assessment roll, and found that lots 2, 3, and 4 contained 182 acres. Carson asked him how he accounted for the decrease in the acreage. He replied that Withers had been paying for years on land in the Mississippi river, but added, referring to the maps, that "these are the latest surveys, and are [as he supposed] correct." Carson looked at the map and saw lots 5 and 6 thereon, and asked who they belonged to. Miller replied: "I do not think they belong to Withers; I do not know. I do not think they were ever assessed to Mr. Withers." Carson, not being satisfied, and anxious to pay the taxes on all of Withers' land, examined his title-deeds, with the assistance of the circuit clerk, who was familiar with the records, to see if lots 5 and 6 belonged to Withers, never having heard of lots 5 and 6, and could not find them, and had no knowledge of any change in the maps, or description of the land. As all the deeds described the land as lots Nos. 2, 3, and 4, and by which they had before been assessed and known, he came to the conclusion that they did not belong to Withers, but was then prepared and anxious to pay the taxes, and never learned that they were the lands of Withers until this suit was brought, nor did defendant, or any of his agents. The taxes not being paid, the lands were sold, and purchased by plaintiff for between four and five dollars; and, not being redeemed within the time prescribed by law, the sheriff's deed to the land under the sale was delivered to the plaintiff, and is his only muniment of title. These are substantially the facts, as shown by the proof, so far as it is

necessary to a determination of the questions involved, which are whether or not the plaintiff, under these facts, is entitled to recover this land, with its rental value, from the defendant, and which must be determined according to the statutes of the state, as construed by the supreme court of the state. It is very clear to my mind that the non-payment of the tax was alone caused by the change made in the description of the land by the assessor, and without the knowledge or consent of the defendant, or any agent of his, and for which he is not in any way responsible; nor do I believe it makes any difference that the assessment roll, with the change, was reported to and confirmed by the board of supervisors. The defendant had a right to rely upon the description given by his agent, and that by which it had always before that time been known and assessed for taxes. Plaintiff relies upon section 516, Code 1880, which provides a form of receipt for taxes, and which shall be the only evidence of the payment of taxes due, and the decision of the supreme court of the state holding that this is the only evidence of such payment, unless lost or destroyed. But this is not a question of the payment of the tax, but of the correctness of the assessment,—the change in the description having been made without notice to the defendant or his agent,—and as to whether or not this change without notice is an excuse for the non-payment of the tax by the defendant. I am of opinion that this question has been settled in favor of the defendant by the supreme court of this state in the case of *Richter v. Beaumont*, 7 South. Rep. 357. The facts in that case were that, in the ancient division of the town of Ocean Springs, a lot of ground in the return for assessment was described as lot No. 6, and which was afterwards given a different description on a new map of the town, which was recognized by the citizens generally, and by the officials of the town; and, it being assessed for taxes under and by the description on the new map, and the taxes not being paid, the same was sold for the non-payment of the tax, and conveyed by the tax collector. The court held that, if the owner did not know of the new map and the change in the description of the ground, but had given it in as lot or part of lot No. 6 to the assessor, he would not be affected by the sale and conveyance. This decision is so just that I presume no court will hold to the contrary under a similar state of facts, and which, in my opinion, are the facts in the present case. To deprive the defendant of the title to this valuable tract of land under the facts stated, to say nothing about the few dollars paid, would certainly be a hardship and wrong, never contemplated by the legislature. Besides, the statute provides ample indemnity to the plaintiff by refunding to him all the money paid by him with 25 per cent. damages, and 10 per cent. per annum interest thereon, until paid, with a lien on the land until payment is made. The result is that the finding of the facts must be in favor of the defendant, and judgment that when the amount paid, with damages and interests, are refunded, he go hence with his costs.

UNITED STATES *v.* YOUNG *et al.*

(Circuit Court, E. D. New York. November 18, 1890.)

1. EVIDENCE—GOVERNMENT DOCUMENTS—CERTIFIED COPIES.

Though certified copies of the books and accounts of the treasury department are by statute made evidence in favor of the government in actions against alleged delinquents, they are not conclusive, and, if a reply is made thereto, the case is to be decided on all the evidence.

2. INDIAN AGENTS—ACTION ON BOND.

In an action on an Indian agent's bond for failure to account for property alleged to have come into his hands, the government is not required to show that the agent has converted the property or proceeds thereof to his own use, but it may recover whatever loss it has sustained by his failure to account as required by his bond.

3. SAME.

Where the government has lost nothing by such failure to account, it can recover nominal damages only.

4. SAME—BURDEN OF PROOF.

The burden of proving the amount of its loss is on the government.

5. SAME—EVIDENCE.

The fact that certain articles have been omitted from the agent's quarterly report is only *prima facie* proof that they have been lost to the government, and may be overcome by proof that they were at the agency at that time.

6. SAME.

An Indian agent who has given bond to faithfully discharge the duties of his office is not responsible for the negligence, error, or breaches of duty of doctors and clerks furnished by the government, unless by reasonable diligence he could have prevented such negligence, errors, or breaches of duty.

7. SAME.

Where the government fails to furnish the agent a clerk, he is responsible for the performance of the clerical duties of the agency in the best way practicable for him alone.

At Law.

Jesse Johnson and John Oakley, for the United States.

Andrew J. Todd and George G. Reynolds, for defendants.

LACOMBE, Circuit Judge, (*charging jury.*) The defendant Young having been appointed an Indian agent, in accordance with the law, executed a bond, together with the other two defendants, that he would, while in office, carefully discharge the duties thereof, and faithfully expend all public moneys, and honestly account without fraud or delay for the same, and all public property which should or might come into his hands. This suit is upon that bond. The government claims that he did not carefully discharge the duties of his office, nor faithfully expend all public moneys; that he did not honestly account without fraud or delay for the same, and for all public property which came into his hands; but that, on the contrary, as such agent he did receive certain moneys and other property belonging to the United States, amounting in value to the sum of \$1,486.10, which he did not faithfully expend and honestly account for without fraud or delay, or pay over to the United States, and which said sum still remains unpaid and unaccounted for. That is the claim in this suit. Now you have heard the phraseology of the bond, which is that he should carefully discharge the duties of his office, and faithfully expend the public moneys, and honestly account, etc. He does not discharge his whole duty

by being simply honest. He was bound also to carefully discharge the duties of his office as the same were prescribed to him by his superior officers. Especially was he bound to account for all public property which came to his hands, and to do so not only without fraud, but without delay. His term served, and his final returns being made, the government examined his accounts, and, finding that they did not on their face account for all the property which appeared to come into his hands, now comes into court to enforce the obligation of this bond. By statute, a certified copy of the books and accounts of the treasury department is made evidence in favor of the government in support of any claim which it advances against an alleged delinquent, and certifications of the books and accounts were introduced in evidence here. That is a convenient rule, and lays the burden where it belongs. If no explanation at all is offered, judgment of course goes in accordance with the certified copies of the accounts. But the certified copies of the accounts, although evidence, are by no means conclusive evidence; and, if there is reply made to them, the case must be decided, not simply by the accounts, but by the evidence introduced in the case. Leaving out the cash items, (as to which you are directed to find in favor of the defendant,) these accounts make out on their face a *prima facie* case of failure to account in accordance with the obligation of the bond. This case the defendant undertakes to meet, and it is for you to determine if he has done so. In determining that question, there are certain general principles of law governing the case which you must bear in mind.

I have been asked by the defendants to charge with regard to them, and have added one or two statements of my own. These are the principles which you must bear in mind: *First*. The government is not bound to show that the defendant has converted the property received, or the proceeds of property sold, to his own use. It is not bound under this bond to make out a case of fraud or conversion against him. *Secondly*. A failure on the part of the defendant to conform to the obligations of the bond is sufficient to entitle the government to recover upon the bond whatever loss it has sustained by reason of such failure. If through such failure it has lost property or proceeds of property, he must respond for such a loss, although he did not himself appropriate the property. But the government can only recover such damages as it has in fact sustained by reason of the breach of his obligation under the bond.

If the government has in fact lost no money, and lost no property, by reason of the defendant's failure, the recovery can only be for nominal damages.

The burden of proof is upon the plaintiff to show the amount of its loss. The fact that certain articles of property have been left off from any of the quarterly reports, is not conclusive proof that they have been lost to the government. It is, however, *prima facie* proof of that fact. Any presumption which might arise from such omission—that is, such omission of property from the quarterly reports—may be overcome by satisfactory proof that the property was, in fact, at the agency at the

time of such omission. If you believe that no money or property has been appropriated by the defendant Young, or lost to the plaintiff through his fault, you cannot award more than nominal damages to the plaintiff.

The defendant Young is not responsible for the negligence, errors, or breach of duty of the doctors and clerks who were appointed and furnished by the government, unless by the exercise of reasonable diligence he could have prevented such negligence, errors, or breach of duty. When the plaintiff failed to furnish the defendant with a clerk, the defendant was only responsible for the performance of the clerical duties of the agency in the best way practicable for him.

In leaving this case to you, I shall send with you a series of questions raised in this way: Do you find for the plaintiff or the defendant on these separate items? Opposite each item which is lettered here you will write the word "plaintiff" or "defendant," as the case may be. These items are as follows: (a) "Sales to employes." There is a difference between the amount collected from the employes and the amount which the government says should have been collected from them. That difference, the defendant says, arose from the fact that he was not in all cases able to ascertain the cost price or the transportation price which he should put upon the articles, the government at Washington in revising the accounts having more full information as to the cost of articles and the cost of transportation than he. The second item (b) is for "supplies fed out." That includes the hay of which you have heard, which was furnished to the starving stock. The third item (c) "supplies issued to Indians;" such as soap, flour, and so on. The fourth article (d) relates to "shortages on goods received." The fifth article (e) relates to "dead animals," among which is included the horse, and so on. The next, (f), "school supplies," as to which there has been some testimony. The next, (g), "medical supplies." And, finally, (h), the other items on property returns not accounted for. As to each of those items, you will return a separate answer. In case you find for the plaintiff as to either of these items, you are to indicate whether the verdict as to such finding is for nominal damages (six cents damages) or substantial damages. To illustrate, if, as to a particular piece of property, you find that it is dropped from the agent's last return, and has never turned up again, that it has disappeared so far as the government is concerned, is out of the government's hands, then the damages in that case are not to be nominal, but substantial. If, as to the same article, however, you should find that it was dropped from his return through some oversight when his successor receipted for the property, but that the article was, in fact, at the time there, and did come to the hands of his successor or successors, and has not been lost to the government, then the utmost which the government can claim is nominal damages for breach of duty in failing to include it on the return. I think I have covered all the requests that have been handed up to me by counsel. I have declined the request to direct a verdict in favor of the defendants, and give them an exception.

The jury found for the defendant as to the first six items, and for the plaintiff as to the last two, awarding nominal damages; the items being as follows:

- (a) Sales to employes. For defendant.
- (b) Supplies fed out. For defendant.
- (c) Supplies issued to Indians. For defendant.
- (d) Shortage in goods. For defendant.
- (e) Dead animals. For defendant.
- (f) School supplies. For defendant.
- (g) Medical supplies. For plaintiff; nominal.
- (h) Items of property on returns, and not accounted for. For plaintiff; nominal.

BUTTERFIELD v. TOWN OF ONTARIO.

(Circuit Court, N. D. New York. December 1, 1890.)

INTEREST COUPONS—SPLITTING CAUSE OF ACTION.

Interest coupons attached to negotiable bonds are distinct and independent promises to pay the interest installments, and a recovery on one is no bar to a suit on another, though the latter was past due when the first action was brought.

At Law.

L. W. Wolcott, for plaintiff.

S. D. Bentley, for defendant.

WALLACE, J. As a defense to this action the defendant invokes the familiar doctrine that a party cannot split up an entire and indivisible demand, and bring an action on the part of it, and a subsequent action on the other part, and that the judgment in the action first brought is a good bar to the second action. The plaintiff brought an action against the defendant to recover upon interest coupons of municipal bonds owned by him, and recovered judgment thereon. The present action is brought upon coupons of the same bonds which had matured when the former action was brought, and were then annexed to the bonds. If the present suit were brought to recover interest installments payable by the terms of a bond, according to the weight of authority, it would be no defense to the action that the plaintiff had brought a former action to recover installments due at later dates, and recovered judgment therein. *Sparhawk v. Wills*, 6 Gray, 163; *Bank v. Adams*, 83 Mass. 28; *Dulaney v. Payne*, 101 Ill. 328. When the promise for the payment of interest installments in the bond is supplemented by promises in the form of negotiable paper, that circumstance implies that the obligee is at liberty to sell the different promises, and transfer them to others, at his pleasure, before or after they mature; and it would be utterly unreasonable to hold that he could not do this without prejudicing his right to recover on one or more of them in case others which he has sold, though maturing earlier, should not have been sued upon. It is quite immaterial that they all represent an indebtedness arising out of one contract or a single trans-

action. *Nathans v. Hope*, 77 N. Y. 420. Coupons are distinct and independent promises for the payment of the interest installments, and have all the attributes of commercial paper. Judgment is ordered for the plaintiff for \$3,695.05.

HARRIS v. DAVIS.

(Circuit Court, W. D. Texas, El Paso Division. October 10, 1890.)

1. CONTRACTS—CONSTRUCTION.

Plaintiff and defendant, stockholders in a corporation, agreed that, in case the corporate property should be sold under a certain trust-deed, they or either of them would buy it at the sale, for their joint interest, each to pay in proportion to the stock owned by him, or be barred from any share. Defendant purchased the property at the sale, and took a bill of sale to himself, and plaintiff failed to pay any part of the purchase price. *Held*, that defendant took an absolute title for his own benefit, but if he subsequently agreed with plaintiff that each should try to sell the property, and divide the proceeds under the former agreement, and that, if they failed to sell within a reasonable time, payment should be made as provided in the former agreement, the title inured to both in proportion to their respective amounts of stock.

2. SAME.

If such second agreement was made, and the property was afterwards sold by defendant, the valuation placed by him and the purchaser from him at that time on certain corporate stock received in payment for the property is binding on both him and plaintiff.

3. RELEASE AND DISCHARGE—ESTOPPEL—DECEIT.

A receipt given by plaintiff to defendant in reliance on representations made by defendant to him as to the amount of the consideration which defendant received for the property does not estop him to reopen the account between himself and defendant, and recover the amount found justly due him, if defendant's representations were false.

At Law.

Jennings & Fowlkes, for plaintiff.

Davis, Beall & Kemp, for defendant.

MAXEY, J., (charging jury.) This suit is brought by the plaintiff to recover of defendant the sum of \$4,668.88, with interest, which sum the plaintiff claims as his interest in the proceeds of a sale of cattle and other property sold by the defendant to one I. A. Stevens. The defendant relies upon several defenses which will be hereinafter called to your attention. The property sold by the defendant to Stevens was originally owned by a corporation known as the "Mexico Cattle Company," and in order to secure an indebtedness which amounted, principal and interest, to \$23,329.44 on the 10th of March, 1886, the cattle company, on the 22d of September, 1885, executed a deed of trust, embracing its cattle and other property, to J. A. Peacock, as trustee, giving Peacock, or his substitute trustee, the power to sell the property in accordance with the terms of the instrument. The debts of the company not having been paid at their maturity, the property was advertised for sale by Swinney, the substitute trustee, and duly sold by him on the 6th day of Febru-

ary, 1886, to the defendant, and a bill of sale was executed by the trustee to defendant on the 10th of February following. The property thus conveyed to the defendant by Swinney was subsequently sold by the defendant to I. A. Stevens, and it is important for you to determine:

1. Who was the real owner of the property under the bill of sale executed by the trustee Swinney to defendant? Did that sale vest in the defendant the absolute right, title, and ownership of the property, or did the defendant purchase the same at the trust sale for the joint benefit of himself and plaintiff? If the defendant, at the trust sale, purchased the property for himself alone, and not for the joint use and benefit of himself and plaintiff, then the plaintiff could have had no interest in it at the date of defendant's sale to Stevens, and he would not, therefore, be in a position to complain whether the defendant made or lost money in his trade with Stevens. If, however, the defendant bought the property from the trustee on the joint account of himself and the plaintiff, then the plaintiff had an interest in it, although the bill of sale was executed to the defendant only, and it was the duty of defendant, in subsequently selling the property, to fairly account to plaintiff for his interest in the proceeds of sale. To reach a conclusion in reference to the character of title held by the defendant under the trust sale made by Swinney, it will be necessary to examine the written agreement entered into between the plaintiff, the defendant, and Hendrix, on the 22d of September, 1885, and ascertain from the testimony what passed between the parties touching any changes which they may have agreed to make in reference to the terms of that agreement. That agreement reads as follows:

"We, the undersigned, stockholders in the Mexico Cattle Company, do hereby agree that, in case the cattle of this company shall be sold under deed of trust made this day by said company, we, or either of us, will bid the amount of the debts of said company so secured, and, should either of us buy the property at said sale, it is understood and agreed that we buy for our joint interest as represented by our several stock in said company, and we each will pay in cash or put in hands of purchaser good bankable collaterals in the proportion of our stock in said company. Any member failing to notify the others by the tenth day before the sale aforesaid takes place of his desire and intention to take advantage of the privilege herein granted, or failing to place in the hands of the purchaser, according to this instrument, his *pro rata* share of the cash or good bankable collaterals, he shall be forever debarred from enjoying the rights granted by this writing."

The agreement above read to you was binding upon all the parties alike, and, in order to claim its benefits, each was required to perform the conditions imposed upon him, by the instrument, unless the terms of the agreement were extended, or performance of its conditions waived, by a subsequent agreement entered into between plaintiff and defendant. The plaintiff insists that there was such subsequent understanding and agreement made by him and defendant, and his claim in that respect is based upon the following allegations of his petition:

"That, prior to said mortgage sale, propositions were being made *pro* and *con* between the plaintiff and defendant for the sale of their respective inter-

ests in the Mexico Cattle Company, looking also to and including in the same the payment of said mortgage indebtedness, which said propositions were kept up, up to the time of said sale, but which did not result in any agreement or settlement, and the same was kept up for several days after said sale, but without result; that after the failure of said propositions of sale and purchase as aforesaid between plaintiff and defendant, and after said mortgage sale, it was understood and agreed between plaintiff and defendant that each would try and make a sale of the property, and, if successful, that the debts would be settled, and the surplus, if any, divided between the parties under their said agreement of September 22, 1885, but, if they failed to negotiate a sale within a reasonable time thereafter, (there being one or two sales contemplated at the time,) then the cash or collaterals would have to be put up by the parties under their said agreement of September 22, 1885."

It is conceded by the parties to this suit that the defendant bid in the property at the trust sale by Swinney at a price equal to the amount of the Mexico Cattle Company's indebtedness, and that a bill of sale was executed to him by the trustee; and the testimony, without contradiction, clearly shows that the plaintiff did not place in the hands of the defendant, who was the purchaser at the sale, the cash or bankable collaterals provided for in the agreement of September 22, 1885. And you are instructed that the sale by the trustee and his bill of sale to the defendant vested in defendant an absolute title to the property involved herein, unless you find from the testimony that the subsequent agreement, as claimed by the plaintiff in his petition, was actually made and entered into between him and defendant. If such subsequent agreement was made, then, although the defendant purchased the property at the trust sale, and the title was executed to him, he would not be permitted to claim and hold it for himself alone, but the title would inure to the plaintiff and himself in proportion to their respective interests as provided in the written agreement of September 22d. On the one hand the plaintiff strenuously insists that the new agreement was made as alleged, and on the other, the making of such new agreement is urgently denied by the defendant. A sharp conflict, you observe, arises between the parties at this point, and it is your province, gentlemen, to determine the existence or non-existence of the new agreement as claimed by the plaintiff. That question you must answer to your own satisfaction from an examination of all the facts and circumstances admitted in evidence; and, in reaching a conclusion, you may consider not only what occurred between the parties at the time of and prior to the sale, but you may also look to their conduct subsequent to the trust sale, and their dealings with each other, regarding the management, ownership, and disposition of the property, as such conduct and dealings may tend in some measure to aid you in arriving at the true meaning and intention of the parties. If you conclude that the new agreement, as insisted upon by the plaintiff, was not made by the defendant, then you are instructed that the absolute title to the property, under the sale and deed made by the trustee Swinney, vested in the defendant alone for his sole use and benefit, and your verdict should be in his favor. But, if you determine that such new agreement was made and entered into by the

plaintiff and defendant, then the defendant held the title to the property, as you have already been instructed, for the benefit of himself and plaintiff in proportion to their respective interests as shown by the agreement of September 22d, and in that event it will be your duty to consider other questions arising in the case.

2. The defendant admits that he sold the property to I. A. Stevens about March 1, 1886. And under the terms of the verbal agreement, referred to in the preceding clause of this charge, if you find as a matter of fact that such agreement was made, it was the duty of defendant, after payment of the debts of the Mexico Cattle Company, to divide any remaining surplus, arising from the proceeds of such sale, ratably between himself and plaintiff in proportion to their respective interests. It hence becomes necessary to determine the consideration that passed to the defendant in the sale of the property made by him to Stevens. Upon this point it is alleged by the plaintiff in his pleadings that said property was negotiated in said sale to Stevens at \$35,000 for the cattle, horses, etc., and, in addition, Stevens assumed the payment of certain lease moneys, which the Mexico Cattle Company had obligated itself to pay, amounting to \$10,000, making, in the aggregate, \$45,000, as the true consideration paid by Stevens for all of said property. On the other hand, it is averred by the defendant in his answer that he sold the property to Stevens for the actual consideration paid by Stevens of 27 shares of the capital stock of the Independence Cattle Company of the par value of \$1,000 per share, and that the defendant agreed to take said stock at the value of \$27,000; and, further, that he sold said property to Stevens for the actual consideration of \$27,000, as agreed upon at the time of the sale, to be paid in the stock of said Independence Company, and for the further consideration that Stevens agreed to assume the payment of \$10,000, on account of certain leases which the Mexico Cattle Company had, by contract, bound itself to pay. In order to arrive at a satisfactory conclusion as to the real consideration of the sale made by the defendant to Stevens, it will be necessary for you to examine all the written and other evidence before you, and from it determine what the true consideration was. Was it \$35,000 for the cattle, etc., and \$10,000 lease money, assumed by Stevens, as insisted by the plaintiff? Or was it 27 shares of the stock of the Independence Company taken at \$27,000 and \$10,000 lease money assumed by Stevens? In this connection you are instructed that the true consideration of the sale is the one agreed upon by the parties at the time the sale was made. If it was agreed between defendant and Stevens, at that time, that the former should take the Independence stock at a valuation of \$27,000, that agreement would be binding upon the plaintiff. And so, if it was, at the time of the sale, agreed and understood between the parties that the defendant would receive the Independence stock at a valuation of \$35,000, the defendant would be equally bound by the agreement now, notwithstanding the stock of that company may have subsequently declined in value. The testimony as to the consideration of the sale made by defendant to Ste-

vens is conflicting, and it is your duty to examine it carefully with the view of reaching a just conclusion.

3. As a further defense to the suit, it is averred in the answer of defendant that on the 27th day of March, 1886, he (the defendant) paid to the plaintiff the sum of \$2,000 in full satisfaction and discharge of the cause of action set forth in the petition, and of all damages sustained by the plaintiff by reason thereof, and that the plaintiff accepted said sum of \$2,000 in full satisfaction and discharge of said cause of action, and of all damages sustained by him, and of all claims or demands against the defendant. In support of these averments the defendant introduced in evidence, with other testimony, a written receipt bearing date the 27th day of March, 1886, executed by the plaintiff, in the following words:

"\$2,000.00.

COLORADO, TEXAS, March 27, 1886.

"Received of A. F. Davis through the hands of E. F. Swinney the sum of two thousand dollars for sale of Mexico Cattle Company.

[Signed]

"JOHN HARRIS."

The plaintiff admits the execution of the receipt, and that he received the sum of money stated, but denies the legal effect of the paper as claimed by the defendant; and the plaintiff further maintains that he is not estopped from reopening his account with the defendant on account of the receipt executed by him, for the reason that, at the date of its execution, he was, as he alleges, through the false and fraudulent statements of defendant, in ignorance of the real consideration paid by Stevens to the defendant, and that he then believed, as he had been informed by the defendant, that the true consideration was \$27,000, and the assumption by Stevens of the payment of \$10,000 lease moneys, when in truth and fact he alleges that he thereafter learned the true consideration passing from Stevens to defendant was \$35,000, and the assumption by Stevens of the \$10,000 on account of leases. In the absence of fraud on the part of defendant, the receipt would clearly be binding upon the plaintiff, and he would not be permitted to reopen the account closed by the execution of the receipt. But if the defendant had deceived and misled the plaintiff as to the real consideration of the sale to Stevens, and if he falsely and fraudulently represented to the plaintiff, prior to the execution of the receipt, that he had sold the property to Stevens for \$27,000, and that, in addition, Stevens was to assume the payment of lease money of \$10,000, when in truth and fact the consideration of the sale was \$35,000, and the assumption by Stevens of the payment of lease money to the extent of \$10,000, and if the plaintiff, when he signed the receipt, believed that the statements of the defendant were true, then you are instructed that the plaintiff would have the right to reopen his account against the defendant, and to recover the sum which might be found due him upon a fair and just accounting between himself and the defendant. If the defendant misled and deceived the plaintiff by making to him false statements in reference to the true con-

sideration of the sale made to Stevens, the law would not permit him to reap benefit or advantage from such statements to the prejudice of the plaintiff. But, gentlemen, it is your province to determine whether the defendant practiced a fraud upon the plaintiff by making false statements to him regarding the consideration of that sale, and you must look to the testimony in the case to satisfy yourselves on that point. The plea of limitations has been abandoned by the defendant, and the issue arising thereon will not be submitted for your consideration.

4. If, under the testimony and charge of the court, you should conclude to find a verdict for the plaintiff, you will then proceed to determine the amount to be awarded him. The testimony shows that, as an original stockholder, he was entitled to a four-sevenths interest in the Mexico Cattle Company; that the debts of the company amounted to \$23,329.44; and that he received from defendant, prior to the institution of this suit, \$2,000. Plaintiff would, of course, not be entitled to any part of the proceeds received by defendant from Stevens as the consideration of the sale made to Stevens, until all the Mexico Cattle Company debts were paid. After the payment of those debts, if there was a surplus left from the proceeds of sale received by defendant, the plaintiff would be entitled, if to anything, to four-sevenths of that surplus, less a credit of \$2,000, which he has received, with interest on the amount so found at the rate of 8 per cent. per annum from the 27th day of March, 1886. In direct connection with the amount of any verdict you see proper to find, you will recall the testimony bearing upon the sale by defendant to Stevens, its consideration, and the price at which the 27 shares of the Independence stock was received by defendant at the time of sale, and frame your verdict accordingly. If the 27 shares of Independence stock were received by defendant in his sale to Stevens at an agreed price and valuation of \$27,000, or less, then the plaintiff would not be entitled to a verdict for any amount. But, if the 27 shares of Independence stock were received by defendant from Stevens at the price and valuation agreed upon at the time of sale of \$35,000, then, if your verdict be in favor of the plaintiff, you will deduct from the \$35,000 the Mexico Cattle Company indebtedness of \$23,329.44, and award the plaintiff four-sevenths of the remainder, less \$2,000, with interest on the amount so found at the rate of 8 per cent. per annum from the 27th day of March, 1886. If you conclude that the plaintiff ought not to recover, you will simply say: "We, the jury, find for the defendant." You are the judges of the credibility of the witnesses, and of the weight you may attach to their testimony, and you are authorized in suits of this character to base your verdict upon a preponderance of the evidence. Give the case, gentlemen, that calm consideration which its importance demands, and let your verdict be responsive to the law and the testimony.

BENSON v. UNITED STATES.

(Circuit Court, N. D. New York. November 12, 1890.)

1. INDIAN COUNTRY—WHAT CONSTITUTES—FEDERAL JURISDICTION.

Act Cong. Feb. 19, 1875, (18 St. at Large, p. 830,) provided for the appointment of commissioners to survey and establish proper boundaries for the villages upon the Cattaraugus and Allegany Indian reservations in New York, and declared that all Indian leases within such limits should be valid, and that all municipal laws and regulations of New York might be extended over such villages. The boundaries were thereafter established, and the villages incorporated, and the general laws of New York were, by statute, (Laws N. Y. 1881, c. 188,) extended over such villages. *Held*, that one of such villages was not "Indian country," within the meaning of Rev. St. U. S. § 2139, prohibiting the introduction of spirituous liquor into "the Indian country."

2. SAME.

Respective of the act of 1875, such villages cannot be considered "Indian country," within the meaning of section 2139, as Act Cong. June 30, 1834, which was a revision of former acts regulating trade with Indian tribes, and which contained the provision now embodied in section 2139, in describing what lands should be deemed "Indian country" for the purposes of the act, included only lands outside the territorial limits of any state then existing, and, by providing that "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country," showed that by such country was meant territory "within the sole and exclusive jurisdiction of the United States."

At Law. On writ of error from district court.

Martin I. Townsend, for plaintiff in error.

M. W. Norton, Asst. U. S. Atty.

WALLACE, J. The question in this case is whether the village of Salamanca, a village of white inhabitants, containing a population of 4,000 persons, and incorporated under the laws of this state, is "Indian country," within the meaning of section 2139 of the United States Revised Statutes. For the purpose of having this question decided in this court, upon the trial in the district court, at the suggestion of both parties, the district judge made a *pro forma* ruling against the plaintiff in error; and, a verdict of guilty having been rendered, and sentence pronounced, the circuit and district judges, sitting together, have heard the question upon writ of error. That section declares that every person "who introduces or attempts to introduce any spirituous liquor or wine into the Indian country shall be punishable by imprisonment for not more than two years, and by a fine of not more than \$300." The plaintiff in error was licensed to sell spirituous liquors in Salamanca by the proper local authorities, conformably to the act of the legislature of this state of April 11, 1870, to regulate the sale of intoxicating liquors; and he has been convicted of an offense under section 2139 upon evidence which shows that he brought liquors to his place of business at Salamanca, and sold them there at various times, as by the terms of his license he was permitted to do. It is insisted for the government that, inasmuch as Salamanca is located within the exterior boundaries of the Allegany Indian reservation, the plaintiff in error was properly convicted, although there was no evidence of any attempt or intent on his part to introduce

liquors into the reservation beyond the village limits. The Allegany reservation is comprised of lands in Cattaraugus county, in this state, to which the title of the Seneca Nation of Indians has not been extinguished, except to the extent effected by the leases, and the provisions of an act of congress of 1875, hereinafter referred to. Prior to the time of the adoption of the federal constitution, the states of Massachusetts and New York had each claimed territorial sovereignty over the lands; but in 1786 the dispute was settled by a cession from Massachusetts to New York of the "sovereignty and jurisdiction of the lands," and from New York to Massachusetts of the "right of pre-emption of the soil from the native Indians." See *Blacksmith v. Fellows*, 7 N. Y. 401, 19 How. 366. November 11, 1794, a treaty was entered into between the United States and the Six Nations, in which the title to the lands within the Allegany reservation was acknowledged by the United States to belong to the Seneca Nation of Indians. In the progress of the general development of the country, settlements of whites grew upon this reservation, acquired names and coherency, and became flourishing communities. The Indians leased their lands within the boundaries of these settlements, and moved their domiciles elsewhere. Corporations obtained leases from the Indians, and built railroads through the reservation. Gradually the line of demarkation between the areas upon the reservation occupied by the whites and by the Indians became distinctly defined. At the time of the trial, the only resident Indians in Salamanca were two women, each of whom was married to a white man; and all the lands within the village limits were in the occupation of white men, under Indian leases. In 1875, congress passed an act to authorize the Seneca Nation to lease lands within the Cattaraugus and Allegany reservations, and to confirm existing leases. Act Feb. 19, 1875; 18 St. at Large, 330. This act provided for the appointment of commissioners to survey and establish proper boundaries and limits for the villages upon these reservations, including Salamanca. It also provided that all Indian leases of land within such limits should be valid upon the lessor and upon the Seneca Nation. It provided for successive renewals of these leases at the option of the lessees, their heirs or assigns. Finally it declared that all the municipal laws and regulations of the state of New York might be extended over and be in force within said villages. Thereafter, the boundaries were established, and the villages were incorporated, and in 1881 the state legislature (chapter 188, Laws 1881) extended the general laws of the state over the village of Salamanca, and the other villages named in the act of congress. The statute under which the plaintiff in error was convicted is found in that chapter of the Revised Statutes of the United States entitled: "Government of Indian Country." Section 2133 of the same chapter makes it a crime for any person other than an Indian to attempt to reside in the "Indian country" as a trader, or to introduce goods or trade therein, without a license from the government agent. Section 2134, the same chapter, makes it a crime for any foreigner to go into the "Indian country" without a passport from the department of the interior, or some other designated officer of

the government. Manifestly, the term "Indian country" has the same meaning in each of these sections. Consequently, if the contention for the government is sound, every merchant of Salamanca, and of the several other villages within the boundaries of the Allegany reservation, every "butcher and baker and candlestick maker," and every foreigner who visits one of them, is a criminal, and subject to severe punishment by fine and imprisonment by the laws of the United States. In view of the terms of the act of congress of 1875, the statement of this proposition is the only argument necessary to show that it cannot stand. There would be an unreconcilable antagonism between statutes which forbid and punish these things and the later law of congress which recognizes the existing situation in 1875, and sanctions them. The law of 1875 authorized the state to permit all the previously prohibited acts by allowing it to extend all its municipal laws and regulations over these villages. Whether this permission enlarged in the least the sovereignty of the state over the persons and personal rights of its own citizens need not be considered; it suffices that the state has acted upon it, and has extended over these villages, among other laws, that one which allows the traffic in spirituous liquors,—a law which was on the statute-book when the act of 1875 was passed. After this has been done, the traffic in spirituous liquors, as well as all other kinds of traffic in these villages, is sheltered by the consent of congress; and the rights of white persons to visit these villages, and to reside there, are no longer abridged by the provisions of the previous statutes. The present case might therefore be disposed of upon the consideration that the act of 1875 withdraws Salamanca, and the other villages upon the reservation, from the operation of the statutes for regulating the government of Indian country.

Irrespective of the act of 1875, the conclusion seems irresistible that none of these villages, and none of the Indian reservations within this state, are Indian country, within the meaning of the three sections of the Revised Statutes mentioned. It is unnecessary to consider the question of the power of congress to extend such statutes over the Indian reservations of this state, even to the exclusion of any state jurisdiction over the lands of the Indians, or over criminal offenses committed within their territory, so long as the reservations are occupied by Indians in tribal organization. The government of the United States has always regarded the Indian tribes as distinct communities, in a state of semi-independence and pupilage, between which and it certain international relations were to be maintained; and both the legislative and judicial departments of the national government have always emphatically asserted that the Indian tribes possess such a national character as to be within the treaty-making power of the constitution, and outside the sphere of state jurisdiction over their persons or their lands so far as the national authority has intervened. As early as in 1802, by the twelfth section of the act of congress for regulating trade and intercourse with the Indian tribes, it was declared that no purchase of lands made from any Indian or any Indian tribe or nation within the United States should be "of any validity in law or equity, unless the same be made by treaty or convention,

entered into pursuant to the constitution." In 1832, the supreme court, in *Worcester v. State*, 6 Pet. 515, declared that the whole intercourse between the United States and an Indian nation was by our constitution and laws vested in the government of the United States, and that within the territory occupied by such Indians in the state of Georgia the laws of Georgia had no force unless with the assent of the Indians themselves, or in conformity with treaties and acts of congress.

In the recent case of *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, an act of congress, giving jurisdiction to the courts of the United States over the crimes of arson, burglary, and murder, when committed against the person or property of an Indian or other person on an Indian reservation within a state, was upheld as constitutional by the supreme court. The court declared that the government of the United States has the right and authority, instead of controlling the Indian tribes by treaties, to govern them by acts of congress, and that, the Indians being necessarily subject to the laws which congress may enact for their protection, and for the protection of the people with whom they come in contact, the states have no such power over them as long as they maintain their tribal relations. But the question now involved is not one of the power of the national government over Indians or Indian reservations within the states; it is one as to the extent of its exercise by congress over Indian country under the trade and intercourse acts. A brief consideration will demonstrate that certainly since 1834 the Indian reservations of this state have not been embraced in the Indian country of the laws of congress. The term "Indian country" originated in the acts of congress passed in or prior to 1834 to regulate trade and intercourse with the Indian tribes. The act of June 30, 1834, which was a revision and repeal of the former acts regulating trade and intercourse with the Indian tribes, contained the identical provisions which are now embodied in sections 2133, 2134, and 2139 of the Revised Statutes. That act specifically described what lands in the United States were to be deemed Indian country for the purpose of the act, and thus defined what was meant by the term as used in the original statutes, from which the three sections are taken. The lands described comprised parts of the United States which were outside of the territorial limits of the then existing states. As interpreted by the supreme court in *Bates v. Clark*, 95 U. S. 204, the Indian country of this act comprised the lands west of the Mississippi river, to which the Indian title had not been extinguished, not within any state or organized territory, and the lands east of the Mississippi river to which the Indian title had not been extinguished, not within any state. The country east of the Mississippi, not within any state, was the region then under the government of Michigan territory, now constituting the states of Michigan and Wisconsin. All the "Indian country" east or west of the Mississippi was "lands not within any state." After this act was passed, and before the Revised Statutes were adopted, new territory had been acquired by the United States, new territorial governments had been established, and new states had been admitted to the Union; and when some of the new states were

admitted; and new territories were organized, provisions had been made in the organic law by congress that certain lands in the possession of the Indian tribes should not be deemed a part of the new state or territory. *The Kansas Indians*, 5 Wall. 756; *Harkness v. Hyde*, 98 U. S. 476; *Langford v. Monteith*, 102 U. S. 145. Indian lands which were not within any state in 1834 were now in the new states. New Indian country had been added to the national domain. Under these circumstances, the language of the act of 1834 was inappropriate to describe what lands should be deemed Indian country at the time of the revision and consolidation of the General Statutes of the United States. But although the former definition of "Indian country" was abrogated it may properly be referred to for interpretation. The omission of an inapplicable definition does not imply that in revising the statutes congress intended to enlarge the area of Indian country, or subject to the regulations of the Indian intercourse laws territory which for 40 years had not been included in the sphere of regulation. In *Bates v. Clark*, the supreme court interpreted the meaning of the term in the Revised Statutes by recourse to the definition of the act of 1834; and the court held that all the country embraced in the description of the act of 1834 remains Indian country, within the meaning of the Revised Statutes, so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or act of congress. In *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. Rep. 396, the question again arose as to what country, being Indian country under the act of 1834, was still Indian country under the Revised Statutes; and the court decided that the term, as used in the Revised Statutes, applies to all country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, except that within the boundaries of states, and that it embraces all territory within the boundaries of states actually occupied by Indians and excluded by statute or treaty from state jurisdiction. According to the opinion in that case, no territory with the boundary of the states, although it was Indian country in 1834, is Indian country under the Revised Statutes, unless it is excluded by treaty or statute from state jurisdiction, although actually occupied by Indians. Inasmuch as the Indian reservations of this state were not Indian country in 1834, and as no lands are now included within that country which were not within it then, the three sections of the Revised Statutes which have been mentioned have no application to these reservations. Some of the lands in the reservations of this state are now actually occupied by Indians, and the Allegany reservation, outside the villages, is occupied by Indians which still maintain their tribal relations. The state of New York always exercised its sovereign powers within these reservations, and since 1858, when the case of *New York v. Dibble*, 21 How. 366, was decided by the supreme court, its right to do so, so far as necessary to protect the property and persons of Indians in this state, and to preserve the public peace, has never been questioned. Among others, it has enacted

laws to punish the sale or gift of spirituous liquors to Indians. The conclusions thus reached lead to a reversal of the judgment of the district court.

COXE, J., concurred in the result, upon the ground that, under the provisions of the act of congress of February 19, 1875, (18 St. at Large, p. 330,) and the act of the legislature of New York of May 2, 1881, (Sess. Laws 1881, p. 288,) extending the municipal laws of the state over the villages of the Allegany reservation, the village of Salamanca, where the defendant resides, is not "Indian country," within the meaning of section 2139 of the Revised Statutes.

DROVERS' NAT. BANK OF UNION STOCK-YARDS v. ALBANY COUNTY BANK.

(Circuit Court, N. D. New York. December 1, 1890.)

BANKS AND BANKING—CONTRACT TO PAY DRAFTS—STATUTE OF FRAUDS.

In February, 1883, plaintiff bank wrote to the defendant bank: "G. was at our office to-day, and arranged for us to cash his stock tickets, and draw on him for the amount and exchange with the tickets attached. He referred us to you, saying you would say such drafts would be paid through your bank all right. Please advise us regarding it and oblige." Defendant replied February 13, 1883: "We will pay your drafts on G. with his stock tickets attached." Thereafter the plaintiff cashed such of G.'s stock tickets as were presented, and drew on him for the amounts, and forwarded the drafts with the tickets attached for collection of defendant. These transactions took place two or three times a week, and sometimes less frequently. The drafts varied from \$300 to \$12,000, and the aggregate from February 19, 1883, to November 8, 1888, was over \$600,000. The defendant paid the drafts and charged them to G., whether his account was good for them or not, but it refused to pay the two drafts in suit drawn November 7 and 8, 1888, for \$359.92 and \$4,789.05, respectively. *Held* that, considered with reference to the situation of the parties, and their subsequent acts evincing their own understanding, the letter of February 19, 1883, must be construed as a continuing promise, and not merely as one to pay drafts for stock tickets which the plaintiff had already cashed, or arranged to cash; and that the consideration was sufficiently disclosed to satisfy the statute of frauds.

At Law.

S. W. Rosendale, for plaintiff.

N. E. Kernan, for defendant.

WALLACE, J. The following facts were proved upon the trial in this case: Previous to February 16, 1883, and from that time to and including November 8, 1888, Michael Gillice, of Albany, N. Y., was a cattle dealer and purchaser of cattle at Chicago, Ill., where his brother acted as his agent, buying according to the customary course of the cattle trade in Chicago at the premises of the Union Stock-Yard & Transit Company. Upon purchases the seller gives the purchaser a ticket signed by the secretary of the company, stating the number, description, and weight of the cattle bought, with the name of the seller and buyer, which is in effect a certificate that the buyer has bought such cattle at the yard of the company. The aggregate purchase price is placed by the secretary

in figures on the back of the ticket, and below them is indorsed an order directing the bank, which has its place of business at the stock-yard, to pay for the number of cattle certified as purchased. The purchaser signs this order, and delivers the stock ticket to the seller, who uses it by getting it cashed at the bank named in the order, or at any other bank which is willing to cash it. Gillice did not keep an account at either of the stock-yard banks, but the Union Stock-Yard Bank had been accustomed to cash his tickets, and draw upon him for their amount, attaching the ticket to the draft, and forwarding both to the defendant for payment. During all this time, Gillice kept an account with the defendant. February 16, 1882, Gillice and the plaintiff entered into an arrangement by which the plaintiff was to cash Gillice's tickets when presented by holders at a specified discount, provided the defendant would agree to protect the drafts plaintiff should draw upon Gillice for the tickets cashed. Thereupon the plaintiff wrote to defendant the following letter, on the date of February 16, 1883:

"Mr. M. C. Gillice was at our office to-day, and arranged for us to cash his stock tickets, and draw on him for the amount and exchange with tickets attached. He referred us to you, saying that you would say such drafts would be paid through your bank all right. Please advise us regarding it, and oblige."

Shortly afterwards the plaintiff received from the defendant a reply to the foregoing letter, dated February 19, 1883, as follows:

"In reply to your favor of the 16th inst., we say that we will pay your drafts on M. C. Gillice with his stock tickets attached, by remitting the amount to your New York correspondent, or through our exchanges, as you prefer."

Thereafter, and until and including November 8, 1888, the plaintiff cashed such of Gillice's tickets for cattle purchases as were presented to it by its customers and other holders, and drew on him for the amount of the tickets, accompanying its drafts with the tickets, and forwarding the drafts and tickets to its correspondent for collection of the defendant. These transactions took place sometimes two or three times a week, and sometimes less frequently, and the drafts drawn varied in amount from \$300 to \$12,000; and the aggregate amount of tickets cashed and drafts drawn during the period from February 19, 1883, to November 8, 1888, was over \$600,000. The defendant always paid these drafts and charged them to Gillice, whether his account was good for them or not, it having collateral security for any advances made to him. But it refused to pay the two drafts in suit, one of which was drawn by plaintiff November 7, 1888, for \$389.92, and the other November 8, 1888, of \$4,789.05. These drafts were drawn by the plaintiff upon Gillice, and forwarded in the usual way for collection of the defendant with the tickets attached. Until after these drafts were forwarded, the defendant never informed the plaintiff of its purpose to terminate its obligation under its letter of February 19, 1883; but about that time Gillice became embarrassed, and the defendant lost the benefit of the collateral security it had theretofore had. The plaintiff and defendant were each corporations, organized

and doing business as alleged in the complaint. There was due for principal and interest upon the two drafts at the time of the trial the sum of \$5,811.66.

If the two letters read together amount to a promise by the defendant to pay such sums as the plaintiff might thereafter advance in cashing Gillice's stock tickets, and draw for upon him, there can be no fair doubt that the consideration is sufficiently disclosed by the writing within the statute of frauds. *Stadt v. Lill*, 9 East, 348; *Warrington v. Furber*, 8 East, 242; *Jarvis v. Wilkins*, 7 Mees. & W. 410. A promise to pay money for goods thereafter to be delivered, or services thereafter to be performed, is equivalent to a request by the promisor to the promisee to deliver the goods or perform the services. The more doubtful question in the case is whether the promise by the defendant is to be construed as a continuing one, or only as one to pay drafts for stock tickets which the plaintiff had already cashed, or arranged to cash, for Gillice. The meaning of the parties, as expressed in the two letters, is not altogether intelligible, and therefore it is competent to resort to extrinsic evidence, and consider the surrounding circumstances, the situation and relation of all the parties to the transaction, their previous course of dealing, and their subsequent acts evincing their own understanding, in order to ascertain the meaning of the language used. *Heffield v. Meadows*, L. R. 4 C. P. 595; *Field v. Munson*, 47 N. Y. 221; *Bank v. Myles*, 73 N. Y. 335. Read with the aid of this evidence, the more reasonable conclusion is that the promise of the defendant was understood by the parties as applying to future transactions, and should be treated as a continuing one. Judgment is ordered for the plaintiff for \$5,811.66 as of November 19, 1890.

In re Ross.

(Circuit Court, N. D. New York. November 30, 1890.)

1. HABEAS CORPUS—REVIEW—SENTENCE BY UNITED STATES CONSUL GENERAL.

Rev. St. U. S. §§ 4083-4085, vests in the ministers and consuls of the United States in Japan authority to arraign, try, and sentence all citizens of the United States charged with offenses committed in that country. The treaty between the United States and Japan, proclaimed June 30, 1858, provided that "Americans committing offenses in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws." Petitioner was confined in the Albany penitentiary under a sentence of the United States consul general for murder committed in Japan on an American vessel, while the petitioner was a member of the crew. *Held*, that the circuit court of the United States would not discharge petitioner on *habeas corpus*, on the ground that the consul general had no jurisdiction because petitioner was not a citizen of the United States; the consul general, the minister to Japan, the state department, and the president having held that, inasmuch as petitioner was a seaman on an American vessel, his *status* as a citizen of the United States, or at any rate as an American, within the meaning of the treaty, could not be questioned while he was under the protection of the flag.

2. CRIMINAL LAW—TRIAL BY UNITED STATES CONSUL—INDICTMENT—RIGHT TO JURY TRIAL.

Rev. St. U. S. § 4086, provides that jurisdiction in both civil and criminal matters shall in all cases be exercised in conformity to the laws of the United States, which are, so far as is necessary to execute the treaty, and so far as they are suitable to

carry it into effect, extended over all citizens of the United States in Japan, and over all others to the extent that the terms of the treaty justify or require. Sections 4117, 4119, direct the minister to Japan to prescribe the forms of process and the modes of executing the same, and the manner in which trials shall be conducted. *Held*, that neither presentment by grand jury nor a trial by a common-law jury is essential to the validity of the sentence.

Petition for Writ of *Habeas Corpus*.

Geo. W. Kirchwey, for petitioner.

John E. Smith, Asst. U. S. Atty., for respondent.

WALLACE, J. It appears by the petition and return in this case that the petitioner is now confined in the Albany penitentiary under a sentence of imprisonment for life, he having been originally sentenced to death by hanging, and that sentence having been commuted by the president of the United States to imprisonment for life. It further appears that the sentence was imposed by the consul general of the United States at Kanagawa, Japan, and approved by the United States minister resident in Japan, upon the conviction of the petitioner, after a trial before the consul general, of the crime of murder committed in the harbor of Yokahama, Japan, on board an American vessel, of which the petitioner was at the time a member of the crew. By the laws of the United States, the ministers and consuls of the United States appointed to reside in China, Japan, Siam, Egypt, or Madagascar are invested with judicial authority to arraign, try, and sentence all citizens of the United States charged with offenses against laws committed in their respective countries, and also with all the judicial authority in regard to civil rights, whether of property or person, necessary to execute the provisions of treaties between the United States and the countries to which they are respectively accredited. Their jurisdiction embraces "all controversies between citizens of the United States, or others, provided for by such treaties." Rev. St. U. S. §§ 4083-4085. Section 4086 of the Revised Statutes provides that such jurisdiction, in both criminal and civil matters, shall in all cases be exercised and enforced in conformity to the laws of the United States, which are, so far as is necessary to execute such treaties, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others, to the extent that the terms of the treaties justify or require. It further provides that—

"If neither the common law nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedy, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and insufficiency."

By sections 4117 and 4119 the ministers are directed to prescribe and promulgate the forms of process, the mode of executing the same, and the manner in which trials shall be conducted; and they are directed to transmit their regulations, orders, and decrees to the secretary of state, to be laid before congress for revision. Jurisdiction to try the petitioner was assumed by the consul general under the provisions of the treaty between the United States and Japan, concluded June 15, 1857, and

proclaimed June 30, 1858, which, among other things, contains the following stipulation:

"Americans committing offenses in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws. Japanese committing offenses against Americans shall be tried by the Japanese authorities, and punished according to Japanese law."

It is insisted for the petitioner that the sentence imposed upon him is void because the consul general did not have jurisdiction to try a person not a citizen of the United States; that, if he had jurisdiction in the case, the petitioner was entitled to be placed on trial only upon the presentment or indictment of a grand jury, and to be tried by a common-law jury; and that if the statutes which confer judicial powers and criminal jurisdiction upon ministers and consuls do not preserve to the accused the right to be tried only after presentment or indictment of a grand jury, and then by jury, these statutes are unconstitutional. The questions which are thus presented are of great interest and importance. They have never been considered by any of the circuit or district courts, or by the supreme court of the United States, in any adjudications which have been brought to the attention of this court. Yet during the 30 years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offenses before these officers without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders, and decrees of ministers, and it must be presumed that the regulations, orders, and decrees of ministers, prescribing the mode of trial, have been transmitted to the secretary of state, and by him been laid before congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects modal, as well as substantial, regular, and valid under the laws of congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative, and legislative departments of the government for this long period of time. It was the view of the consul general, that, inasmuch as the petitioner was a seaman upon an American vessel, his *status* as a citizen of the United States, or at any rate as an American, within the meaning of the treaty with Japan, could not be questioned while he was under the protection of the flag; and this view was approved by action of the minister to Japan, the state department, and the president. Under these circumstances, this court ought not to adjudge that the sentence imposed on the petitioner, and modified by the president, was utterly unwarranted and void, when the case is one in which his rights can be adequately protected by the supreme court, and when a decision by this court, setting the petitioner at liberty, although it might be reversed, would be practically irrevocable.

UNITED STATES *v.* BYRNE.

(District Court, E. D. Missouri, E. D. December 9, 1890.)

**1. OFFENSES AGAINST POSTAL LAWS—EMBEZZLEMENT OF LETTERS—INDICTMENT—DUP-
LICITY.**

Though under Rev. St. U. S. § 5467, "embezzling a letter" and "stealing its contents," are separate offenses, and may be charged as such, the offenses are of the same grade and subject to the same penalty, and hence they may both be charged in a single count of the indictment, stating the whole transaction as a single offense, when both acts are committed by the same person at the same time, and constitute a single continuous act.

2. SAME—REPUGNANCE.

Averments in such an indictment that the letter was secreted, embezzled, and destroyed, and that its contents were stolen, are not repugnant.

On Demurrer to Indictment.

The first count of indictment is as follows: "That Lee M. Byrne, late," etc., "at," etc., "heretofore," etc., "being then and there a person employed in a department of the postal service of the United States,—that is to say, a clerk in the post-office of the United States at Piedmont, in the state of Missouri,—unlawfully and feloniously did then and there secrete, embezzle, and destroy a letter then and there intrusted to him, said Lee M. Byrne; and that came into his possession as such post-office clerk, and which said letter was then and there registered matter, and intended to be conveyed by mail, and forwarded through said post-office at Piedmont, and delivered to one Mrs. S. M. W., to whom said letter was then and there addressed, at the post-office of the United States at the city of Detroit, in the state of Michigan, which said letter then and there contained the certain articles of value, that is to say, one United States treasury note X of the denomination of ten dollars, of the value of ten dollars, [nine other notes are then described,] and said ten articles of value being then and there the property of one C. H. T., and which said letter and each of said articles of value, the said Lee M. Byrne did then and there feloniously and unlawfully embezzle, and fraudulently and feloniously convert to his own use, and did then and there feloniously steal and take each of said articles of value out of said letter, and carry away the same, contrary to the form of the statutes of the United States in such case made and provided, and against its peace and dignity." The second count is for another letter to another party with other notes. The indictment was demurred to for the reasons, among others, that the counts were bad for duplicity, and that the allegations were repugnant.

George D. Reynolds, U. S. Atty.

C. D. Yancey and *C. A. Davis*, for defendant.

THAYER, J. In both counts of the indictment it is averred, in substance, that the defendant "feloniously secreted, embezzled, and destroyed" the letter therein described, and "feloniously stole and took out of said letter" the articles of value therein contained, to-wit, treasury

notes and silver certificates. It may be conceded that under the provisions of section 5467, on which this indictment is framed, "embezzling a letter" and "stealing its contents," are separate offenses, and may be charged as such. *Vide U. S. v. Taylor*, 1 Hughes, (U. S.) 514; *U. S. v. Harmison*, 3 Sawy. 556; and *U. S. v. Falkenhainer*, 21 Fed. Rep. 624. It may be further conceded that it is a fundamental rule of criminal pleading that two offenses should not be alleged in the same count, and that a count is ordinarily defective in which more than one offense is alleged. Still the court is of the opinion that the present indictment cannot be successfully attacked on the ground of duplicity in the several counts. There seems to be a well-defined exception to the rule of pleading above stated to the following effect: When two acts, capable of being counted upon as distinct offenses, are committed by the same person, at the same time, so that they may together be regarded as a single continuous act, it is optional with the pleader to count upon them separately as distinct offenses, or to state the whole transaction in a single count as constituting a single offense, provided both offenses are of the same grade, and the punishment for each is the same. If the latter method of stating the offense is adopted, but a single penalty can be imposed. In *Com. v. Truck*, 20 Pick. 356, the indictment charged in one and the same count that the defendant "broke into a shop with intent to steal," which was a felony, and that "he did then and there steal," which was likewise a felony. The court held that the count was not bad for duplicity. So in the case of *Hinkle v. Com.*, 4 Dana, 518, an indictment charged the defendant in one and the same count with "setting up a gaming table," and "keeping a gaming table and inducing others to bet thereat,"—both of which were independent offenses. The court held the count good, saying, in substance, that, as they were co-operating acts constituting altogether one offense, when committed by the same person at the same time, an indictment for the combined act might properly charge the whole transaction in one count, and but one punishment could then be inflicted. The case at bar falls within the principle of these decisions. The indictment alleges that the defendant secreted and embezzled a letter, and stole its contents. The acts in question are alleged as having been committed at the same time, and as together constituting a single act or transaction. The two offenses are of the same grade, and the punishment of each is the same. The defendant is none the less guilty of embezzlement of the letter, because he stole its contents, and *vice versa*. In other words, the two allegations contained in the counts are neither inconsistent or uncertain. Under the circumstances, if the government sees fit to plead as it has done, thereby making one offense out of a transaction that it might have broken up into two, it is, in my judgment, entitled to do so, and the defendant has no just cause for complaint. The objection that the allegations of the indictment are repugnant, "because it is first alleged that the letter and its contents were destroyed, and is subsequently alleged that the contents were embezzled and stolen," seems to be founded on a misconception of what is averred. The indictment does not aver that the contents of the letter were destroyed. It avers that the letter was

secreted, embezzled, and destroyed, and that the contents—to-wit, treasury notes and silver certificates—were stolen. So far as I can see the averments are not repugnant, and the demurrer must be overruled. It is so ordered.

NATIONAL PROGRESS BUNCHING-MACHINE CO. v. JOHN R. WILLIAMS CO.

(Circuit Court, S. D. New York. December 8, 1890.)

1. PATENTS FOR INVENTIONS—CIGAR-BUNCHING MACHINE—COMBINATION.

The ninth claim of letters patent No. 331,676, granted December 1, 1885, to Nicholas H. Borgfeldt and Adolph C. Schutz, covers a machine designed to make a cigar bunch from scrap-tobacco. The tobacco is placed in a cylinder, which throws out measured quantities through a chute into a funnel. The latter is provided with a plunger, which compacts the tobacco into form. It is then delivered upon an apron, and rolled into a completed bunch, which is then deposited in a receiver. The claim is as follows: "In a bunch machine, the combination of the cylinder, B, having notched disk, D, chute, C, with the reciprocating hopper, I, reciprocating plunger, L, apron, M, sliding frame, N, having roller, u, and a bunch receiver, R." It appeared that each element claimed was old, and that each performed the same function when acting separately as it performed in the article patented. *Held*, that the claim for combination could not be sustained, as the bunch receiver had no connection with the operation of the machine, and was meant simply to hold the manufactured article.

2. SAME—INFRINGEMENT.

In view of the prior state of the art, and the fact that the claim specifically refers to the drawings by letter, it will be strictly construed, and a machine producing similar results will not be held an infringement unless it contains the features enumerated.

In Equity.

This is a bill in equity filed to restrain the defendant from infringing letters patent No. 331,676, granted December 1, 1885, to Nicholas H. Borgfeldt and Adolph C. Schutz, for an improved cigar-bunching machine. The invention relates to a machine designed to produce automatically the inner part, or bunch, of a cigar:

"The machine is adapted to produce such a bunch with a filler of scrap-tobacco, to measure the proper quantity of the scrap-tobacco for each bunch, to transport the same to the binder, to press the filler into the binder, and then to roll the binder around the filler, so as to complete the bunch, depositing the latter in condition for immediate and convenient use."

The machine is provided with a distributing cylinder having mechanism for measuring the scrap-tobacco and for discharging it in successive doses, each dose containing the exact quantity of tobacco necessary for one bunch. A reciprocating hopper, provided with a reciprocating plunger, receives the tobacco from the chute of the cylinder, compacts the bunch, and presses it into the binder. The machine is further provided with a sliding and tilting binder-rest combined with a fixed apron, roller, and mechanism for moving the slide and roller. These operate in such a manner that when the filler has been pressed into the binder, the sliding frame, roller and apron co-operate to roll the binder around the filler. The completed bunch is then deposited in the proper recep-

tacle from which it is taken by an attendant to be molded and finally covered with a wrapper in the ordinary manner of manufacturing cigars. The ninth claim only is involved. It is as follows:

"(9) In a bunch-machine, the combination of the cylinder B, having notched disk D, and chute C, with the reciprocating hopper I, reciprocating plunger L, apron M, sliding frame N, having roller *u*, and a bunch-receiver R, substantially as specified."

The defenses are *First*, non-infringement. *Second*, anticipation. *Third*, that the ninth claim covers an aggregation and not a patentable combination. *Fourth*, that the claim lacks patentable novelty. *Fifth*, that the claim does not describe an operative machine. *Sixth*, that complainant's title is defective, another company holding the exclusive right to manufacture, use and sell under the patent for the state of New York.

Arthur v. Briesen, for complainant.

Charles C. Gill, for defendant.

COXE, J. The machine covered by the ninth claim of the patent is designed to make a cigar bunch—which is all of a cigar minus the outer wrapper—from scrap-tobacco. The tobacco is placed in a large receptacle or cylinder which throws out accurately measured quantities, through a chute, into a vertically movable funnel, each dose being sufficient for one bunch. The funnel is provided with a plunger which descends upon the tobacco and compacts it into a form approximating a cigar. It is then delivered upon an apron on which a leaf of tobacco called a "binder," has been placed and is rolled, by means of a traveling roller, into a completed bunch. This bunch is deposited in a clamp, or receiver, where it is held intact until removed by hand. The claim covers a bunch machine having the following features: *First*, the cylinder B, having notched disk D and chute C. *Second*, the reciprocating hopper I. *Third*, the reciprocating plunger L. *Fourth*, the apron M. *Fifth*, the sliding frame N, having roller *u*. *Sixth*, the bunch receiver R. Experts and counsel agree that these elements, considered separately, were old and well known. The complainant has vied with the defendant in demonstrating that each was "thoroughly old" long prior to the date of the patent. The complainant's brief states the proposition as follows:

"Now, therefore, it is clear from the foregoing, that the complainants cannot be regarded as claiming a new combination of new elements, but that they seek to hold by their patent a new combination of old elements—old, well known elements—for the purpose of producing a new result."

Not only was each element old, but sometimes two and sometimes three had been united to do similar work to that of the complainant's machine. Machines for making cigars were known over 40 years ago, and since then there has been a steady evolution in the art. Previous to the patent, machines were in use which discharged the tobacco in accurate doses, compacted it by pressure into the shape of a cigar, and rolled the binder and filler into the finished bunch. The machines in controversy

show the progress which time would naturally develop in a busy and lucrative industry.

But two defenses will be examined. *First*, does the claim cover a combination or an aggregation? and, *second*, does the defendant infringe?

In order to be patentable a combination must not only be new but it must produce a new result, or an old result in a better way. If the combination be old and the result new, or if the result be unchanged and the combination new, in either case there is no patentable novelty. In a combination of old elements all the parts must so act that each qualifies every other. If they act independently, or if one acts independently of the others, it is an aggregation. It is not enough that these independent parts are conveniently associated in one machine, if each performs the same function it did before they were united. They must be so connected that the new result is due to their co-operative action. *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. Rep. 1034; *Pickering v. McCullough*, 104 U. S. 310; *Packing Co. Cases*, 105 U. S. 566; *Hailes v. Van Wormer*, 20 Wall. 353; *Trimmer Co. v. Stevens*, 53 O. G. 2044, 11 Sup. Ct. Rep. 150; *Stephenson v. Railroad Co.*, 114 U. S. 149, 5 Sup. Ct. Rep. 777; *Beecher Manuf'g Co. v. Atwater Manuf'g Co.*, 114 U. S. 523, 5 Sup. Ct. Rep. 1007; *Machinery Co. v. Bunnell*, 27 Fed. Rep. 810; Merwin on Patentability, 401.

The ninth claim must be considered as covering, irrespective of connecting mechanism, the combination of elements therein enumerated, and, tested by the foregoing rules, it is somewhat difficult to perceive what new result is produced by their united action. That the machine is better than any which preceded it is sufficiently established; but it is argued by the defendant that, although a number of old devices and instrumentalities are placed in convenient juxtaposition, each acts just as it did before. The cylinder will, it is said, discharge the dose in the old way irrespective of the fact that the hopper and plunger are under the chute. The hopper and plunger will compact the tobacco in the similitude of a cigar whether the tobacco is dropped from the chute or is placed in the hopper by hand. The roller will roll and the receiver will hold the bunch in the same manner separately as in their present position. And yet it is thought that the claim might be sustained for a combination were it not for the introduction of the last element—the bunch receiver. The result to be accomplished is the finished bunch. This object is attained by the successive action of the cylinder, the hopper and plunger, and the rolling apparatus. It is true that if one of these were removed the others would act, but the bunch would not be made in a manner so convenient and advantageous. For these elements a combination claim might be sustained within the doctrine of the following authorities: *Forbush v. Cook*, 2 Fish. Pat. Cas. 668; *Hoffman v. Young*, 2 Fed. Rep. 74; *Birdsall v. McDonald*, 1 Ban. & A. 165. But the introduction of the bunch receiver renders the application of these cases to the claim in question, at least, exceedingly doubtful. What reciprocity can there be between the clamp at the end of the rolling table and the cylinder at

the top of the machine? In what way does the cylinder act upon the clamp or the clamp upon the cylinder? Remove either and the other would perform its function unimpaired. The clamp is simply a convenient device for holding the completed bunch. Its very name, "bunch-receiver," would seem to preclude its being a part of the combination. A combination produces something which, when finished, is placed in a receptacle. The receptacle adds nothing to the manufactured thing—it simply holds it. To use the language of the complainant's expert: "Such bunch-receiver is entirely independent and outside of the rolling apron." All action of the other parts of the machine ceases before the clamp begins to perform its office. The bunch (the result) is finished, and rather than have it fall to the floor, or into a box, or into the hand of the operator, the patentees thought it convenient to provide, what complainant's counsel aptly terms, "a mechanical hand" to receive it. This hand has no more to do with the operation of the cylinder, the reciprocating plunger, or the roller, than would a hand of flesh and blood, if placed at the end of the table to catch the bunch. Test it by carrying the operation a step or two further. It is said that the cigar is taken from the clamp by the operator, who places it in a cigar mold and applies the final external wrapper. Assume that the mold is located directly under the clamp, with proper machinery arranged to deposit the bunch in the mold and to convey it to an automatic wrapper-applying device, and again to a cigar box, where it is packed and prepared for the market. Can it be that these structures—the mold, the wrapper-applying machine and the box—could be added to the elements of the claim and included in a valid combination? And yet these also are the progressive but independent steps in accomplishing the desired result—a cigar ready for the smoker. There is no more combination between the cylinder which acts at the beginning of the bunch making operation and the receptacle for holding the bunch at the end, than there is between a canal-boat which receives the grain from the elevator chute, and the bin from which the grain is taken; no more than there is between the knife of the guillotine, and the basket which catches the head of the victim. In a recent case the supreme court decided that where the mechanical operation and effect of the patented devices are the same, whether one of the elements of the claim is present or absent, there can be no patentable combination between those devices and that element. It is a mere aggregation. *County of Fond du Lac v. May*, 53 O. G. 1884, 11 Sup. Ct. Rep. 98.

But irrespective of these views, it is thought that there is no infringement. It will be observed that the claim is more than ordinarily specific. Every element is designated by a letter restricting it to the mechanism shown in the description and drawings. The complainant contends that the claim may be construed substantially as follows: In a bunch machine, the combination of a measuring and dose-distributing device, having a chute or outlet, with a dose-receiving, shaping and compacting device, a bunch-rolling and binder-applying device and a bunch-receiver or clamp, substantially as specified.

It is not necessary to consider what might have been the result had such a claim been allowed. It is enough that there is no such claim in the patent and none that can be so broadened by construction. Even if the state of the art permitted it, and it does not, the use of language unusually concise and technical makes the parts, thus referred to, essential features of the claim, and precludes a loose construction. The courts are not to consider what the patentees might have patented, but what they did patent. Here they have accepted a claim limited to the mechanism shown in the description and drawings. The court cannot now construct for them a different claim. *Keystone Bridge v. Iron Co.*, 95 U. S. 274; *Snow v. Railroad Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. Rep. 493; *Seymour v. Osborne*, 11 Wall. 546; *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. Rep. 376; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. Rep. 72; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. Rep. 236; *Corn-Planter Case*, 23 Wall. 181, 218; *McCormick v. Talcott*, 20 How. 402; *Norton v. Haight*, 22 Fed. Rep. 787.

The case of *Sewing-Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, relied on by the complainant, is not in point as appears from the following quotation from the opinion:

"Morley, having been the first person who succeeded in producing an automatic machine for sewing buttons of the kind in question upon fabrics, is entitled to a liberal construction of the claims of his patent. He was not a mere improver upon a prior machine which was capable of accomplishing the same general result; in that case his claims would properly receive a narrower interpretation."

Morley was a pioneer, he claimed his invention broadly and the court said he was right. These patentees are not pioneers. They are improvers upon prior machines. They have claimed the features of their machine narrowly, and the court is of the opinion that they were right in so doing. Adopting these well-known rules of construction it is clear that the defendant does not infringe.

The proposition that the defendant's machine contains the six enumerated features of the claim, cannot be maintained. The complainant's theory seems to be that the succinct language of the specification may be ignored, and that the defendant's machine contains the "essential elements" of the claim, if construed as above. In other words, if the claim is for a combination containing four main sub-elements operating substantially like the apparatus described, the defendant infringes. Perhaps this is so, but, as before stated, the patent does not contain such a claim. The defendant does not use a cylinder or a notched disk, and there are essential points of difference in the defendant's compacting and rolling apparatus. The same rules of interpretation must apply to all parts of the claim. It will not do to place a broad construction upon one part and a narrow construction upon another part. If any measuring and distributing device may be substituted for "the cylinder B, having notched disk D, and chute C," it would seem to be equally clear that any compacting device may be substituted for "the re-

ciprocating hopper I, and reciprocating plunger L," and so on. In view of the prior art and the explicit language of the claim it is thought that such a loose interpretation is not permissible, and that the court would not be justified in omitting features expressly designated as essential to the combination. But if the claim were so construed it would then be broad enough to include some of the prior Williams structures, and so would be anticipated. It follows that the bill must be dismissed.

PULLMAN'S PALACE CAR CO. v. BOSTON & A. R. R. CO. *et al.*

(Circuit Court, D. Massachusetts. October 9, 1890.)

1. PATENTS FOR INVENTION—VESTIBULE CAR—CONNECTIONS—NOVELTY.

The object of the invention for which letters patent No. 403,137, were granted to George M. Pullman, May 14, 1889, was to provide a continuous connection between the contiguous ends of passenger railway cars, consisting of an inclosed passage-way on the end of each car, the solid parts being connected by a loose joint, or buffer, made of some flexible material so constructed as to accommodate itself to the movement of each car, and yet restrained from moving sidewise so as to obstruct the passage-way, and forming, at all times, a complete vestibule connection. The invention possessed great advantages over the old open platform cars. There had been no prior attempts to construct a vestibule train having the motions and restraint of motions of the patent. Some prior experiments in the construction of vestibule cars had been abandoned, and, in others, the object of the vestibule had been for purposes of ventilation or to diminish the resistance of the atmosphere to the passage of cars. *Held*, that the patent was not void for want of novelty.

2. SAME—ANTICIPATION.

A patent was granted November 15, 1887, to H. H. Sessions for an improvement in the construction of railroad cars. The specification stated that the invention consisted in the application to the cars of a frame-shaped plate arranged in a vertical plane parallel with a vertical transverse plane passing through the car-body, and projecting, by means of backing springs, for a short distance beyond the end of the car, and the purpose was stated to be (1) to diminish the racking effect upon a car-body when suddenly brought from a state of motion to a state of rest, and *vice versa*; and (2) to diminish the tendency to a swaying movement when a train is running rapidly. The specification also stated that the improvement, as shown in the drawings, was exhibited in connection with another improvement in car construction, consisting of a vestibule attachment; and that the vestibule feature was no part of the invention claimed. The Sessions application was filed about two weeks only before the Pullman application, and the patentees had been working together. The drawings in the two patents were almost identical, but, on a bill for infringement of the Pullman patent, Sessions, as a witness, limited his claim to exactly the description contained in his specification. *Held*, that the Pullman patent was not anticipated by the Sessions patent.

3. SAME.

The fact that the Pullman application was at first rejected by the patent-office, mainly on reference to the prior Sessions and another prior patent, and was not granted until after the original specifications and claims were rewritten in great part,—Pullman disclaiming anything contained in the Sessions patent,—and after an affidavit by Pullman that he completed his invention before the filing of the Sessions application, does not prove priority of invention in Sessions, where it does not appear on what ground the Pullman patent was finally granted, and there was nothing in the patent, as allowed, which was not in the original application.

4. SAME—INFRINGEMENT.

In the Pullman patent, an arch-plate was to be so secured to the buffer-plate as to be capable of the same motions and restraint of motions as the latter; and, in the preferred construction, it was riveted to the buffer-plate. *Held*, that a structure in which the only important difference from the Pullman patent was that the arch-plate was hinged to the buffer plate was an infringement of the Pullman patent.

In Equity.

Chauncey Smith, Charles K. Offield, Frederick P. Fish and Wilmarth H. Thurston, for complainant.

George Payson and Causten Browne, for defendants.

COLT, J. The bill in this case alleges infringement of letters patent No. 403,137, granted May 14, 1889, to George M. Pullman, for a new and useful improvement in solid vestibule connections between railroad cars. The description and object of the Pullman invention is carefully set out in his patent. The specification says:

"The object of my invention is to provide suitable means whereby there may be made a continuous connection between contiguous ends of passenger railway cars, this connection being an entirely closed passage-way, preferably of the width of the car platforms, and serving at the same time as a vestibule for entrance and exit to the respective ends of the cars, the connection between the solid parts forming a vestibule being made of flexible or adjustable material, so as to constitute a loose or flexible joint that will permit of sufficient movement of each unit car in travel, but at all times preserving a complete vestibule connection between respective cars. * * * The problem is to hold each bellows so firmly to its car that it will maintain its place when the car is uncoupled from others; *second*, to so support them that when cars are coupled the ends of adjoining bellows or connections take their relative proper positions, so as to form a continuous passage without any necessity of manipulating the bellows or flexible connections; *third*, to provide a continuous flooring between the cars; *fourth*, so to combine the parts that both the flexible connections and the flooring shall be so supported that the cars may approach nearer and remove further from each other without disturbing either the continuity of the flooring or that of the bellows or inclosed flexible passage-way; *fifth*, that the cars may, as in traveling around curves they must, have the longitudinal line passing through the center of one car at an angle with that passing through the center of another car without disturbing the continuity of the foot-passage, or causing open spaces between the ends of adjoining flexible passage-ways."

The patent *first* describes what is called a "vestibule," which is formed by inclosing the platform, except at the end, by means of a roof and doors; and, *second*, a vestibule connection which consists of an arch or face-plate and a bellows-like structure attached at one edge to the arch-plate, and at the other to the outer end of the vestibule. As cars in a moving train increase and decrease their distances with respect to each other, and also change their angles with reference to each other when rounding curves, it follows, that, in order to make a fairly tight joint between the connections of opposite cars, the bellows must be extensible and capable of being shut up on one side, while they are opened on the other, and that the face or arch plate, to which these bellows are attached, must be capable of traveling in and out from the end of the car, and also of turning, as it were, on a vertical axis, so that its two edges can occupy either the same or different distances from the end of the car. It is also necessary that the face-plate shall be restrained from moving bodily sidewise when running on a curve, because, as a result, the pas-

sage-way might be obstructed. It is these motions and restraint of motion which constitute the essence of the Pullman invention. The patent states:

"It [the arch-plate] can move in and out from the platform, it can oscillate, and nevertheless a vertical line drawn through its center will always practically be in a vertical plane passed longitudinally through the center of the car, and it must be supported either from the buffer-bar or by other means of the same character, so as to be capable of thus moving."

To the arch-plate is secured the buffer-plate, and the patent states that it has the same motions, and is restrained in the same manner, as the arch-plate. The patent further says:

"This buffer-plate on one car could not have its acting-face coincident with a similar buffer-plate on an adjoining car when the two cars are rounding a curve, unless it could change its angle with reference to a longitudinal line passing through the center of the car, so that it can be at times at right angles to such a line and at times at various other angles. The support of the buffer-bar, before described, not only permits these changes of angular positions, and the in-and-out motions of the buffer-bar, but prevents its center from leaving a horizontal longitudinal line passing through the center of the car to which it is attached, so that the center of the buffer-bar is always, whether projected or shoved in, practically in line with the center or middle of the platform. The mode of supporting this buffer-bar must be such as to permit it to have these motions so long as the buffer-bar is permitted to move as described, and, at the same time, have its center restrained, so that it can move only in a certain path, as before described."

In the form of the Pullman invention described in his patent, the arch-plate is riveted to the buffer-plate, and the buffer-plate is mounted upon a spring-extended buffer-rod. Upon this rod is mounted a cross-bar, or equalizing bar, in such manner that it can move out and in with the buffer-rod, and at the same time oscillate upon its center. Two rods are attached to the ends of this cross-bar, not firmly, but by a sort of ball and socket joint, in such manner that the cross-bar may change its angles to horizontal lines drawn perpendicular to the length of the car, while the rods always remain substantially parallel with the sides of the car. These rods pass through mortises, or guide-plates, made in or supported by the transverse timbers of the car, and are thus confined in such manner that they can slide outward and inward in the direction of their length, but cannot practically move in any other direction. These rods at their outer ends project beyond the outer cross-beam of the car, and are there pivoted to the buffer-plate. This mechanism permits the forward-and-back and oscillating motions, and prevents any lateral motion, as before described. The first claim of the patent is as follows:

"(1) The combination, substantially, as hereinbefore set forth, of a face-plate forming the open ends of a vestibule-extension to a railway-car when not coupled with another car in a train, and a buffer-plate which is pivotally connected with a spring-extended buffer-rod, and arranged, as described, to be capable of oscillating on a fixed center, but restrained by guide-rods, as described, to compel its center of oscillation to move only in a line passing longitudinally and horizontally through the center of the car, the said buffer-plate and the face-plate of the vestibule connected therewith being free to move angularly with such fixed longitudinal line of their movement."

The second claim is for the combination of the elements of the first claim with the threshold, or foot-plate, when all three have the motions and are restrained as described. The third claim is not in controversy. The fourth claim is for the combination of the arch-plate and flexible connection, when the arch-plate has the motions and is restrained as described. The fifth claim is for the combination of a car-body extension, which incloses the platform, and is provided with doors, bellows-like connection made of flexible material, face-plate, and foot-plate, when the face-plate and foot-plate have the motions and are restrained as described.

The first ground of defense I shall consider is that the Pullman patent is void for want of novelty in view of the prior state of the art. It appears by the record, that Pullman ran his first vestibule train early in 1887, between Chicago and Jersey City, on the Pennsylvania Railroad, and that, in December, 1889, these cars had been placed upon sixty-one railroads of the United States, representing a mileage of more than 91,000 miles. Of the great advantages of the vestibule system over the old open platform cars, both in respect to the safety and convenience of passengers, there can be no doubt. Where a patented improvement possesses such marked utility, and has so speedily and universally come into public use, the court should hesitate to declare the patent invalid for want of novelty, because these circumstances tend strongly to prove invention. The railroad passenger traffic of the country is immense, the dangers incident to the open platform connection between cars are well known, and the fact that an inventor has succeeded in overcoming this danger to human life, and at the same time has materially increased the comfort of railway travel, should not escape the mind of the court in dealing with the question of invention. Considering the amount of thought in the country directed toward improvements in railway mechanism, whereby greater safety and comfort may be secured to the traveling public, it hardly seems possible that the Pullman vestibule system, in view of what it has accomplished, and the immediate recognition of its merits, was the result of the exercise merely of mechanical skill, and, therefore, not patentable under the laws of the United States. Assuming that Pullman, and not Sessions, (a question to be presently considered,) was the inventor of that which is new and useful in the Pullman patent, I do not think it can be seriously questioned that the combinations covered by the first, second, fourth, and fifth claims of the patent are not found in the prior art. The prior attempts, so far as such attempts had been made to construct a vestibule train, had proved failures, or nearly so; at least, I find no prior attempt to construct a solid vestibule train having the motions and restraint of motion which are the prominent features of the Pullman patent. Some of the prior experiments in the construction of vestibule cars appear to have been abandoned. In other cases, the main object of the vestibule seems to have been for purposes of ventilation, or to obviate the loss of power which is caused by the space or break in the general line of cars caused by the atmosphere acting on the end of each car, rather than in securing a continuous passage-way and connection between the cars. The problem which Pull-

man undertook to solve was first shown in his patent. Under these circumstances, I do not deem it necessary to consider all the prior patents which are introduced as anticipations, to a greater or less extent, of Pullman, but it will be sufficient to refer to those which are mainly relied upon. In the English Bessemer patent of 1846, the patentee defines his invention, and states that its purpose is to diminish the resistance opposed to the transit of the cars by the atmosphere. To do this, he incloses the space between the carriages with a hood similar to that of the hooded chaise, or, instead thereof, he forms a fixed hood, or projection, of wood or other rigid material, which projects so far as the ends of the buffer-stocks, and forms externally a continuation of the carriage body. I find nowhere in the Bessemer patent the arch-plate of Pullman, so supported as to have the motions and restraint of motion described in the claims of his patent. And this same observation may be made respecting the English Chidley patent of 1865, and the Smith patent of October 24, 1882. Much stress seems to be placed by the defendants upon the Atwood patent of July 10, 1855. It is true that, for several years prior to 1860, cars with the Atwood equipment were run upon the Naugatuck Railroad, in Connecticut. The patent was for an improvement in ventilating cars. Atwood describes in his patent a flexible connection attached to each end of each ear, and, therefore, the cars had a kind of vestibule connection, but the flexible connections of the Atwood patent are not supported by any rods like those of Pullman, and they are not restrained from any lateral motion. In other words, I do not find in the Atwood device those motions and restraint of motion which lie at the basis of the Pullman invention. Leaving out the Sessions patent, I can discover nothing in the prior state of the art which anticipates the Pullman patent, or which should render it void for want of patentable novelty.

I now come to the most serious defense to this suit. It is said that the patent granted to H. H. Sessions, November 15, 1887, describes what is now claimed as the Pullman invention. In other words, that, if you take the Sessions invention out of the Pullman patent, it becomes void for want of patentable novelty, or, at most, it must be so limited in its scope that the defendants do not infringe in the use of their present apparatus. To express the proposition in another form, the defendants contend that the oscillation of the car about a fixed center, or the so-called "motions" and "restraint of motion," which are made the principal features of the Pullman patent, are found in Sessions's, and that the additions of a vestibule character which Pullman made, such as attaching the bellows-like structure to the end of the car, do not constitute a patentable difference from Sessions's, because this feature is found in the old Atwood patent; and that, therefore, the Pullman patent is void for want of invention. It is admitted that Pullman may have improved the vestibule connection between cars, and that this was his only object, but that all beyond that which is found in his patent was the invention of Sessions. Sessions is general manager of the Pullman Company, at Pullman, Ill. He applied for his patent April 29, 1887, two weeks be-

fore the Pullman application, which was filed May 13, 1887. The fact that these applications were filed about the same time go to prove that Sessions thought that he had invented something, and that Pullman believed he had invented something. Let us turn now to the Sessions patent and see what was his invention. The patent is for an improvement in the construction of railroad cars. The specification says:

"The invention hereinafter particularly described is embodied in the application to the individual cars, which when coupled will compose a train, of a frame-shaped plate arranged in a vertical plane parallel with a vertical transverse plane passing through the car-body and projecting, by means of backing-springs, for a short distance beyond the end of the car. The height of said frame-plate for the best results should be substantially that of the height of the car to which it is attached, and the same should be so shaped as to allow a free communication between the ends of adjacent cars for the passage of persons through such frame-plates."

Sessions then states the purpose of his invention as follows:

"The purpose of the improvement is twofold,—first, to diminish the racking effect upon a car-body, due to its momentum when it is suddenly brought from a state of motion to a state of rest from any cause, as well as the same injurious consequences when a car is suddenly started from a state of rest, and, secondly, to diminish the tendency to a swaying or oscillating movement which is developed whenever a train is running at high speed upon an ordinary railroad track. I have illustrated my improvement in the drawings by exhibiting the same in connection with another improvement in car construction, which consists of a vestibule attachment to the ends of railroad cars for the purpose of completely inclosing the sides of the car platform and allowing of a continuous inclosed aisle or passage-way between the adjacent ends of the coupled cars of a train. This vestibule feature is no part of the present invention. * * * So much of the drawings as represent the arrangement and construction of a vestibule attachment are not illustrative of any invention set forth in this patent, except as the same show, in combination therewith, the improvement hereinafter specifically described. * * * What I claim as my invention, and desire to secure by letters patent, is: 1. The combination, with the end of a railway car, of a frame-plate or equivalent series of buffers backed by springs, arranged with its face in a vertical plane and normally projecting beyond the end of the car, whereby, upon the coupling of two cars, a spring-buffer will be interposed between the superstructures of such adjacent cars above their platforms, and also frictional surfaces under opposing spring pressures to prevent the racking of the car-frames upon sudden stoppages and to oppose the tendency of the car to sway laterally when in motion, substantially as hereinbefore set forth. 2. The combination of a spring-buffer, or friction-plate, with the ends of each of the adjacent cars of a train, said buffers being located on the ends of the superstructures of the cars, respectively, and substantially at the tops of the same, and so arranged that when the two cars are coupled the faces of the buffers will bear against each other in contact under pressure, substantially as and for the purposes specified."

To make a perfect vestibule connection between cars, it appears necessary to use both the inventions of Pullman and Sessions. But Sessions addressed himself to the solution of one problem, and Pullman, another. Each undertook to overcome certain difficulties, and each obtained a patent for the means by which they reached a successful result. The problem Sessions set out to solve was to diminish certain evils inci-

dent to a train of cars,—namely, to the starting and stopping of them, and to a swaying which arises under certain conditions when the cars are moving,—and he accomplishes this, in the language of his first claim, by a “frame-plate or equivalent series of buffers backed by springs.” It is the spring-buffer or friction-plate located at the end and substantially at the top of each adjacent car of a train, and so arranged that when two cars are coupled together the buffers will bear against each other under pressure, which constitutes the invention of Sessions. In the friction produced by the contact of heavy face-plates, or buffers, under spring pressure, Sessions solved the problem he undertook of diminishing the racking effect upon the car-frame when the car is suddenly started or stopped, and the swaying movement which is developed when the car is running at high speed. This is all he claims in his patent to have done, and all he swears he did do. On the other hand, what Pullman undertook to do was to overcome the difficulties incident to a vestibule connection between cars, and he accomplished this by means of “flexible or adjustable joints to permit of sufficient movement between individual passenger-cars,” which he declares is the invention he desires to protect by letters patent. Much reliance is placed by the defendants on the fact that the drawings in the two patents are nearly identical, and from this it is inferred that the adjustable joints, or equalizing mechanism, of the Pullman patent was really the invention of Sessions, and that it is found in his patent. It must here be borne in mind that these two inventors were working together, and that both their applications for patents were filed within a few days of each other. But, more important than this, the Sessions drawings must be read in connection with his specification; and, in his specification, he declares that his improvement, as shown in the drawings, is exhibited in connection with another improvement in car construction, and that the vestibule feature is no part of his invention. Upon the questions whether the drawings of the Sessions patents show the equalizing mechanism of Pullman, the eminent experts employed on each side of the case differ. The only part of the specification throwing light on this point is as follows:

“The spring pressure to act against the lower portion of the frame-plates is obtained, as exhibited in the drawings, from the coiled spring *m*, which takes a bearing at one end against the solid frame-work of the car, and at the other end against a cross-head beneath the entrance-platform car, which cross-head, by means of the rigid links, *s s'*, is connected with the threshold of the frame-plate *a*, the said links or bars, *s s'*, being knuckle-jointed to the threshold-plate *a*.”

It is urged by the defendants that it would be useless to have these links or rods jointed to the threshold-plate, unless they were also loosely connected with an oscillating spring buffer-bar, such as is described in the Pullman patent. But, however this may be, Sessions does not describe rods so connected, or make any mention of an oscillating equalizing bar. To incorporate these features into the Sessions patent must be done by implication, and in defiance of the testimony of Sessions in this suit as to what he invented and what he did not invent. If he were the first inventor of

this equalizing mechanism in combination with the spring-buffers, it is remarkable that he did not set it out in his specification, and include it in his claims. It is further urged by the defendants that the Sessions spring-buffers would work imperfectly, especially in rounding curves, without the equalizing bar and the rods hung loosely or jointed at their ends. Upon this question also the experts differ. Where persons so skilled in the construction of mechanical devices as the witnesses in this case disagree, it is not strange that the court should hesitate to decide all the questions relating to frictional contact or the laws of motion which are raised by the record. The safer course to pursue, I think, is to take each patent as it stands, and give to each inventor no more and no less than what he describes and claims as his invention. It is further urged in defense that Sessions did not describe the equalizing mechanism as a part of his invention, because it was old in the art at that time, it being merely the addition to his spring-buffers of the well-known Janney car-buffer, patented May 13, 1879. But the answer to this is, that if Sessions were the inventor of the modified Janney car-buffer, such as is found in the Pullman patent, in combination with his face-plate, why did he not claim to be such inventor, and set it out in his specification? Instead of this, he swears that Pullman first suggested the application of the Janney buffer to vestibule cars. As bearing upon what Sessions invented, let us briefly examine his testimony in this suit. Sessions says:

"Mr. Pullman showed me drawings of the vestibule, and claimed it as his invention, which was practically as shown in his patent, except that he did not have a heavy iron face-plate backed with springs. When I asked Mr. Pullman about his vestibule, as to the means he purposed using for holding the flexible connections from the car, he said that he was to use a wooden frame. It was then I proposed to modify my former device [*i. e.*, roof-buffer] and apply it to this vestibule. * * * I used an iron face-plate with top-buffer stems and spring, and, on the suggestion of President Pullman, I combined the Janney buffers with a single buffer-bar or face-plate. * * * Mr. Pullman told me he was going to build some solid trains. I didn't know what he meant by 'solid trains.' He explained to myself, and to others in my office, using, as near as I can recollect, these words: 'I want the cars to have inclosed passage ways, and to be connected together;' so that, instead of speaking of cars, he wanted them as one long flexible car. I asked him how he purposed to arrange his platforms so he could maintain the integrity of that long train when rounding sharp curves. He then used the term, a flexible connection. * * * *Int.* It appears, then, that the device, as actually invented by you alone, never came into use? *Ans.* When in combination with the bottom buffer-plate it went into use. *Int.* That is to say, after you had made the additional so-called invention, suggested by Mr. Pullman, then the thing became practical and went into general use? *Ans.* Yes, sir."

Mr. Sessions's testimony clearly limits his invention to the heavy iron face-plates backed by springs, or, in other words, to exactly the description contained in the specification of his patent. Suit was brought in 1887 upon the Sessions patent in the circuit court for the northern district of Illinois, and the patent was sustained. *Pullman Palace Car Co. v.*

Wagner Palace Car Co., 38 Fed. Rep. 416. The record in that case by stipulation is made a part of this record. It is said that the deposition of Sessions in that case, as to the scope of his invention, is somewhat in conflict with his present position. It is true that Sessions there testifies that his buffer is attached to a Janney buffer as modified, but he nowhere says that he was the inventor of this feature, and he now directly and positively swears that this was suggested by Pullman. As to the position which the learned counsel for the complainant in that case took before the court, respecting the proper interpretation to be given to the Sessions patent, I do not see what it has to do with this case, but, admitting that it may have a bearing, I can detect no serious inconsistency in the grounds then urged to sustain the Sessions patent and those now brought forward by the complainant. *Prima facie* a patent is good. It is for the defendants to make out in this case that Sessions was the inventor of the Pullman invention. Here is a most meritorious invention, and the credit is due to one or the other. I cannot upon a comparison of the two patents, taken in connection with the evidence of Sessions, hold him to be the prior inventor. It seems to me it would be an act of injustice for the court by inference to incorporate the Pullman invention into the Sessions patent, and thus prevent both inventors from deriving any benefit from this improvement; because it is manifest that, if we destroy the Pullman patent, Sessions can derive no benefit from the Pullman invention, because he nowhere describes or claims it in his patent. The proceedings in the patent-office are brought forward by defendants, as tending to prove priority of invention in Sessions. It is true that the Pullman patent was not granted until May 14, 1889,—two years after the application was filed. It is also true that the application was rejected mainly on reference to the prior Atwood and Sessions patents. The original specification and claims were, in great part, rewritten, Pullman disclaiming anything contained in the Sessions patent. In his affidavit of April 1, 1889, forwarded to the patent-office, Pullman states that he completed his invention prior to the date of the filing of the Sessions application. The point is consequently made by the defendants that Pullman finally obtained his patent because the patent-office believed that his invention was prior to Sessions's, and not that it embraced anything patentable outside of Sessions's. In the absence of record proof, the court has no right to assume that the patent was issued on this affidavit or for this particular reason. The ground taken by the patent-office in finally granting this patent does not appear, but it does appear by this record that Sessions swears that what Pullman said in his affidavit as to his invention was true in point of fact. The statutes of the United States provide how a patent may be obtained. Where the claims of a patent are rejected, in whole or in part, it is the duty of the commissioner to notify the applicant, in order to enable him, if he desires, to make his description and specification of claims more specific and precise. The Pullman application took the usual course, and the patent was granted. There is nothing in the patent as allowed that was not contained in the original application. The struct-

ure described is the same. Inventors work more or less in the dark. They may not know in the beginning how well they have built. Pullman may not have realized at first about the motions and restraint of motion necessary to a solid vestibule train. But he did describe in his original application, and showed in his drawings, an apparatus which produced these results. He knew what that apparatus was, and he knew it worked successfully, since he had already built and run a train of cars so equipped. The fact that, in its progress through the patent-office, the specification and claims of the patent were made more clear and accurate, so as to express his actual invention, affords no reason for casting doubts upon the validity of his patent.

The question of infringement alone remains. Upon the construction now given by the court to the Pullman patent, I have no doubt that the structure used by the defendants is within the patent. The defendants hinge the arch-plate to the buffer-plate. This is the only important difference in the two structures. If the hinges in the defendants' model were pinned fast, and the latches on top of the arch-plate removed, you would have the construction mentioned in the patent in which the arch-plate, the buffer-plate, and the foot-plate are all mounted so as to have the same motions, and be restrained to the same line of central motion. The arch-plate, the patent states, is to be firmly attached to the buffer-plate, and in the preferred construction it is riveted to the buffer-plate. The defendants seek to avoid infringement by hinging the arch-plate to the buffer. The patent defines, however, what is meant by "firmly attached," because it states that the arch-plate is so secured as to be capable of the same motions, and restraint of motion, as the buffer-plate. Any fastening, therefore, which is secure enough to obtain these results comes within the patent. It is clear also from the language of the specification that the patentee does not confine himself to the precise means shown in the drawings for supporting the arch-plate, foot-plate, and buffer-plate, but that various means may be employed for that purpose, so long as these parts have the motions before referred to, and are restrained centrally. The structure of the defendants may not work perfectly, but it contains the substance of the Pullman invention as set out in claims 1, 2, 4, and 5 of his patent. In defendants' car there is a face-plate, forming the open end of a vestibule connection when not coupled with another car, and a buffer-plate, both being pivotally connected with a spring-extended buffer-rod, and both having the motions, and restraint of motion, set forth in the patent, and it is, therefore, within the first claim of the patent. It has also the threshold, or foot-plate, combined with the arch-plate and buffer-plate, so as to have the motion and be restrained in the same manner; and it is, therefore, within the second claim of the patent. It has also the bellows-like connection when combined with other elements, so as to produce the same results, and it is, therefore, within the fourth claim of the patent. It has a vestibule provided with doors at the sides, in addition to the other elements contained in the fifth claim of the patent, and it, therefore, infringes that claim.

Let a decree be drawn for complainant, as prayed for in the bill.

FIRMAN *et al.* v. NEW HAVEN CLOCK CO.

(Circuit Court, D. Connecticut. December 5, 1890.)

PATENTS FOR INVENTIONS—SIGNALING APPARATUS—INFRINGEMENT.

Claim 5 of letters patent No. 192,644, granted July 3, 1877, to Leroy B. Firman for improvements in automatic signaling apparatus, is for "the combination, with a call writing wheel, of a signal writing wheel, moved by the same power, when the latter is provided with a number of equal spaced teeth, which write the signal desired by making a certain number of equal spaced impulses." Two wheels acting in succession, but operated by separate acts of the user, and a single wheel, which made in succession the two impulses, had been previously known. *Held*, that the claim must be limited to the mechanism substantially as described therein, and was not infringed by an apparatus in which two wheels coacted to produce a similar result, one producing the impulses, and the other determining which of the impulses should be transmitted.

In Equity.

George P. Barton and Wm. Edgar Simonds, for plaintiffs.

Harry M. Turk and Arthur V. Briesen, for defendant.

SHIPMAN, J. This is a bill in equity to prevent the alleged infringement of the fifth claim of letters patent No. 192,644, dated July 3, 1877, granted to Leroy B. Firman for improvements in automatic signaling apparatus, used in the system known as the "district telegraph system," in which "each station is designated by a number, and the apparatus is constructed to write that number as a 'call,' and subsequently to write any one of several signals, at the will of the operator." The apparatus was an improvement upon the device described in letters patent No. 185,455 to G. S. Ladd and S. D. Field, which contained one circuit breaking wheel, described by one of the experts for the plaintiff as follows:

"Having a certain set of teeth or notches upon its rim, extending partly around, so as to give a station number or call, the remaining portion of the rim being divided into teeth, placed at regular intervals apart, so that they will cause a series of equal spaced dots upon the paper of the register at the receiving station, amounting altogether to one more than the number of special signals provided for."

A movable plate, with enough to cover two teeth, is placed against one side of the wheel, and thus a dash is formed, instead of two dots, when these teeth pass the contact point. Any two adjacent teeth may thus be combined, and the special signal depends upon where the dash is formed. The operator determines the special signal by observing which two dots are united to form a dash. The patentee divided this single wheel into two wheels. Upon part of the rim of one wheel there were the unequally spaced notches, which designated the call, the remaining portion of the rim being without teeth, and connected with a segment of a cog-wheel, and upon part of the rim of the other wheel were equally spaced notches, which designated the special signal. The second wheel is brought into action after the call, which has finished its work. It is connected with another segment of a cog-wheel, the teeth

of which are capable of being moved into position in which they will be engaged by the teeth of the segment on the first wheel. After the call has been given, the teeth of the segment of the call wheel are brought into position to engage the teeth of the segment of the signal wheel. This description of the Firman wheel is abbreviated from a longer description given by Mr. Quimby, one of the defendant's experts. Two signaling wheels are described in letters patent to E. A. Calahan, No. 129,526, and to T. A. Edison, No. 146,812, each issued before the date of the Firman patent, for sending, when successively operated by successive and distinct acts of the operator, different signals by prescribed different systems of breaks of the circuit, but not for sending automatically these different signals. It does not appear that either of these inventions went into actual use. The improvement consisted in two wheels instead of one, which automatically and successively communicated to the central office the two sets of signals. It is thus described, in detail, in the first claim:

"(1) The signal mechanism operated by suitable clock-work, provided with a writing wheel constructed to give the call or number of the station, and another adjustable wheel, which stands still while the call is being written, and is engaged by the mechanism after call has been sent, and is caused to turn through whatever space or number of teeth desired, by setting the pointer substantially as specified."

The fifth claim, and the one which is said to have been infringed, is as follows:

"(5) The combination, with a call writing wheel, of a signal writing wheel, moved by the same power, when the latter is provided with a number of equal spaced teeth, which write the signal desired by making a certain number of equal spaced impulses, substantially as specified."

The defendant uses an apparatus which is described in letters patent No. 321,073, dated June 30, 1885, to Frank B. Wood. It produces a compound signal by the joint action of two wheels. It has—

"Two signal wheels, which are geared to each other and to the clock-work, so that they both move simultaneously and in unison during the time that both parts of the compound signal are being transmitted. While thus in motion they are acted upon by opposite ends of the same electrical contact spring."

The smaller wheel runs continuously, has a series of equally spaced notches, and tends to transmit a recurring series of breaks at equal distances apart. The larger wheel has certain portions of the periphery cut away. When both of these wheels are moved simultaneously in the same direction, the small wheel sends a continuous series of signals, but those which are not needed are canceled and prevented from being sent by the action of the larger wheel, with its spaces of "cut-away" periphery, and thus the final result is to give, first, the signal, and then the call. The result is, substantially, that of the Firman device.

The plaintiffs claim that the equivalent of the Firman signal wheel is the small wheel of the defendant, which transmits a series of equally spaced impulses, and that the equivalent of the call wheel is the large

wheel of the defendant, which has its periphery so cut away as to determine the numerical signal which is sent, notwithstanding that the actual transmission of the signal is performed by the other wheel, and that thus the defendant's device contains the call wheel and the signal wheel of the fifth claim. If a literal construction is to be given to the fifth claim, and the requisites of infringement are a signal writing wheel, with equally spaced teeth, which makes equally spaced impulses, and a call writing wheel in combination, regardless of the manner in which these two wheels operate to produce the result, the remaining element being power operating the two wheels in such manner as to transmit the compound signal at one operation, then the defendant infringes. In my opinion, such a broad construction cannot be given, but the scope of the patent must be confined to mechanism substantially such as is described in the patent, viz., two wheels moving by the same power, in succession and automatically, one of which produces a part of the signal by its sole action, and the other of which produces the other part by its sole action. It is true that the Firman invention was the first one having two wheels which did both parts of the work automatically, but this step cannot give the device the character of a primary invention, and permit the inventor to include within his patent wheels which differ so widely from his apparatus as do the double wheels of the Wood patent. This seems manifest from the place which the invention occupied in the history of the art. Two wheels, acting in succession, but operated by separate acts of the user, had been known, and a single wheel, which made in succession the two acts or impulses, preceded Firman, whose advance was to make the single wheel into two wheels, one having equally, and the other having unequally, spaced notches, and to move them by the same power, so that two signals should be transmitted successively by one operation; but this step did not entitle him to include in his patent two wheels which coact with each other and produce a compound signal, one wheel actually producing the impulses and the larger wheel determining which of the impulses shall go through the line and be recorded. These wheels cannot, in view of the limited character of the Firman invention, be properly styled the equivalents of the call writing wheel and the signal writing wheel of the patent, although they produce the same result.

The bill is dismissed.

ATLANTIC DREDGING CO. v. BERGEN NECK RY. CO.

(Circuit Court, S. D. New York. October 22, 1890.)

NAVIGABLE WATERS—OBSTRUCTION—INJUNCTION—JURISDICTION.

The circuit court of the United States sitting in the southern district of New York will not grant an injunction against the erection of embankments or trestles on the soil of New Jersey, though such structures may project into the waters of a navigable channel leading into the Bay of New York

In Equity.

Order to show cause why temporary injunction should not be made permanent. The Atlantic Dredging Company was a New York corporation, which had dredged a navigable channel from the waters of New York into the territory of New Jersey, at Bayonne, at the head of which channel, and within the limits of the city of Bayonne, was situated its repair yard. The Bergen Neck Railway Company in laying its tracks claimed the right to cross such channel by embankment or trestle. This court granted a temporary injunction restraining the obstruction of the channel by defendant, and required the latter to show cause why the injunction should not be made permanent.

Robert D. Benedict, for complainant.

Gilbert Collins, for defendant.

LACOMBE, Circuit Judge. I am not satisfied that this court, sitting in the southern district of New York, has jurisdiction of this action, which is concerned with structures in process of erection on the soil of New Jersey, although such structures may project into the waters of a navigable channel coming up from the Bay of New York. *People v. Railroad*, 42 N. Y. 283; *In re Devoe Manuf'g Co.*, 108 U. S. 401, 2 Sup. Ct. Rep. 894.

Let the temporary stay be vacated.

STRASBURGER *et al.* v. BEECHER.

(Circuit Court, D. Montana. June 30, 1890.)

1. FEDERAL COURTS—ADMISSION OF NEW STATES—TRANSFERS FROM TERRITORIAL COURTS.

Act Cong. Feb. 22, 1889, under which the state of Montana was admitted to the Union, provides that the federal circuit and district courts established by that act shall be the successors of the supreme and district courts of the territory, in respect of all cases then pending in the latter of which the federal courts would have had jurisdiction had they been in existence; but it further provides that no civil action in which the United States is not a party shall be transferred to the federal courts except on the written request of one of the parties, filed in the proper court. *Held*, that the provisions of the general statute regulating the removal of causes from state to federal courts have no application to transfers made under this statute.

2. SAME—APPLICATION FOR TRANSFER—WAIVER.

The filing of a stipulation for a continuance in the state court after the admission of the state is not a waiver of the parties' right to transfer the cause to the federal court, under this statute.

3. SAME—GRANTING TRANSFER—DISQUALIFICATION OF JUDGE.

The fact that the judge of the state court had been an attorney of record in the cause would not disqualify him from entertaining the application for a transfer to the federal court, contemplated by the statute, as he is not called on to exercise any judicial function in regard thereto, and his order for the transfer is merely formal.

4. SAME—NOTICE TO ADVERSE PARTY.

The adverse party is not entitled to notice of such application for transfer to the federal court, as there is nothing in the statute requiring it.

5. SAME—CITIZENSHIP.

An allegation in the petition for the transfer that plaintiff was at the institution of the suit a citizen of "the state of Montana," and defendant a citizen of Minnesota, does not show jurisdiction in the federal court, as contemplated by the statute; for when the suit was instituted Montana was a territory, and jurisdiction on the ground of citizenship does not arise where one party is a citizen of a state and the other of a territory.

6. SAME—JURISDICTIONAL AMOUNT.

An allegation that the property in dispute, which is mining property, is worth more than \$5,000 at the date of the application, is not sufficient to show that the value at the time of bringing suit was within the jurisdiction of the federal courts, as required by the statute.

At Law. On motion to remand from the circuit court of the United States to the state court.

Luce & Luce, for plaintiffs.

F. P. Sterling and J. A. Savage, for defendant.

KNOWLES, J. The above suit is one at equity, instituted in one of the district courts for the territory of Montana, to determine the right to the possession of a lode mining claim, and as to who has the right to a patent to the same from the United States. Plaintiffs instituted their suit in the territorial district court in Park county, Mont., on the 14th day of May, 1887. The defendant subsequently answered to the merits of plaintiffs' complaint. The parties entered into several stipulations for continuances of the cause from term to term. The last one was on the 29th day of December, 1890, and, as it will be seen, after Montana became a state in the Union. On the 5th day of February, 1890, defendant filed his petition in said district court for said Park county, duly verified, asking to have the cause removed to the United States circuit

court for the district of Montana. In this petition it is set forth that the value of the property in dispute exceeds \$5,000, and that the plaintiffs were at the time the action was commenced, and still are, citizens of the state of Montana, and that defendant was at such date, and still is, a citizen of the state of Minnesota. To the hearing or granting of this petition plaintiffs file their protest, and state that the said district court should not hear the same, for the reason that the judge thereof, FRANK HENRY, had been an attorney of record in said cause before he was elected judge; that the cause had been continued by a stipulation, signed by both attorneys for plaintiffs and defendant, over the January term of said court; and because no notice of the said motion or petition had been served on the attorneys for plaintiffs. Notwithstanding this protest, the judge ordered the cause transferred to this court.

The plaintiffs now come into this court, and move to remand the cause to the district court upon about the same grounds set forth in their protest, with the additional grounds that defendant filed no bond, as required by law in the removal of a cause from a state to a circuit court, and that he has entered no copy of the record of the suit in the said circuit court. The consideration of this motion to remand presents some questions of importance, which have not as yet been considered under the statute of the United States applicable to the transfer of causes which were pending in the courts of the territory at the date of Montana's admission into the Union, to the United States courts. Section 23 of "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the Union on equal footing with the original states, and to make donations of public lands to such states," approved February 22, 1889, provides as follows:

"That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction, under the laws of the United States, had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory, and, in respect to all other cases, proceedings, and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such territories into the Union, arising within the limits of such proposed state, the courts established by such state shall be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceedings now pending, or that prior to the admission of any of the states mentioned in this act shall be pending, in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be: provided, however, that in all civil actions, causes, and pro-

ceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon a written request of one of the parties to such action or proceeding, filed in the proper court, and, in the absence of such request, such cases shall be proceeded with in the proper state court."

Congress had the power to provide for the transfer to the courts of the United States of any cause of which such courts might have had jurisdiction, under the constitution of the United States, had they existed at the time of the institution of the same, which were pending in the courts of the territory of Montana. This it sought to do under the above statute, subject to the condition that in civil actions between private parties a written request should be made by one of the parties for a transfer. The general statute of the United States upon the subject of removal of causes from state courts to the United States courts is not the one under which the defendant in this action sought a removal in the above case to this court. The provisions of the general statute, which requires a bond to be filed as one of the conditions of removal, do not apply where a removal is sought under the above statute. Neither have the provisions of the general statute in regard to the time when the application or written request should be made any pertinency under the above statute. It is perhaps true that the request should be made in a reasonable time. But what is a reasonable time? I should say if the application was made at any time before trial in the state court, there could be no objection but that it had been made in season, unless by some unequivocal act the party applying showed he acquiesced in the jurisdiction of the state court. I do not think the signing of a stipulation for a continuance in the state court would be a waiver of the right to appeal to the jurisdiction of the United States courts. The statute does not require that there should be any certified copy of the records in the state courts filed in the circuit court. It contemplates that original papers in the case shall be transferred to the United States court entitled to the jurisdiction thereof. It says: "All the files, records, indictments, and proceedings relating to any such cause shall be transferred to such circuit, district, and state courts, respectively." Undoubtedly, under the statutes of Montana, and also under the general rules of the common law pertaining to such matters, a judge who, previous to his elevation to the bench, was an attorney for one of the parties to an action, cannot act in the trial of such action. This disqualification of the judge does not preclude him from making such preliminary orders as are merely formal, and tend only to prepare the case for trial, and he may perform what are merely ministerial acts. *Moses v. Julian*, 84 Amer. Dec. 114, and note to same, 131.

The action of Judge HENRY in transferring this cause to the circuit court cannot be classed as an act prohibited either by the statute of Montana or the common-law rule in such cases. It is urged that he was called upon to perform the judicial function of determining whether the petition for a transfer of the cause was sufficient. This is not true. If the cause was one of which the circuit court might have had jurisdiction

at the time the suit was commenced, had it existed, then the petition, which must be classed as a written request, for the transfer of the cause from the state to the circuit court, would, of its own force, transfer the cause, and oust the state court of jurisdiction in the case. The court over which Judge HENRY presided could not determine as to whether the circuit court received jurisdiction or not upon the filing of the petition. That duty devolved upon the circuit court, and the state court would be bound by its determination in the matter. It may be true it might inspect the petition or written request, and determine, as far as the jurisdiction of his own court, as to whether it was ousted, subject to the power in the circuit court to finally settle the question by assuming or refusing jurisdiction. The point involved in considering the statute upon the transfer of causes from the state to the circuit court or district court of the United States has been determined in interpreting the analogous statute upon the subject of removals from a state court to the circuit court of the United States.

In the case of *Kern v. Huidekoper*, 103 U. S. 490, the supreme court of the United States uses this language:

"If the cause is removable, and the statute for its removal has been complied with, no order of the state court for its removal is necessary to confer jurisdiction in the court of the United States, and no refusal of such order can prevent that jurisdiction from attaching."

In the case of *Railway Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262, the supreme court held that it is a question for the circuit court in such cases to determine whether it has jurisdiction or not, and that its determination is binding on the state court until reversed. Judge Dillon, in his work on Removal of Causes, (5th Ed. § 147,) says:

"Upon the filing of the petition and bond required by statute, the suit being removable, the jurisdiction of the state court absolutely ceases, and that of the circuit court immediately attaches in advance of the filing in the latter of the transcript from the former."

In section 143, Id., the same rule is expressed in this language:

"If the record discloses a removable cause, and the other conditions have been complied with, the jurisdiction of the state court ceases and that of the federal court attaches without any further proceedings, and for all subsequent purposes."

In the statute I have been considering there is nothing which gives the state court any power to make any order as to the transfer of a cause. If the cause is one of which the circuit court would have had jurisdiction at the time it was instituted, had it existed, the filing of the proper written request would transfer it to this court without any action on the part of the court over which Judge HENRY presided. It cannot be said, then, that any action on the part of that court has anything to do with the determination of the jurisdiction of this court. The order thereof did not give this court jurisdiction. The disability under which the judge thereof rested has nothing to do with the jurisdiction of this court. Hence the objection that the judge in the state court was disqualified from acting in this case has no force in this case in this court.

Concerning the proposition maintained by plaintiffs, that they should have had notice of the application of defendant for a transfer of the cause, I would say there is nothing in the statute which requires this. Again I would refer to the ruling upon the analogous statute for the removal of causes from the state to the United States courts. In the case of *Fisk v. Railroad Co.*, 8 Blatchf. 247, Justice NELSON says:

"The learned counsel for the plaintiff seems to suppose that the solicitor is entitled to notice of the time and place of the presenting of the petition. But this is an error. The act provides no such practice, and it is otherwise under all the previous statutes providing for removals."

As no order is required of the state court for the transfer of a cause, and as its action in the matter does not affect the transfer in any way, there can be no object in requiring a notice of the application or written request for the transfer. There can be no hearing upon this request.

This brings me to the consideration of the important point as to whether this is a case of which the circuit court would have had jurisdiction had it existed when the suit was commenced. The petition alleges that at the time this suit was instituted plaintiffs all were, and still are, citizens of the state of Montana, and that defendant was, and still is, a citizen of the state of Minnesota. A court is not obliged to believe an impossibility, even if presented to it in a sworn petition. This suit was instituted, according to the files in the case, on the 14th day of May, 1887. At that time Montana was not one of the states in the national Union. It was a territory of the United States. It has been repeatedly held that, when the jurisdiction of a United States court depends upon the fact of citizenship, the fact that one of the parties is a citizen of a state, and the other of a territory, will not give such courts jurisdiction. *Corporation of New Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore City*, 6 Wall. 287. If the plaintiffs resided within what are now the boundaries of the state of Montana when this suit was commenced, they were, properly speaking, perhaps, citizens of the United States residing in the territory of Montana. If they were citizens of any state, it does not appear. Certain it is they were not then citizens of the state of Montana. This court has acquired no jurisdiction by reason of the citizenship of the parties at the time the suit was commenced. As to whether this court would have jurisdiction of this cause by reason of the present citizenship of the parties, I am not called upon to decide. It may be that enough is stated in the petition, as far as citizenship is concerned, to warrant a removal under the general statute providing for the removal of causes from the state to the United States courts. Whether that statute applies, I am not now prepared to say. But the defendant has not filed in this case the bond required under that statute as a condition of removal, and the request for removal was evidently not based upon that statute. As to this suit, I am clearly of the opinion that it is one which arises under the laws of the United States. It is a suit instituted in pursuance to the provisions of section 2326 of the Revised Statutes of the United States. See *Frank G. & S. M. Co. v. Larim M. & S. Co.*, 8 Fed. Rep. 724. One of the objects of such an action is

to determine who is entitled to a patent to the premises in dispute. The judgment is filed in the United States land-office on the determination of the action. To some extent the United States is a party to the action. See *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301. This decision must be based upon the theory, it appears to me, that the action, pursuant to an adverse claim, has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in dispute. The case of *Trafton v. Nougues*, 4 Sawy. 178, is not in point. That was not an action in pursuance to the provisions of section 2326, Rev. St. U. S. There is, however, a more serious objection to the jurisdiction of this court presented. In a case such as this, the amount involved must exceed \$500, and perhaps \$2,000. The petition states that the property in dispute is worth over \$5,000. This must be taken as an estimate of the value of the property at the date of the verification of the petition, and not at the date when the suit was commenced.

It should appear in the record somewhere that the value of the property in controversy was sufficient to give the circuit court jurisdiction at the time suit was instituted. At the time the suit was instituted, the circuit court had jurisdiction of causes in which the amount in controversy exceeded \$500. Whether the circuit court can now take jurisdiction unless the property exceeds in value the \$2,000, in cases like this coming from a territorial court, it is not necessary to determine. But it must be decided whether, at the time this suit was commenced, the circuit court of the United States for the district of Montana would, had it been in existence, have had jurisdiction of this cause. That it would have had such jurisdiction must appear affirmatively in the record. In the case of *Water Co. v. Keyes*, 96 U. S. 199, the supreme court, speaking through Chief Justice WAITE, says:

"It is well settled that in the courts of the United States the special facts necessary for jurisdiction must in some form appear in the record of every suit, and that the right of removal from the state court to the United States courts is statutory. A suit commenced in a state court must remain there until cause is shown, under some act of congress, for its transfer. The record of the state court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court in which it goes. If it is not, and the omission is not afterwards supplied, the suit must be remanded."

The above remarks are applicable to this case. The fact that the property in dispute may be worth over \$5,000 on the 4th day of February, 1890, would not show that the property was worth that amount in 1887, when the action was commenced. The value of mining property fluctuates as much or more than any other kind of property. Hence the statement in the petition of the value of the property in dispute is not sufficient to show that this court, had it existed at the time the suit was commenced, would have had jurisdiction of this cause. For this reason, this cause must be remanded to the state court, and it is so ordered.

UNITED STATES v. LYNDE *et al.*

(Circuit Court, D. Montana. June 30, 1890.)

FEDERAL COURTS—ADMISSION OF NEW STATES—TRANSFERS FROM TERRITORIAL COURTS—CASE PENDING ON APPEAL.

Act. Cong. Feb. 22, 1889, admitting Montana as a state, provided that the United States circuit and district courts established by that act should be the successors of the supreme and district courts of the territory in respect of all cases then pending in the territorial courts of which such federal courts would have had jurisdiction had they been in existence. Section 23 further provides that "no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission" of Montana "shall be pending, in any territorial court, shall abate by the admission of such state into the Union, but the same shall be transferred and proceeded with" in the proper federal court. *Held*, that the circuit court has jurisdiction to review such a case, which was pending on appeal in the territorial supreme court when the act was passed.

At Law. On motion to dismiss appeal.

Elbert D. Weed, U. S. Atty.

Luce & Luce, for defendants.

KNOWLES, J. This action was pending in the supreme court, of Montana, on appeal from the district court of Gallatin county, when Montana became a state in the Union. The act of congress approved February 22, 1889, (see U. S. St. at Large, 1888-89, p. 683,) providing for the admission of Montana and certain other territories into the Union, contains the following provision:

"That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction, under the laws of the United States, had such courts existed at the time of the commencement of such cause, the said circuit and district court, respectively, shall be the successors of said supreme and district courts of said territory."

The United States is the party plaintiff, and the amount involved, according to the allegations of the complaint, is \$106,000. This court, had it existed at the time this suit was brought, would have had jurisdiction of the same. St. March 3, 1887, c. 373, § 1, (24 St. 552,) as corrected by St. Aug. 13, 1888, (25 St. 434.)

The defendants move to dismiss the appeal in this cause because this court has no jurisdiction to hear the appeal pending in the supreme court of Montana territory at the date Montana became a state in the Union. The above statute, relating to the admission of Montana and other states into the Union, also provides, in said section 23:

"And all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of any of the states mentioned in this act shall be pending, in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same

shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be."

Previous to this clause in said section 23, it had been provided what should be the disposition of all cases of which the United States circuit and district courts would not have had jurisdiction had they existed at the time the same were commenced. It is provided, it will be seen, that these cases are to be proceeded with "in due course of law;" that they are not to "abate," but are to "be transferred and proceeded with" in the proper court; that is, the court having jurisdiction of the same. There can be no doubt but that congress intended that these causes should be taken up as they were, and tried by the court having jurisdiction of the same.

The same question as is here presented, and under a statute the same in terms, arose in the circuit court of the United States for the district of Colorado, in the case of *Bates v. Payson*, 4 Dill. 265. In deciding the same, MILLER, the circuit justice, said:

"It is admitted that the case was one which might have been brought in a federal court, if such court had existed at the date of the commencement of the suit, as such was within the eighth section of the act. By that section this court is declared to be the successor of the supreme court of the territory as to all such cases, with power to proceed therein 'in due course of law.' This means that this court may do all that was left undone by the supreme court of the territory. The cause was pending in that court for review, and we may proceed as that court would have proceeded if it had retained the case. The way in which, under the territorial statute, the cause was taken to the supreme court is not material to be considered. The act of congress applies to all cases of a federal character pending in that court at the date of the admission of the state, and it matters not whether they were removed into that court by writ of error or appeal. If it were necessary to remand the cause to the state court, there would be a difficulty in disposing of it, but that was not required. Whether the judgment should be affirmed or reversed, we could enter the proper judgment here, and, if necessary, we could try the case again in this court."

The interpretation of a statute almost word for word by one of such acknowledged ability and eminence has controlling weight with this court, and the interpretation given to that statute pertaining to Colorado will be adopted as the interpretation of the statute under consideration which pertains to Montana.

The motion to dismiss the appeal in this cause is overruled.

In re ALLIS.

(Circuit Court, E. D. Wisconsin. December 13, 1890.)

DEPOSITIONS—ORAL INTERROGATORIES—PRACTICE.

Equity rule 67 provides that testimony may be taken under commission upon oral interrogatories, if the party desires it, and that "the examiner shall note all objections to questions, but shall not have the power of decision thereon; but the court shall have the power to deal with the costs of all incompetent, immaterial, or irrelevant depositions," etc.; and that, "in case of refusal of witnesses to attend, to be sworn, or to answer any question, * * * the same practice shall be adopted as

is now practiced with respect to witnesses to be produced on examination before an examiner of said court, on written interrogatories." Rev. St. U. S. §§ 863, 868, give the judge of the court of the district in which a witness resides power to compel his attendance and testimony *de bene esse*, or on a commission with written interrogatories. *Held* that, where the testimony of a witness is taken by consent on oral interrogatories before an examiner of the court of the district of his residence, for use in an action pending in another court, the former court has power to decide as to the materiality of questions asked, and may compel the witness to answer.

In Equity.

Mr. Parkinson, for the motion.

Mr. Mason, *contra*.

JENKINS, J. The Consolidated Roller Mill Company filed its bill in equity in the circuit court of the United States for the district of Minnesota against the Wilford & Northway Manufacturing Company, to restrain the alleged infringement by the defendant of letters patent of the United States No. 222,895, issued to William D. Gray for a new and useful improvement in roller grinding mills. After issue joined, the testimony of William W. Allis, a resident of this district, and the secretary of the complainant, was taken by consent at his place of residence, upon oral interrogatories, and before an examiner of this court. Upon the cross-examination of the witness, and under advice and request of counsel for the complainant company, he declined to produce certain documents and to answer a certain question; whereupon the defendant moves for an order compelling the production of the required instruments, and requiring the witness to answer the interrogatory. It is objected, in opposition to the motion, that the propriety of the production of the document demanded, and the relevancy of the interrogatory propounded, can only be determined by the court in which the action is depending, and, until so determined, no jurisdiction is lodged with this court to act in the premises. With respect to actions at law, the practice is determined by the statutes. The testimony of a witness by deposition *de bene esse* may be compelled by the court of the district in which the witness resides, and where the deposition is to be taken. Rev. St. § 863. In such case the court or judge invoked to compel answer determines the materiality of the interrogatory, so far, at least, as involved in the exercise of the power of compulsion. *Ex parte Peck*, 3 Blatchf. 113; *Ex parte Judson*, Id. 148. Under a commission with written interrogatories the attendance and testimony of the witness may be compelled by the judge of the court of the district in which the witness resides. Rev. St. § 868. In such case, the interrogatories having been settled and their materiality determined prior to the issuance, and by the court issuing the commission, possibly no occasion arises for a ruling by the judge of the court of the district in which the commission is executed as to their materiality; but I apprehend that, upon application to compel answer, he would have the power to determine as well the sufficiency of the answer, as the privilege of the witness to decline to answer. That is an incident to the power to compel answer, necessary to be exercised to determine the alleged contumacy of the witness.

Under rule 67 in equity, prior to its amendment in 1862, testimony could be taken under commission upon written interrogatories, and, by agreement of parties, upon oral interrogatories. Under the rule as amended, (1 Black, 6,) oral examination, if the party desires it, is the rule; examination by written interrogatories is the exception. The rule provides that—

"The examiner shall note all objections to questions, but shall not have the power of decision thereon; but the court shall have the power to deal with the costs of all incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just; and that in case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories."

It is insisted that the rule contemplates that all questions must be referred, as to their relevancy, to the court having jurisdiction of the cause. Undoubtedly that court has the ultimate control of and decision upon the materiality of the examination. But it is quite another matter with respect to the compulsion of a witness to answer. In such case the court or judge exercising the power must be satisfied of the contumacy of the witness. The witness responds to the authority dominant at his residence. He is beyond the coercive power of the court entertaining the cause. His disobedience is to the mandate of the court issuing the writ of subpoena, not to the court issuing the commission. The question of disobedience involves both the materiality of the interrogatory and the privilege of the witness, and both must be considered by the court exercising jurisdiction of the witness; and this, as well for the protection of the witness, as for the proper conduct of the examination. The language used by Judge BETTS in the *Case of Judson, supra*, in answer to a like contention, upon the taking of a deposition *de bene esse*, is equally applicable here:

"The counsel for the motion urges that it belongs to the court in Massachusetts, on the return of the deposition, to determine whether the evidence is pertinent to the case, and that the court will exclude the evidence if it is found not to be pertinent. This argument is correct, in so far as it relates to the conduct of the commissioner. That officer must write down and return to the court any species of evidence offered before him, and the court will receive or reject it, according to the rights of the parties. But most serious mischief may be in that way effected, if a witness is compellable, in all cases, to answer, in the first instance, all questions put to him. He may be thus compelled to make public important secrets in relation to the rights or character of himself or others, which the party extorting them has no title to or interest in, and which are drawn out through a course of interrogation that would have been peremptorily arrested had the examination taken place in open court."

The rule makes no provision for reference of questions to the court in which the cause is pending. Upon its face it may be said to assume that all questions will be answered, reserving the question of costs of immaterial testimony to be dealt with by that court as justice may require. But, as respects the witness, no power is reserved. The construction

contended for, if correct, would establish the practice that every objection to questions, every refusal to answer, and every question respecting the character of the answer, must first be referred to and passed upon by the court issuing the commission before the court issuing the subpoena could deal with the witness. This would compel frequent stoppages in the course of an examination, and compel counsel and the witness, in case of personal privilege claimed, to make frequent journeys "across the continent" to obtain the ruling of a distant court upon each question as it should arise. I cannot assent to an interpretation of the rule that would place such grievous burden upon witness and parties. The practice which the rule provides for is the practice as to the contumacious witness, not as to the settlement of interrogatories. The rule refers to the practice then obtaining in equity with respect to the compulsion of testimony by the witness, or his punishment for refusal to testify. As an incident to the power of compulsion, and by analogy to the rule obtaining with respect to depositions at law under oral interrogatories, the court or judge having jurisdiction of the witness, for the purposes of the exercise of the power of compulsion and the punishment of a refractory witness, must determine the materiality of the question declined to be answered.

COLONIAL & U. S. MORTG. Co., Limited, v. HUTCHINSON MORTG. Co.
et al.

(Circuit Court, S. D. Iowa, C. D. November 21, 1890.)

1. ACCOUNTING IN EQUITY.

From time to time complainant forwarded lump sums of money to defendant, and to these were added the amounts paid in on the principal and interest of loans already made, and the fund thus created was intrusted to defendant to be loaned on improved farms. Defendant was forbidden to make loans in certain localities and on certain kinds of lands. These instructions having been violated, complainant tendered to defendant the notes and mortgages which represented the loans improperly made, and demanded a settlement of the account. *Held*, that complainant was entitled to an accounting in equity.

2. SAME—PARTIES.

Where a bill in equity against a corporation waives an answer under oath and seeks no special discovery from the individual defendants, the officers and stockholders of the corporation, against whom no relief is asked, are not proper parties defendants, and a demurrer by them will be sustained.

In Equity. Demurrers to bill in equity.

Whiting S. Clark and Chas. A. Clark, for complainant.

Read & Read and Lehmann & Park, for defendants.

SHIRAS, J. The complainant is a foreign corporation, engaged in loaning money on farm property, and in the carrying on of this business it constituted the defendant, an Iowa corporation, its agent, and intrusted to it the entire management of its affairs in the state of Kansas. According to the averments of the bill, it was the custom of complainant

to forward from time to time to the defendant corporation lump sums of money, and to these were added the amounts paid in from time to time upon the principal and interest of loans already made, and the fund thus created was intrusted to the defendant corporation, to be loaned out upon the security of improved farms. In the instructions given to the defendant it was forbidden to make loans in certain named localities, and also upon certain kinds of lands. Under the agreement between the parties, the defendant corporation guarantied the titles of the lands upon which it made loans, and was bound to make weekly and monthly reports of the business conducted by it, and was further bound to collect the interest and principal of the loans as they matured, to see that the borrowers kept the taxes on the mortgaged property paid up, and generally to exercise proper supervision over the business intrusted to it. As compensation for its services the defendant was entitled to a fee of 5 per cent. upon the amount of each loan; one-half to be paid when the loan was made, and the remainder in annual payments during the life of the loan. It is charged in the bill that the defendant corporation in many instances violated the express instructions given it, and made many loans of the money intrusted to it upon lands situated in localities in which it was forbidden to make loans, and also upon lands of a character and quality which it was forbidden to take as security. It is also charged that the defendant failed to make proper reports of its doings; that finally the complainant terminated the agency, and, upon ascertaining the fact that the defendant corporation had violated the instructions given it in regard to the loans to be made, complainant caused an investigation to be made, and, upon learning the full facts, it tendered back to defendant the notes and mortgages which represented the loans improperly made, and demanded a full accounting of the moneys received by defendant, and a settlement and adjustment of the account between the parties. In the bill this tender is repeated, and complainant offers to place in the hands of the court, or of a receiver to be appointed, such notes and mortgages, to be disposed of as the equities of the parties may require. The bill is very lengthy, and I shall not attempt to state it more fully, as the foregoing is sufficient to show the nature of the questions presented by the demurrers interposed by the defendants. To this bill the defendant corporation and Charles and Paul Hutchinson, two of its managing officers and principal stockholders, are made parties defendant.

The first question raised by the demurrers to the bill is that the case is not one of which a court of equity can take jurisdiction, the remedy at law being adequate. Counsel for defendants have supported the demurrers in a very clear and able argument, yet, in spite of the cogent reasoning employed, it must be held that the bill presents a case within equitable cognizance. The averment of facts in the bill shows that the defendant corporation undertook a duty in the nature of a trust. As agent for the complainant, it received large sums of money, and agreed to dispose of the same under certain restrictions and limitations, thereby undertaking to apply the same faithfully, and in accordance with the

confidence reposed in it, which is of the very essence of a trust. The theory of the bill is that the defendant corporation expressly violated the instructions given it, and misapplied the funds intrusted to it by loaning the same upon property which, by reason of its location or quality, came within the restrictions imposed upon the defendant, as agent for the complainant, and for this breach of trust it is now sought to compel the defendant to account. As the defendant corporation refused to take back the mortgages which it is claimed evidence the loans made in breach of the trust confided to it, the complainant seeks the aid of a court of equity to direct the disposition to be made of these mortgages, pending the settlement of the account between the parties. It may be entirely true, as contended for by defendant's counsel, that the complainant might accept these mortgages for their value, and sue the defendant for the damages caused by loans made on insufficient security; but it does not follow that the complainant was compelled to adopt that course. As is said in *Taylor v. Benham*, 5 How. 233:

"Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of the trust."

Many of the loans averred to have been improperly made are not yet due. What amounts can be realized from the mortgages cannot be known at the present time. Had complainant chosen to accept the mortgages *pro tanto*, and sued for damages, assuming that such a course was open to complainant, it is clear that it would have been almost impossible to have ascertained, by the verdict of a jury, the amount necessary to be paid to complainant, because the data for anything approaching an exact estimate does not now exist. Had complainant, tendering back the mortgages in question, sued at law for so much money had and received, it would, in order to ascertain the sum due, be necessary to have a full and complete accounting between the parties; because the sums loaned on the mortgages in question were not specific amounts, forwarded in each case by complainant, but were amounts taken from the general fund placed with defendant, and made up of sums forwarded by complainant and collections made by the defendant of other loans. In any event, to effectuate justice between the parties, a full accounting would have been necessary of the entire business dealings between the parties,—a task to which the powers of a court of law would be wholly inadequate. However this may be, it is clear that the complainant has the right to call the defendant corporation to an account for the manner in which it has performed, or failed to perform, the trust confided to it; and, as it is apparent that such accounting involves many and complex questions, including the disposition to be made of the mortgages tendered back to the defendant, the expenses connected therewith, the sums received as interest thereon, and the compensation, if any, due to the defendant, it follows that, not only by reason of the right of complainant to call for a settlement of the trust, but also by reason of the complexity of the account to be settled, and the disposition to be made of the mort-

gages in question, there exists grounds for the exercise of equitable jurisdiction. Much of the argument in support of the demurrer was addressed to the proposition that, where the rights of the parties arise upon contract, and an accounting is sought in order to ascertain the amount to be adjudged to the complainant, a court of equity cannot take jurisdiction simply because the account is voluminous, and embraces many separate items. As a general proposition, this is undoubtedly true, yet there are many exceptions to be made in the application of it to particular cases. Much stress was laid in support of the proposition upon the ruling of the supreme court in *Root v. Railway Co.*, 105 U. S. 189, in which was filed a bill for an accounting for profits and savings alleged to have accrued to an infringer of a patent, the bill having been filed after the termination of the life of the patent. The authorities are fully collated and commented on, and the conclusion is reached—

"That a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement, but that grounds for equitable relief may arise other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is needed on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a remedy at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete, and, as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule."

This case, therefore, holds that, even in the absence of any other equity, the nature of the accounting may be such that a court of law cannot deal adequately therewith, and in such case jurisdiction in equity can be sustained.

The case at bar falls fairly within the ruling in *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442, wherein it is said:

"The right which the plaintiffs so have to call on the city to render an account of the property is one which can be properly adjudicated in this suit in equity. It involves the taking of an account, the sale, under the direction of the court, of what remains of the property, and the ascertainment of the proper charges to be allowed to the city against the moneys it has received and against the proceeds of sale."

Even more applicable is the language used in *Kirby v. Railroad Co.*, 120 U. S. 130, 7 Sup. Ct. Rep. 430, wherein it is said:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co.

were entitled on each settlement. Justice could not be done except by employing the methods of investigation peculiar to courts of equity."

But, as already said, it is not necessary to base the jurisdiction in equity upon the nature of the account alone. The averments of the bill show that there existed between the parties a trust of a fiduciary nature, and the bill charges numerous breaches of such trust on part of defendant, and seeks a settlement thereof, and thus we have presented a case of undoubted equitable jurisdiction as against the defendant corporation.

On behalf of the defendants Charles and Paul Hutchinson, the demurrers present the question whether they are proper parties to the bill. No relief is prayed against these defendants, and from the averments of the bill it is plain that they are joined as defendants solely for the purpose of securing a full answer from the corporation; yet the bill expressly waives an answer under oath, and does not seek any special discovery from the individual defendants. The general rule is well settled that no one should be made a party defendant who has no interest in the suit, and against whom no decree nor relief is sought, or who in fact is merely a witness in the case. Under the former practice, an exception to this general rule existed in suits against corporations, in which, in order to secure an answer under oath and when needed to compel full discovery, it was permissible to join as a defendant an officer or stockholder therein. As all parties, regardless of interest, are now permitted and compellable to testify, the necessity for making an officer of the corporation a party for the purposes of discovery no longer exists. In the present instance, the bill, as already said, does not require the answers of defendants to be under oath, but expressly waives the same, and it is difficult to see what good purpose is subserved by making the officers parties defendant. If they should refuse to answer, no decree could be rendered against them for any relief, for none is prayed, and, if it was sought to make them answer fully on behalf of the corporation, no ground exists for such a course, for neither discovery nor answer under oath is prayed for. All the effect that could be given to an answer filed by them would be that of a pleading on behalf of the corporation, and, so far as answering the bill is concerned, the defendant corporation is competent to answer for itself. If the corporation fails to answer, a decree *pro confesso* can be taken against it, and in proving up its claims thereunder the complainant can procure the testimony of the officers of the corporation and all other evidence needed. If the defendant corporation answers, then the issues presented by that answer are the ones to be heard and determined, and the filing of answers by the other defendants would only incumber the record to no good purpose. It not appearing, therefore, that any reason exists for making Charles and Paul Hutchinson parties defendant, it must be held that they are improperly joined as defendants, and upon that ground the demurrers to the bill are sustained. Leave is granted to amend by dismissing the bill as to them, and the defendant corporation is ruled to answer the bill by the January rule-day.

AMES v. HOLDERBAUM *et al.*, (two cases.)

(Circuit Court, S. D. Iowa, C. D. November 28, 1890.)

1. WILLS—VALIDITY—PREFERENCES.

A testator directed that all his debts should be paid out of the first assets realized, and that his executor should manage his real and personal property so as "to realize the largest and best income therefrom, and in paying off the indebtedness on the land." The executor was given power to negotiate loans and execute mortgages for the purpose of meeting the indebtedness on the land, and to sell a certain portion whenever he could realize enough to pay off the incumbrances. After payment of "all indebtedness and liens on my real estate," the assets remaining were to be divided between the testator's wife and children. *Held*, in a suit to foreclose mortgages given by the executor under the power, that the will did not attempt to create a trust for the payment of debts secured on the real estate in preference to the unsecured debts, and that neither the will nor any part thereof was void because in violation of the rights of creditors, each of whom had the right to pursue his statutory remedy for the collection of his debt, if he chose to do so.

2. ESTOPPEL—ACQUIESCENCE.

Creditors of the testator having acquiesced for 10 years in the executor's management of the estate under the provisions of the will, they cannot now question the validity of mortgages executed by him under the authority given.

3. EXECUTORS—POWERS.

The power of the executor is not limited to a single renewal of the mortgages in existence at the time of the testator's death, nor to loans made to pay off the original mortgages, but extends to such further renewals or loans as were fairly necessary to enable him to carry out the trust.

4. SAME.

The title to the realty passed to the executor for the purposes of the trust, and he had power to make loans and execute mortgages without applying to the probate court for authority.

5. WILLS—CONSTRUCTION—CHARGE ON LAND.

The provision of the will that "all my just debts shall be paid out of the first realized assets of my estate" does not charge the payment of the debts on the land, so as to create a lien prior to that of a mortgage given by the executor.

6. EXECUTORS—MORTGAGES—EXECUTION.

The mortgages given by the executor named the grantor as "A. C. H., executor of the estate of M. H.," and were signed "A. C. H., Est. M. H." The notes secured read "I promise to pay," and were signed "A. C. H., Executor Estate M. H." *Held*, that the mortgages were the deeds of the executor, and so executed as to bind the property of the estate; the rules relating to the execution of sealed instruments not applying, Code Iowa §§ 49, 2112, having abolished the use of private seals.

In Equity. Bills for foreclosure of mortgages. Submitted on pleadings and proofs.

Kauffman & Guernsey, for complainants.

John Leonard & Son and Gatch, Connor & Weaver, for defendants.

SHIRAS, J. On the 12th day of June, 1879, Michael Holderbaum, then a resident of Madison county, Iowa, executed a will, the material parts of which are as follows:

"Item 2. I desire that all my just and equitable debts be paid out of the first realized assets of my estate, including expenses of last illness and funeral expenses.

"Item 3. I desire that my executor hereinafter named shall stand in my place and stead, for the purpose of managing and controlling my real and personal property in such a way and manner as to realize the largest and best income therefrom, and in paying off the indebtedness on said real property.

"Item 4. I desire that my said executor, for the purpose expressed in item 3, shall have full power and authority to negotiate a loan or loans for the pur-

pose of meeting said indebtedness on said real estate, and to make and execute a mortgage or mortgages on a part of said real estate, and generally to do, and make and execute such paper or papers, as shall or may be for the best interest of said estate, as I might or could do for said purpose, limiting my said executor as to mortgages, so that no new mortgage shall be given on the quarter section known as the 'home place.'

"Item 4 $\frac{1}{2}$. I desire that personal property and proceeds from the real estate be first used to pay off indebtedness, and real estate not to be so used unless my said executor should find that by disposing of a portion of said real estate, not to exceed a half section, (exclusive of the home place,) he could realize enough to pay off all liens on the real estate; then, and in that case, I desire my said executor to dispose of so much of said real estate (exclusive of the home place) as shall pay such incumbrance as may remain unpaid instead of procuring new loans, and in this, as in all matters, to do all for the best interests of the said estate."

"Item 5. I desire that the home place, containing one hundred and sixty acres, together with the buildings, farming utensils, two teams of horses, their harness, reaper and binder, and threshing machine, be and remain in the possession and control of my beloved wife, Rachel Holderbaum, for the use of the family as a home, and for their support; any overplus remaining to be used in the payment of indebtedness.

"Item 6. After the payment of all indebtedness and liens on my real estate, I desire that my said wife, Rachel Holderbaum, have the full one-third of the assets remaining, unless the said sum should be less in amount than the said homestead; then, and in that case, it is my will that she hold the said homestead, and, if her share is given in land, I desire that she have the full one-third thereof in value.

"Item 7. I desire that the remaining two-thirds of my said estate, including personalty and realty, be equally divided between my eight children, namely: Henry D., Michael S., Augustus C., Solomon, Eliza Schlarb, Sophia H., and Lucinda, and the two children of my deceased daughter, Mary Hochstetler; except that I have advanced Henry D. one thousand dollars, and Michael S. one thousand five hundred dollars, which is to be considered in said division, and except my son Solomon, whom I desire to have and receive five hundred dollars more than his proportionate share of my said estate.

"Item 8. It is my further will that, should any of my children die without issue, the share that would go to them should be equally divided among the brothers and sisters; and, if my said wife should not be living at the time of such division, then I desire that the estate be equally divided among my said children, or their representatives, subject to the matters stated in item 7 as to the advancement and the extra amount to Solomon.

"Item 9. Reposing full confidence in my son Augustus C. Holderbaum, I desire him to act as my said executor for this, my last will and testament, and that he be duly appointed as such executor without being required to execute any bond as such executor."

Michael Holderbaum died on the 21st day of June, 1879, being then seised of some 1,120 acres of land in Madison county, on which rested mortgages to the amount of some \$15,000 and over. His will was duly admitted to probate in the proper court, and the executor named therein entered upon the discharge of his duties as such executor. On the 28th day of January, 1887, a loan was negotiated with one Wilson Ames, of Chicago, Ill., for the sum of \$6,000, for which two coupon notes or bonds were given, the principal of which was made payable August 1, 1892, and the payment of principal and interest was secured by the execution

of two mortgages on different portions of the lands owned by Michael Holderbaum at the time of his death. Each note or bond recites that, "On the first day of August, 1892, I promise to pay Wilson Ames, or order, three thousand dollars," etc., and is signed by "AUGUSTUS C. HOLDERBAUM, Executor Estate Michael Holderbaum." The mortgages are as follows: "Know all men by these presents, that Augustus C. Holderbaum, executor of the estate of Michael Holderbaum," etc., and are signed, "AUGUSTUS C. HOLDERBAUM, Est. Michael Holderbaum;" and each contains provisions that, if the interest is not paid when due, the note shall become due in 60 days after such default, and the mortgagee may proceed at once to foreclose the mortgage.

Default in payment of interest having been made, suits of foreclosure were brought by Julia Ames, to whom the notes and mortgages had been assigned by Wilson Ames, the mortgagee. Among others, there were made defendants to the bills for foreclosure W. R. Shriver, administrator of Adam Hochstetler and Josiah Hochstetler, who are creditors of the estate of Michael Holderbaum, and Henry A. and David M. Hochstetler, who are devisees under the will of said Michael Holderbaum. These parties contest the validity of the mortgages sought to be foreclosed, and thus arise the issues presented for determination in these cases.

The first point made is that the mortgages are not so executed as to bind the property of the estate, but must be held to be simply the deeds of Augustus C. Holderbaum as an individual. Under the statutes of Iowa, a deed or mortgage is not an instrument under seal; the use of private seals being abolished. Code Iowa, §§ 49, 2112. It is well settled that in case of instruments not under seal courts may read the instrument in the light of the facts attending its execution, in order to ascertain who it was intended should be bound thereby. *Whitney v. Wyman*, 101 U. S. 392; *Hitchcock v. Buchanan*, 105 U. S. 416; *Post v. Pearson*, 108 U. S. 418, 2 Sup. Ct. Rep. 799. The attending circumstances, as well as the form of the mortgages, clearly show that it was the intent of the parties on the one hand to give, and on the other to receive, mortgages executed by Augustus C. Holderbaum in his capacity as executor, and such they must be held to be.

It is next urged that the testator had no legal right to create a trust or confer a power by will to execute mortgages for the payment of debts, and that the several provisions of the will looking to that end are wholly void. The contention is that the statutes of Iowa forbid any testamentary disposition of property prejudicial to the rights of creditors, and an exceedingly ingenious argument is made for the purpose of showing that such a use could be made of the power to mortgage as that thereby certain creditors might be preferred to the injury of others, and that in fact the will creates a discretionary power in trust for the benefit of a certain class of creditors, to-wit, those holding mortgages on the realty. By sections 2322, 2384, 2406, Code Iowa, it is provided that every person of sound mind and full age may dispose by will of all his property, except what is sufficient to pay his debts, or is allowed as a homestead, or other-

wise given as privileged property to his wife and family; that if a person by will makes disposition of his property prejudicial to the rights of creditors, the will may be sustained by giving security for the payment of the debts equal to the value of the property devised; that when the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which his estate shall be administered, and the manner in which the affairs of the estate may be conducted, until the same is finally settled, or until the minor children become of age. If the contention of defendants was sustained and carried out to its fullest extent, it would result in the conclusion, that any disposition made by will of a homestead or other privileged property, or in case the testator owed debts, no matter how small in amount, any disposition of any of his property, would be absolutely void; for the creditors have the right to look to all of the property not exempt for the payment of their claims. This is clearly not the law, nor the true meaning of the sections of the Iowa Code above cited. A person has the right, subject to the paramount rights of parties entitled to claim exempt or privileged property, and of creditors, to make any disposition he deems best of his entire property, subject only to the restriction that the purpose to which it may be devoted is not one contrary to law. The parties entitled to claim the privileged property and creditors have secured to them the rights which the law gives them, and which they may enforce, regardless of the will, or, waiving such enforcement, they may elect to profit by the provisions of the will. A will is not void in whole, nor necessarily in part, because it deals with the disposition of privileged property, or property that may be made liable for the payment of the debts of a testator.

The facts developed in the evidence submitted in this case show that Michael Holderbaum, when he executed his will, owned a large amount of farm property, both real and personal. Upon the realty rested mortgages to the amount of \$15,000, or over, representing the large bulk of his indebtedness. It is entirely clear that he believed that with proper management the proceeds of the available personal property, with the profits of the farm, would be sufficient, if time was allowed, to pay off the entire amount of the indebtedness. The general purpose of the will was to provide for the payment of the debts, and, this being accomplished, then to have the property remaining divided between his widow and children. His eldest son was appointed executor, to "stand in my place and stead, for the purpose of managing and controlling my real and personal property in such a way and manner as to realize the largest and best income therefrom, and in paying off the indebtedness on said real property." This is not to be construed, as is argued on behalf of defendants, as an attempt to create a trust or power for the payment of the debts secured on the real estate in preference to the unsecured debts, for in the preceding clause of the will it is declared that—

"I desire that all my just and equitable debts be paid out of the first realized assets of my estate, including expenses of last illness and funeral expenses."

Instead of being an attempt to dispose of the estate in a manner prejudicial to creditors, the will not only provides for the payment of all

debts before any distribution of the estate is made, but it empowers the executor to hold possession of the entire estate, real and personal, and to devote the profits of the realty to the immediate payment of all debts. In the absence of such testamentary disposition of the realty, the same would, under the law of Iowa, have passed at the death of the testator into the possession of the heirs or devisees, and the profits thereof would have belonged to such heirs. All the creditors would have been entitled to would be the proceeds of the personalty, with the right to sell so much of the realty as might be necessary to make up the deficiency; but the right to procure a sale by order of the probate court, after due disposition of the personalty, would not enable the creditors to reach the produce or profits of the realty anterior to the completed sale. In this particular, the will is beneficial, instead of prejudicial, to the interests of the creditors. Fairly construed, there is nothing in the provisions of the will which, upon their face, show any sufficient reason for holding that the will, or any part thereof, is void as against creditors. Any creditor who wished to pursue his statutory remedies for the collection of his debt had the right so to do, and there is nothing in the will that would prevent his taking such action, had he so desired. Furthermore, the will was duly probated in the state court, and the administration of the estate has been proceeded with in that court. It was open to the creditors, defendants herein, to contest the validity of the will in that court, or to invoke the aid of that court for the enforcement of all statutory rights, regardless of the provisions of the will, had such course been deemed advisable. Instead of so doing, these creditors stood by while the executor was dealing with the estate under the provisions of the will, during a period of 10 years, and now seek to question the validity of the will, as well as all that has been done thereunder. It is clear that this long inaction on their part is due to the fact that they were perfectly willing to leave the estate to be managed by the executor, in the belief that he would be enabled to carry out the purposes of the will, and pay off all the indebtedness. If they were willing for years past to leave the control and disposition of the property in the hands of the executor, they must abide by such election, so far as is demanded for the protection of innocent third parties, whose rights have accrued under the will as administered by the executor.

The will in express terms gives "full power and authority to negotiate a loan or loans for the purpose of meeting said indebtedness on said real estate, and to make a mortgage or mortgages on a part of said real estate," etc. It is argued that this power was exhausted when the first loans and mortgages were executed, thus limiting the power of the executor to one renewal or extension of the debts secured on the realty. The express intent of the will was to place the executor in the stead of the testator, and to authorize him to carry on the farm until the indebtedness had been fully paid; and, to aid him in so doing, the authority to make a loan or loans and execute mortgages was given him, so that the time of payment of the mortgaged indebtedness could be carried along until the executor had the funds in hand to meet such indebted-

ness. The purpose of the will, in this particular, was to enable the executor to secure time sufficient to pay the debts from the profits of the business, and the authority to make loans and give mortgages was a means to that end; and such a construction should be given to the means as is fairly necessary to accomplish the end. As is said by the supreme court in *Taylor v. Benham*, 5 How. 233, 267:

"Courts, in carrying out the wishes of testators, the pole-star in wills, are much inclined, especially in equity, to vest all the power or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it. * * * They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the purpose to be accomplished."

The power of the executor in this case is not to be limited to a single renewal of the mortgages in existence at the time of the death of the testator, nor to loans made for the purpose of paying off such original mortgages; but it must be held that such power extended to such further renewals or loans as were fairly necessary to enable the executor to execute the trust imposed upon him by the terms of the will. It is claimed that the will confers only a naked power upon the executor, and that such power must receive the limited construction that usually obtains in such cases. This is not the true construction of the will. It creates an interest in the devisees, of whom the executor is one, and in fact in favor of the creditors, and confers the powers granted to the executor, in order that he might be enabled to protect these interests and discharge the trust imposed upon him for the benefit of the creditors and the devisees. In *Taylor v. Benham*, *supra*, it is said by the supreme court, that—

"No doubt exists that a power coupled with an interest may be inferred by obvious implications from the whole will, as the fee not being vested at once elsewhere, and it being necessary to have it in the executors to effect the general design, as well as from the usual course, which is by an express devise to the executors. Nor is it of any consequence how small the interest may be. It is enough if only to distribute the proceeds as here, or to take the rents or use for the benefit of others."

There can be no question that the will in this case confers upon the executor a power coupled with an interest, and charges him with the performance of a trust, and that his authority under the will must be construed in that light.

Equally ill founded is the assumption that the title and beneficial interest in the realty passed at once to the devisees upon the death of the testator. The estate devised was that remaining after the payment of the debts, and, taking the entire will into consideration, it is clear that the title, as well as the control of the estate, real and personal, passed primarily to the executor. It is declared that the executor shall stand in the place and stead of the testator in managing and controlling the real and personal property, with power to execute mortgages, and such other paper or papers as shall be for the best interest of the estate, and with the further power to sell at once a half section of the realty, if by so doing enough could be realized to pay off the incumbrances on the

realty. Furthermore, the will directs the executor to pay all indebtedness and liens before distribution is made of the remainder of the estate to the devisees, and to accomplish this purpose it might become necessary to sell the realty, or portions of it, and this duty would, in such case, devolve upon the executor.

To effectuate the power to sell the realty, or to mortgage it, the title must be vested in the executor, or otherwise he could not well execute the trusts created by the will. It is true that it might be held that the title passed to the devisees, subject to the right of the executor to sell the same in the execution of the trusts, and such a construction may be given to a will, and especially in cases wherein particular realty or the whole is devised to a particular person. In the will now under consideration no such devise is made. Until the debts are all paid, it cannot be known what property will be left for distribution, nor whether it will be in realty or personalty. The will does not devise the realty which the testator might own at the time of his death, subject to the payment of his debts, to certain named devisees, but he directs the executor to pay all debts first, and then to divide what is left, giving "one-third of the assets remaining" to his widow, and the remaining two-thirds to be equally divided between the children. Viewing the will as a whole, it seems to me to be the true construction thereof to hold that the title to the realty passed to the executor for the purposes of the trusts created by the will, and that, under the terms of the will, he had the power to make loans, and execute mortgages for the security thereof, without applying to the probate court for authority so to do.

It is further contended that the will charges the payment of the debts upon the entire property of the estate, by reason of the direction in the second clause thereof,—“That all my just and equitable debts be paid out of the first realized assets of my estate,”—and that thereby the debts became, equitably, a prior lien upon all the property of the estate, and that consequently all mortgages given by the executor would be inferior to such lien.

The charge or equity in favor of creditors created by the will is not limited or defined by a single clause of the will. If the creditors claim rights or equities created by the will, they must be willing to take what the will, fairly construed, intended to give them. Leaving out the homestead, the will intends that all the remaining realty, and the profits derived therefrom, should be used for the payment of the debts, so far as might be needed. This purpose is to be gathered, not from a single clause in the will, but from the will as a whole; and the mode in which the estate was to be managed, including the making loans and giving mortgages therefor, is provided for in the will. In order to secure to the creditors the benefit of the profits arising from the cultivation of the farm, it was necessary that the loans secured by mortgages thereon should be extended from time to time. The will provided a mode for so doing, and the executor, by securing new loans, was enabled to retain control of the realty, and to use the proceeds thereof in the payment of debts. The primary purpose of the will was to provide a means

by which the debts could be paid out of the proceeds of the personalty, and the profits to be derived from the farm business to be carried on by the executor. The executor has for years been engaged in performing the duties required of him by the will, and the creditors have reaped the benefits thereof. To enable the executor to retain control of the realty, it was necessary that the liens thereon should be renewed, for which purpose successive loans were necessary; and, these loans having been procured in the interest of the creditors, it cannot be held that the creditors could reap the benefits thereof, and then assert that the loans were made subject to a prior lien, created by the will for the benefit of the creditors. The fact that the executor has not succeeded in realizing profits enough to pay off the entire indebtedness on the realty, and that it now appears that it might have been better to have sold the realty in the beginning, does not change the rights of the parties. The creditors and devisees were alike content to have the executor undertake the trusts created by the will, and to undertake the management of the farm in the mode therein prescribed, and they cannot now be heard to object to the validity of acts done by the executor under the powers conferred by the will. It must therefore be held that the mortgages in question are valid liens on the realty therein described, and are paramount to any lien, right, claim, or equity existing on behalf of any of the defendants.

It appears in the evidence that the creditors are proceeding in the state court, and have obtained an order for the sale of all the realty, including that covered by the mortgages to Ames. It would seem that by agreement a sale might be had that would convey a clear title, and thus secure the best possible price for the realty, in which event it ought to realize enough to pay the mortgage lien thereon, and also the amount due the other creditors.

In each case a decree will be entered for complainant, adjudging the amount due on the debt secured by the mortgage, for a foreclosure of the mortgage, and sale of the premises therein described.

HOWE, BROWN & Co. *et al.* v. SANFORD FORK & TOOL Co. *et al.*

(Circuit Court, D. Indiana. December 9, 1890.)

CORPORATIONS—INSOLVENCY—PREFERENCES TO DIRECTORS.

Where a corporation, while still a going concern, is insolvent, a mortgage on its property, executed to secure the directors, who are liable as indorsers for it to a large amount, is invalid as to general creditors, and that though the mortgage was procured by the directors without any actual fraudulent intent.

In Equity. On demurrer to the bill.

McNutt & McNutt, for complainants.

McDonald, Butler & Snow and *George A. Knight*, for defendants.

Woods, J. The bill shows that the respondents McKean, Nixon, Minshall, Kidder, and Mayer are stockholders, and all except Mayer di-

rectors, of the Sanford Fork & Tool Company, incorporated, and that, being liable as indorsers of the paper of that company, overdue and about to become due, to the aggregate amount of \$69,000, Mayer being liable jointly with the others, or some of them, upon a part of that paper, the said directors, on the 17th of March, 1890, after first procuring the consent and authority of the stockholders that it should be done, caused the officers of the company to execute a mortgage upon the corporate "buildings, machinery, and plant," to indemnify them and Mayer from loss on account of that liability; that the company was at the time deeply insolvent, its debts exceeding its assets by as much as \$150,000, and that on the 13th of May it was put into the hands of a receiver by the circuit court of Vigo county. The complainants are shown to be general creditors of the company, with claims which, as allowed by the Vigo circuit court, amount to \$11,631.39; and they dispute the validity of the mortgage for the indemnity of the respondents on the ground that the directors of the company had no right to obtain a preference for themselves over other creditors. It is not alleged, nor was it claimed in argument, that the respondents, or any of them, did anything with an actual intent to defraud. The question whether or not an insolvent corporation which had not suspended business could prefer its directors or managing agents, who were its creditors, or liable as indorsers of its paper, was considered upon full argument and citation of authorities *pro* and *con* in the case of *Lippincott v. Carriage Co.*, 25 Fed. Rep. 577, 586, and the conclusion was reached that the weight of authority and reason was against the validity of such preferences. The theory upon which that conclusion was based is shown in the following extract from the opinion:

"For while it is generally conceded that a corporation, notwithstanding insolvency, continues possessed [while a going concern] of a general power of management of its affairs, and, like natural persons, may give preferences by way of payment or security to one creditor or class of creditors over others, yet in close analogy to the rule which forbids the giving of preferences by individual debtors, for the purpose of securing, or in such manner as to secure, advantage or benefit to themselves, and in manifest accord with the tendency of judicial opinion, as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations, in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. Indeed, it has been often said by judges, including those of the federal supreme court, that the property of an insolvent corporation is a trust fund, and the directors trustees for the creditors; and, if this were strictly so, it is manifest that no preferences could be allowed between creditors standing in the same relation to the fund. These statements are, however, true in a qualified sense, and lead logically, if not necessarily, to the conclusion that in such cases, if they give preferences, they must do it unbiased by considerations of personal advantage or gain."

That ruling has the support of a number of later decisions, in some of which it is expressly approved: *White, etc., Manuf'g Co. v. Pettes Importing Co.*, 30 Fed. Rep. 864; *Adams v. Milling Co.*, 35 Fed. Rep. 433; *Beach v. Miller*, (Ill.) 22 N. E. Rep. 464; *Haywood v. Lumber Co.*, 64

Wis. 639, 26 N. W. Rep. 184; *Olney v. Land Co.*, 16 R. I. 361, 18 Atl. Rep. 181; *Rouse v. Bank*, (Ohio,) 22 N. E. Rep. 293. See, also, *Hope v. Salt Co.*, 25 W. Va. 789; *Gillet v. Moody*, 3 N. Y. 479. On the contrary, the supreme court of Iowa, in the recent case of *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. Rep. 395, has declared such preferences valid if fairly given, and in support of that view counsel for the respondents have referred to the following cases, not cited in *Lippincott v. Carriage Co.*, *supra*: *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. Rep. 514; *Railroad Co. v. Dewey*, 14 Mich. 477.

It is not to be overlooked that some of the later decisions which deny the validity of preferences in favor of directors proceed upon the theory that the directors of an insolvent corporation, even before a suspension of business, are trustees for the creditors, and, if that theory is essential to the conclusion, the question is perhaps already foreclosed in the federal courts; because, in *Purifier Co. v. McGroarty*, 136 U. S. 241, 10 Sup. Ct. Rep. 1017, the supreme court has said that the decision in *Rouse v. Bank*, *supra*, "proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence." But I do not think that theory indispensable. It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self-protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I think will compel its recognition and adoption. The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is averred, procured by the directors proposed to be benefited, they, themselves, being stockholders; and, even if this were not averred, the case would not, I think, be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth; and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization, for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure

comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which Equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence. The demurrer is overruled.

UNITED STATES *v.* WALLAMET VAL. & C. M. WAGON-ROAD Co. *et al.*

(Circuit Court, D. Oregon. May 12, 1890.)

LAND GRANT—WAGON-ROADS, COMPLETION OF—STATE CLAIM—ESTOPPEL—BONA FIDE PURCHASER.

In 1866 congress made a grant of lands to the state of Oregon, to aid in the construction of a wagon-road from Albany through the Cascade mountains to the eastern boundary of the state, and provided that the land might be sold as the work progressed, on the certificate of the governor of the state, that the portion of the same coterminous with said land was complete. The state transferred the grant, without further condition or qualification, to the Wallamet Valley & Cascade Mountain Wagon-Road Company, which undertook the construction of the road; and, within the five years allowed therefor, procured certificates from the governors of the state that the road was completed as required by law. Soon after, the company sold the lands to the defendants Weill and Cahn, who are now the legal owners thereof, except a small portion which has been disposed of. In 1874 congress authorized the issue of patents for these lands to the state or its assignee, when it was shown by the certificates of the governor that said road was "constructed and completed." Between 1878 and 1883 a question was made before the department of the interior whether the company had completed the road according to law, and testimony was received thereon, *pro* and *con*, and, after argument, the secretary of the interior directed patents to issue to the company, which was done on October 30, 1882, for 440,856 acres, in addition to a patent for 107,893 acres, issued on June 19, 1876. In consequence of this action by the secretary, the defendants believed that the due construction of the road was admitted by the complainant, and were thereby induced to expend a large sum of money on and about said property. In 1889, congress passed an act requiring the attorney general to bring a suit in this court against all persons claiming an interest in this grant, to determine the question of construction of the road, the legal effect of the governor's certificates, the right of the United States to resume the grant, and to obtain judgment declaring the land coterminous with any uncompleted portions of the road forfeited, saving the rights of any *bona fide* purchasers; the suit to be tried and adjudicated like other suits in equity. On August 29, 1889, in pursuance of this authority, this suit was commenced to obtain the relief therein specified. The defendants Weill and Cahn filed two pleas to the bill, in one of which they set up the foregoing facts as an estoppel, and in the other the defense of a *bona fide* purchase for a valuable consideration, and without notice of any failure on the part of the company to comply with the terms and conditions of the grant. *Held*, (1) that this suit must be tried as a suit between private persons, in which the defendants may set up any defense, including estoppel, and the statute of limitations, that they could if the complainant was merely a private person; (2) that the claim of the complainant to set aside these patents, and declare these lands forfeited, is, under these circumstances, a state one, and therefore ought not to be allowed; (3) that the complainant, by the passage of the act of 1874, either accepted the certificates, as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition on which the grant was made; (4) that the complainant, by the action of its executive department in issuing the patent of 1882, impliedly recognized and accepted the performance of such condition, and, having thereby induced the defendants to change their relation to said property, by expending a large sum of money thereon and thereabout, is now estopped to allege or claim that said condition was not performed; (5) that the certificate of the governor of Oregon was made, by the act of 1866, the only evidence of the compliance with the terms of the grant by the completion of the road; (6) that, upon the facts stated in the plea, the defendants are purchasers in good faith, and for a valuable consideration, within the saving clause of the act of 1889, and within the general principles of

equity jurisprudence; and (7) that, on the case made by the bill and first plea thereto, it appears that the complainant ought not to prevail in this suit, and therefore it is dismissed.

(*Syllabus by the Court.*)

In Equity.

Mr. Lewis L. McArthur, for the United States.

Mr. John A. Stanley, *Mr. C. E. S. Wood*, and *Mr. Henry Ach*, for defendants.

DEADY, J. By the act of July 5, 1866, (14 St. 89,) congress made a grant to the state of Oregon, to aid in the construction of a military wagon-road from Albany to the eastern boundary of the state, of the odd sections of the public lands, equal to three sections per mile of said road, to be selected within six miles thereof, together with the right of way for the same. The legislature of the state was authorized to dispose of the lands for the construction of the road, as the work progressed, and the governor of the state certified "to the secretary of the interior" that any 10 miles of the same was completed. If the road was not completed within five years, no further sales were to be made, and the land remaining unsold should "revert" to the United States. The act also provided that the road should be constructed with such "width, graduation, and bridges, as to permit of its regular use as a wagon-road," and in such other "special manner" as the state might prescribe; and that the road should remain a public highway for the use of the government of the United States.

On October 24, 1866, the legislature of the state granted to the Wallamet Valley & Cascade Mountain Wagon-Road Company, hereinafter called the "wagon-road company," a corporation theretofore formed, under the general laws of Oregon, for the purpose of constructing and maintaining a wagon-road from Albany across the Cascade mountains to the Deschutes river, "all lands, right of way, rights, privileges, and immunities," theretofore granted to the state "for the purpose of aiding said company" in constructing the road described in the act of congress, "upon the conditions and limitations therein prescribed." Sess. Laws, 58.

Between April 11, 1868, and June 24, 1871, both inclusive, there were issued by the governors of Oregon, and duly filed with the secretary of the interior, four certificates, which, taken collectively, showed that the road had been completed according to the acts of congress, and of the legislative assembly, to the eastern boundary of the state,—a distance of 448.7 miles.

On June 18, 1874, congress passed "An act to authorize the issue of patents for lands granted to the state of Oregon in certain cases," (18 St. 80,) which reads as follows:

"Whereas, certain lands have heretofore, by acts of congress, been granted to the state of Oregon to aid in the construction of certain military wagon-roads in said state, and there exists no law providing for the issue of formal patents for said lands, therefore be it enacted * * * that, in all cases where the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the state of Oregon, as in said

acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall, by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the general land-office to such corporation or corporations upon the payment of the necessary expenses thereof: provided, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents to lands to which the state is already entitled."

On June 19, 1876, and October 30, 1882, patents were issued to the wagon-road company, under the act of 1874, the first one for 107,893 acres, and the second one for 440,856 acres, since which no patent has been issued for any portion of the grant.

On June 6, 1881, the secretary of the interior, in a communication addressed to the speaker of the house of representatives, estimated that the company is entitled, under the grant, to 1,346 sections of land, or 861,440 acres.

On March 2, 1889, congress passed an act making it the duty of the attorney general to cause a suit to be brought against all persons or corporations claiming an interest in the wagon-road grants made to the state of Oregon, including the one made by the act of 1866—

"To determine the questions of the seasonable and proper completion of said roads, in accordance with the terms of the granting acts, either in whole or in part; the legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads; and the right of resumption of such granted lands by the United States; and to obtain judgment, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon-roads, which were not constructed in accordance with the requirements of the granting acts; and setting aside patents which have issued for any such lands; saving and preserving the rights of all *bona fide* purchasers of either of said grants or any portion of said grants, for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner, and by the same principles and rules of jurisprudence, as other suits in equity are therein tried."

The act also provides, among other things, for the disposition of the lands, in case the same are declared forfeited by the final determination of said suit.

In pursuance of this act, this suit was commenced by the attorney general, on August 29, 1889, on behalf of the United States against the wagon-road company and others, to have the lands included in the said grant forfeited to the United States, and the patents issued therefor, as well as the certificates of the governors of Oregon, concerning the construction of the road, declared fraudulent and void, on the ground and for the reason, as alleged, that the road never was "constructed and maintained" as required by law, either in whole or in part, so as to be a public highway, over which the property, troops, or mail of the United States could be transported; that the proceeds of said lands were not applied to the construction of the road; that the certificates of the governors are false, and were obtained on the false and fraudulent repre

sentations of the wagon-road company, without examination on the part of said governors, and in one instance, that of September 8, 1870, with his knowledge that the same was false; all of which was known to the defendants at the time they acquired an interest in these lands.

The bill also shows that by sundry conveyances, commencing with that of the wagon-road company of August 19, 1871, to H. K. W. Clarke, and ending with that of Fred W. Clarke, the son of said H. K. W. Clarke, to Alexander Weill, of April 9, 1879, the title to said lands has become vested in the defendants Alexander Weill and David Cahn; and that T. Edgerton Hogg, and certain corporations of which he is an officer, made defendants in the bill, claim an interest in said lands.

The defendants Weill and Cahn, by leave of the court, have filed two pleas to the bill and their joint and several answers in support thereof.

The first plea may be called an estoppel.

Briefly, it alleges that, after these defendants had acquired the title to the lands in question, as stated in the bill, and in March, 1878, a complaint was received at the office of the secretary of the interior, to the effect that the road had not been constructed, as required by the act of July, 1866, in consequence of which the commissioner of the general land-office, with the approval of said secretary, appointed a special agent to examine the road and report thereon; that, in October, 1880, said agent reported that the road had not been constructed, as required by law; that said report, and the evidence accompanying the same, was laid before congress, and in the house of representatives was referred to the committee on military affairs, which committee, upon consideration of said report and evidence, and evidence contradictory thereof, made a report in February, 1881, recommending that no action of congress be had in the premises.

In their report the committee say they—

“Do not feel called upon to investigate the disputed question of fraud arising from the *ex parte* testimony submitted, or warranted in expressing an opinion in regard to the same, but believe that to be a matter within the province of the judicial and not the legislative department of the government.”

And concludes as follows:

“(1) That the act of congress approved July 5, 1866, vested a present title to the land in question in the state of Oregon. (2) That, by the act of the legislature, and the acts of the governor of Oregon, the title to said land was vested in the Wallamet Valley & Cascade Mountain Wagon-Road Company. (3) That, by the deed of said company to Clarke, and the subsequent deeds from Clarke and others, the title of said land is now lawfully vested in the present claimant, Alexander Weill. (4) That said title cannot be forfeited or annulled or reinvested in the United States, excepting by a judicial proceeding, and that the same has become a vested right which congress cannot impair or take away.”

That afterwards, on February 8, 1882, a communication from the secretary of the interior was laid before congress, containing further charges and alleged proofs that the road was not constructed as required by the act of July 5, 1866, and the matter was referred in the house of

representatives to the committee on public lands, and in the senate to the committee on military affairs, which committees reported, recommending that congress take no action in the premises. Both these reports are annexed to the plea, and made a part thereof, and each state that the title to this land passed to the state, and its assigns under the act of congress and the state legislature.

The senate committee says that "it is impossible" for them "to make such an investigation as will justify action by congress which would do justice and equity in the premises;" and that "the executive department of the government had ample authority, in law," to investigate the matter, and, if necessary, to institute legal proceedings in the courts of the United States to secure a forfeiture of the grant, or any part thereof, for failure to comply with the terms and conditions thereof, "without any legislation or instruction from the legislative department."

That, by the proceedings thus had, the matter of the completion of the road was referred to the executive department of the government, whereupon the secretary of the interior, after due investigation of the subject, including the hearing of argument thereon, did, on July 5, 1882, direct the commissioner of the general land-office to proceed and certify the lands for patent under the act of June 18, 1874, and thereafter, in October, 1882, said patent for 440,856 acres was duly issued to the wagon-road company; that these defendants, relying in good faith upon the action of the legislative and executive departments of the government, were induced to, and did, before the passage of the act of 1889, "so alter and change their position, in reference to said lands," as to—

"Render it inequitable and unconscionable for the complainant to assert any right * * * to forfeit or reclaim said lands; that these changes consist, in part, in the expenditure of \$2,660.62 in securing the issue of patents therefor; in the payment of \$29,875.79 of taxes levied thereon; in the payment of \$109,800.97 to agents and attorneys for grading, selecting, and platting said lands, and defending the possession of the same from adverse claimants and trespassers, by the sale of sundry parcels of said lands with warranty of title, on which the liability of the defendants exceeds the sum of \$22,609.71; in the expenditure of \$86,895.75 in rebuilding and improving said road, through its entire length, which has greatly increased the value of the lands along the line thereof, a very large portion of which still belongs to the complainant, and in the payment of \$31,651.71 interest on said sums of money, making in all the sum of \$280,754.03."

In the second plea, these defendants aver that they are purchasers in good faith for a valuable consideration, and, in support thereof, allege in substance and effect that, in 1871, said lands were in the market for sale, when Weill and H. K. W. Clarke purchased the same of the wagon-road company, through their agent, T. Edgerton Hogg; that, in pursuance of said sale, the vendor conveyed the lands, on August 19, 1871, to said Clarke, who, on September 1st, of that year, conveyed the same to the defendant Cahn, in trust for Weill, Clarke, and Hogg; that, at this time, the greater portion of these lands were unsurveyed, and that, for the purpose of continuing the existence of the wagon-road company, and thereby securing the selection, and patenting of the lands, Weill and

Clarke, in the month of August, 1871, purchased the stock of said company, and, as a matter of convenience, some of said stock was bought in the name of Hogg, and by him held for Weill and Clarke, but said stock had no value apart from said land grant; that, at the time of the conveyance of said lands by the company, Weill had expended in the purchase thereof \$140,636.39, and Clarke \$20,000; that, at the time of said purchase, the several certificates of the governors of Oregon to the construction and completion of said road, as required by the act of July 5, 1866, were on file in the department of the interior, and the office of the secretary of state of Oregon; and these defendants then believed, and do still believe, that the same were altogether true, and never heard anything to the contrary, until 1880, when the attention of congress was called to the matter by the secretary of the interior; that, before purchasing the lands, Weill employed counsel learned in the law, who advised him that the title of the wagon-road company to the same was perfect, and that he had a right to rely on the certificates of the governors as conclusive evidence that the conditions of the grant had been duly performed; that, in making said purchase, he did so rely, and but for the existence of said certificates would not have made it; that, at the date of the purchase, these defendants were living in San Francisco and had never been in Oregon, except Cahn, who was there a short time in June, 1867, nor has either of them ever been there since; that, prior to said purchase, neither Hogg nor Clarke had any knowledge or information that these certificates were not true in point of fact, and if they or either of them was obtained by false or fraudulent means, neither of these defendants nor Hogg nor Clarke had any knowledge or information thereof; that, in 1879, Weill purchased all the interest of Hogg and Clarke in said lands, the same being 11-24 thereof, for \$21,400, and the release to the former, and the estate of the latter, from the repayment to him of their proportions—amounting to many thousands of dollars—of the money advanced by him in the purchase of the lands, and received conveyances from them accordingly, as set forth in complainant's bill.

The answer in support of the plea avers that the price paid by Weill, on August 19, 1871, for the lands, was the full value thereof, and denies all knowledge or notice that the road had not then been duly constructed and completed, as required by the act of congress, or that the certificates of the governors were, in any respect, untrue or had been procured by false or fraudulent representations.

The case was heard on the sufficiency of the pleas, admitting the truth of the facts stated therein.

The act authorizing the bringing of this suit empowers the court to consider and determine these three questions, and no others:

(1) Was the road seasonably and properly completed, either in whole or in part, as provided in the act making the grant?

(2) What is the legal effect of the governors' certificates concerning the completion of the road? And

(3) What right has the United States to resume the granted lands?

U. S. v. Union Pac. R. Co., 98 U. S. 608.

In the determination of these questions, the court is required, by the act of 1889, to proceed "in like manner," and be governed "by the same principles and rules of jurisprudence," as in other suits in equity,—that is, as in suits between private individuals. And such is the rule of procedure and adjudication in the case, independent of the directions of the statute.

When the United States comes into court of equity to assert a claim, it is subject and must submit to the rules of procedure and principles of jurisprudence which obtain in suits between private parties. *U. S. v. Arredondo*, 6 Pet. 711; *U. S. v. Flint*, 4 Sawy. 58; *U. S. v. Tichenor*, 8 Sawy. 156, 12 Fed. Rep. 449.

The grant of 1866 was a grant *in præsentia*. The language of the act is: "That there be and hereby is granted to the state of Oregon." As soon as the line of the road was designated, the grant attached to the odd numbered sections, within the prescribed limits, on either side of said line, and took effect from the date thereof. *Cahn v. Barnes*, 7 Sawy. 53, 5 Fed. Rep. 326; *Pengra v. Munz*, 12 Sawy. 238, 29 Fed. Rep. 830; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336.

The grant, however, was a conditional one, the condition being that the road should be completed, in the manner provided, within five years from the date of the act.

This was a condition subsequent, and, unless it was complied with, the complainant, as grantor, might, by proper legislation or judicial proceedings, have enforced the forfeiture of the grant on the account of such failure. But no one else could do so, and, unless the grantor does, the title remains unimpaired in the grantee.

Schulenberg v. Harriman, *supra*, 63.

As appears from the first plea, congress has repeatedly refused to declare the forfeiture of the grant, or take upon itself the investigation of the question whether the condition had been complied with or not. The attorney general has declined to institute judicial proceedings to that end, until required to do so by the act of 1889, which appears to have been passed on the memorial of the legislature of the state. It is also well understood that congress was influenced to the passage of the act by the desire of these defendants to have a speedy and complete determination of their rights in the premises.

On the facts stated in this plea, the demand made by this suit for the forfeiture of this grant, on the ground stated in the bill, is what is known in equity as a "stale claim," and therefore ought not to be allowed. The period prescribed for the construction of this road expired in July, 1871, full 18 years before the commencement of this suit. During all this time it was open to the complainant to bring this suit by its attorney general to have this grant declared forfeited on the grounds now stated in its bill. *U. S. v. Throckmorton*, 98 U. S. 70; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 278, 8 Sup. Ct. Rep. 850.

This, in my judgment, is such a delay or lapse of time as renders the

claim stale, and constitutes, under the circumstances, a bar to the relief sought.

Lapse of time, particularly when coupled with possession, as in this case, is a defense in equity in cases not within the reach of the statute of limitation. Story, Eq. Pl. § 813; 2 Story, Eq. Jur. § 1520; *U. S. v. Tichenor*, 8 Sawy. 156, 12 Fed. Rep. 449; *U. S. v. Beebee*, 4 McCrary, 12, 17 Fed. Rep. 36.

For seven years after the expiration of the time prescribed for the construction of the road, and filing of the certificates of the governors, in which its completion was formally and officially declared, nothing appears to have been said or suggested to the contrary by any one, when a trespasser on the lands made a complaint to the secretary of the interior, that the road had not been constructed according to law. Investigation ensued, under the direction of the secretary, and the matter was submitted to congress, who referred it back to the executive department in 1882, where, after due consideration, patents were ordered issued to the company under the act of 1874, which was done as to the greater portion of the lands.

The statute of limitations does not ordinarily run against the United States. But this suit is required, by the act of congress, to be tried and adjudicated as a suit between private parties, and therefore, in my judgment, the lapse of time, or the bar of the statute of limitations, is to have the same effect as in a suit between such parties.

Since 1878, the analogous action at law, to recover the possession of these lands, on account of a breach of the condition on which they were granted, would be barred in 10 years, and prior to that time in 20 years. And although the statute of limitations does not apply, *proprio vigore*, to suits in equity, yet, in cases like this, of concurrent jurisdiction at law, the court will apply the same limitation to one as the other. *Hall v. Russell*, 3 Sawy. 515; *Manning v. Hayden*, 5 Sawy. 379.

No case has been cited from the supreme court in which it has been distinctly held that the defense of estoppel can be made against the national government. But in many cases it is so assumed, even where the term is not used.

For instance, in *Clark v. U. S.*, 95 U. S. 543, it was held that a defense to a claim against the government for the use of a steam-boat, which involved bad faith on its part, could not be made.

In *Branson v. Wirth*, 17 Wall. 39, it is assumed, in the opinion of the court, that the United States may be estopped.

In *U. S. v. McLaughlin*, 12 Sawy. 200, 30 Fed. Rep. 147, it was said by Judge SAWYER: "That the law of estoppel in a proper case applies to the government."

In *Indiana v. Milk*, 11 Biss. 209, 11 Fed. Rep. 389, the court having found that the state by its conduct had recognized the validity of the defendants' title, and thereby induced them to alter their position by investing their money on the strength of it, Judge GRESHAM said:

"The state cannot now in fairness or law assert its invalidity. Resolute good faith should characterize the conduct of states in their dealings with in-

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dividuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."

In my judgment, the complainant ought not, in fairness and justice, be allowed to assert, as against these defendants, that this road was not completed, as required by law, and claim a forfeiture of the grant on that ground.

In the first place, the certificates of the governors to the completion of the road are the acts of the agents of the complainant. By the express terms of the grant, the governor of the state was authorized and required to determine if, and when, the road was constructed, as provided therein; and his certificate to that effect is the necessary and only legal evidence of that fact.

On the faith of these certificates, the truth of which was then and for long after unquestioned, these defendants invested their money in these lands.

By this means, the complainant proclaimed to these defendants: This road has been constructed according to law. The condition on which this grant was made has been complied with, and the same has become absolute; and it ought not now to be heard to allege anything to the contrary, even if it should be true, to the prejudice or injury of those, who, like these defendants, have, in good faith, acted upon such representation as true.

In the second place, after the investigations in congress and the department of the interior, between the years of 1873 and 1882, concerning the effect and verity of these certificates, and the fact of the compliance by the wagon-road company with the conditions of the grant, the complainant practically affirmed the right of the company to the lands, and listed the same for patent, under the act of 1874, and actually issued such patent, for the greater portion of the grant, on the faith of all which these defendants were induced to materially change their position in relation to the property by expending large sums of money thereon and thereabout, including the payment of \$29,885.79 taxes levied thereon by the authority of the state, and \$86,805.75 disbursed in the repair and improvement of the road.

In addition to the grounds above stated, on which this estoppel ought to be allowed, as against the United States, there is the express provision in the act of 1889, to the effect that this suit shall be tried and adjudicated as a suit in equity between private individuals. This direction is without qualification or exception, and, in my judgment, includes the setting up of an estoppel, as well as any other procedure or defense known to equity practice or jurisprudence. By this provision the complainant consents in advance that an estoppel for conduct may be availed of against it in this suit.

And even admitting, what is denied by the plea, that their certificates are false in fact, and were procured by the fraud of the wagon-road company, and that these defendants had notice of the same when they made the purchase, and, therefore, the complainant is not estopped to show these facts in any litigation between it and them, in which they

may be pertinent and material, still, by the deliberate action of the complainant the inquiry has become immaterial.

Congress had the same right to waive the performance of the condition subsequent to the grant, as to make it in the first place. When, therefore, congress decided by the act of 1874 that patents should issue for these lands, in case it was shown by the certificates of the governors of Oregon that the road was "constructed and completed," in effect, it thereby affirmed, for the purpose of the grant, the integrity and efficacy of said certificates, and accepted them as final and conclusive evidence of the performance of the terms and conditions of the grant, or waived the same. Again, admitting that the complainant could, as a matter of fact, and notwithstanding the certificates to the contrary, show that the road was not completed in all respects according to law, and that these defendants had notice thereof, still, the complainant having subsequently investigated the question upon evidence taken *pro* and *con* thereon, and decided by and through its proper officers that the grantee, or its assignee, the wagon-road company, was entitled to a patent for the lands, under the act of 1874, either on the ground that the road had been sufficiently constructed, or that, under said act, the certificates were conclusive of that fact, in consequence of which these defendants made the expenditures, and incurred the liabilities, on and about the property, as above stated, the complainant would be estopped to show such failure or notice in this suit.

The second plea is also good. All the elements of a *bona fide* purchase appear in the transaction. The original grant passed the legal title to the state, which it transferred to the wagon-road company, who conveyed the same to these defendants. Their grantor was not only the apparent, but the actual, owner of the property. The purchase is alleged to have been made in good faith, and nothing appears to the contrary; and it was made for a valuable consideration,—\$140,636. It is a matter of common knowledge, of which the court may take notice, that, at the date of this purchase, the country along the greater portion of the line of this road was unsettled, and much of it occupied by or within the range of wild Indians. Its value was purely speculative. Neither had the purchasers any notice of any defect or flaw in the title of their grantor, or any failure on its part to comply with the condition of the grant.

But, on this point, the district attorney contends that the grant having been made by statute on a condition subsequent, the purchasers were bound to inquire and see that this condition was fulfilled, before they can claim to have purchased in good faith. Admit this. But how were they to ascertain whether the condition was fulfilled or not? In effect, the district attorney answers: By a personal examination of the work on the ground. This would be a very unsafe proceeding. The purchasers might think the work was all that the law required, and some judge or jury, before whom the question might be raised years afterwards, might think otherwise. The only specific direction in the act on the subject is that the road shall be constructed so as "to permit

of its regular use as a wagon-road, and in such other special manner as the state of Oregon may prescribe." The state assigned the grant to the wagon-road company without prescribing any "special manner" in which the road should be constructed. It follows that the construction was only to be such as "to permit of its regular use as a wagon-road." Nothing could be more indefinite than this. Probably no two men in Oregon could have been found who would agree in all particulars as to what was necessary to constitute such a road.

The act provides for the sale of the lands as the work progresses in sections of not less than 10 continuous miles, on the certificate of the governor to the secretary of the interior that the same "are completed." No lands were in fact sold until the certificates were furnished of the completion of the whole road. But this is a matter of which the grantor cannot complain. The provision was intended solely for the benefit of the grantee, and could be waived, as it was.

The power to declare the road, or any portion thereof, not less than 10 miles, "completed," was thus vested in the governor. When his certificate to that effect was filed with the secretary of the interior, the fact of completion was established. And any one thereafter seeking to purchase the lands need go no further or seek elsewhere for information on this point.

And so, these defendants finding the evidence on file, as to the completion of the road, that authorized the sale of the lands, freed from all conditions thereabout, purchased the same in good faith, and for a valuable consideration.

On the facts stated in the plea, there can be but one conclusion in the premises,—that these defendants are *bona fide* purchasers, within the purview of the act of 1889, and the principles of equity jurisprudence on that subject; therefore they are not liable to have the lands so purchased by them declared forfeited to the United States, even if the certificates of the governors should prove false and fraudulent, of which there is no evidence beyond the formal allegations of the bill, unsupported by any specific statement showing wherein or how they are false or fraudulent.

The pleas are both sustained, and, in my judgment, the bill ought to be dismissed.

The facts stated in them are not only admitted for the purpose of this hearing, but they are manifestly true. The only exception to this statement is the denial of the falsity of the certificate, or, if they are false, notice to these defendants of that fact. That they ever had any such notice is extremely improbable under the circumstances. Naturally enough, a purchaser would rely on the certificates, and not travel hundreds of miles through an unsettled country to determine, by personal observation, a matter which the law made the governor the unqualified judge of, and which, as I have said, no two persons were likely to agree about.

Admitting that the falsity of the certificates may be shown in conjunction with notice to these defendants of that fact, the time which has elapsed

since the period for the construction of the road has expired, and the absence of any resident population along its line at that time, would render it extremely difficult to make any satisfactory proof on the subject. The company was not bound to do more than construct the road. Its maintenance was no part of the condition of the grant. If the state had constructed the road, it would no doubt have been left to the people who wanted the use of it to keep it in repair, as in the case of the other public roads.

The state assigned the grant to the wagon-road company without condition in this respect. Nor is it likely that any one would, at that day, have accepted the grant on the onerous and uncertain condition of keeping the road indefinitely in repair. The fact that the act authorized the land to be sold, freed from all conditions of course, as fast as the road was constructed, shows conclusively that the grant was not intended to be charged with the burden of maintaining the road through all time or at all. In the nature of things, in many places the road would soon deteriorate and disappear if not kept in repair. Snow and rain, floods, washouts, and slides must occur yearly on the line of this road, or some portion of it. Therefore it would be very difficult to show at this late day what was the character and quantity of work done in its construction. The persons employed on the work, who would be the best and almost the only witnesses on this point, are likely, in 20 or more years, to have died or disappeared.

These alone are probably sufficient reasons for dismissing this bill. But the conclusions reached on the first plea make it certain, in the judgment of this court, that the complainant cannot and ought not to prevail in this suit—*First*, because the claim is clearly a stale one, and also by analogy to the statute of limitations is barred by the lapse of time; *second*, because, by the act of 1874, it has either accepted the certificates as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition subsequent; and, *third*, by the action of its executive department prior to 1883, whereby it distinctly recognized and accepted the performance of such condition, and thereby induced these defendants to so alter their position in relation to the property that it would be unconscionable and unjust now to allege the contrary to their serious injury and prejudice.

As an authority applicable to this case generally, see *U. S. v. Dalles Military Road Co.*, 41 Fed. Rep. 493.

Let a decree be entered dismissing the bill as to these defendants.

FIRST NAT. BANK OF GRAND HAVEN v. FOREST.

(Circuit Court, N. D. Iowa, E. D. November 25, 1890.)

DEPOSITIONS DE BENE ESSE—FILING.

A deposition *de bene esse*, taken on interrogatories propounded by both parties, is not under the control of the one at whose instance it was taken; and, if at his request, the commissioner withholds the deposition, an order will issue requiring its return, the court having no discretion to refuse the order because the party was surprised by the testimony given.

At Law.

Motion for an order requiring a commissioner to file in court a deposition taken *de bene esse*.

Chas. A. Clark, for plaintiff.

Boies, Husted & Boies and Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, J. This action is based upon certain promissory notes signed "Forest Bros.," it being claimed that the defendant was a member of the firm, and therefore liable upon the notes. The defendant denies that he was a member of such firm, and this is the main issue in the case. In June last, plaintiff's attorneys served written notice on attorneys for defendant that the deposition of George Forest would be taken at Flint, Mich., before Henry R. Lovell, a United States commissioner, the reason assigned for taking the same being "that the said George Forest resides in the state of Michigan, outside of the northern district of Iowa, and more than one hundred miles from the city of Dubuque, the place where it is expected the said action will be tried." In other words, it was proposed to take the deposition under what is commonly known as the *de bene esse* provisions of the statute, and which now form sections 863, 864, and 865 of the Revised Statutes of the United States. On the day named in the notice, counsel for the respective parties appeared at Flint, Mich., and the deposition of the witness was taken upon oral interrogations and reduced to writing by the commissioner. It now appears that the deposition thus taken has never been returned into court by the commissioner, and, in reply to a letter of inquiry addressed him by counsel for defendant, he writes under date of October 28, 1890, as follows:

"Replying to yours of 22d inst., Mr. Farr, who appeared for the plaintiff in the matter in question, instructed me to hold the deposition subject to his order, and I am still so holding it.

"Very respectfully,

"HENRY R. LOVELL, U. S. Commissioner."

The motion now submitted on behalf of defendant is for an order directing the commissioner to return the deposition forthwith, as the case is noticed for trial at the present term.

So far as the action of the commissioner is concerned, it is clear that he misconceives his duty in the premises. It is his duty to deliver the

deposition into this court with his own hand, or to seal it up and send it to this court, as required by the provisions of section 865 of the Revised Statutes. A commissioner is supposed to be wholly indifferent between the parties, and to act for the common interest in taking and forwarding depositions; and a deposition taken upon interrogatories propounded by both parties is not under the control of one of the parties. When taken, it should be promptly forwarded by the commissioner to the court in which the cause is pending for trial, and a commissioner is derelict in his duty who allows one of the parties to dictate to him the disposition to be made of a deposition thus taken by him under the authority conferred upon him by law for that purpose. On behalf of plaintiff it is urged, in opposition to the motion, that the court, in the exercise of its discretion, should not require the forwarding of the deposition, for the reason that plaintiff has been taken by surprise by the testimony of the witness in question, and that plaintiff's counsel had no opportunity for cross-examining the witness, and thus exposing the alleged falsity of his testimony, and that plaintiff is entirely willing to have defendant take the deposition anew, and thus afford plaintiff an opportunity for a thorough cross-examination. To the motion is attached a copy of the testimony given by the witness before the commissioner, and the court has thus been enabled to see fully the force of the reasons urged by plaintiff's counsel in justification of the course pursued in this matter, and if I deemed it to be a matter within the discretion of counsel I might feel justified in holding that the facts did not demand action on part of the court; but the real question to be determined is whether, as a matter of practice, a party can direct a commissioner to withhold a deposition of a witness taken on his motion, but where both parties have examined the witness, simply because the testimony does not suit such party. For illustration: Suppose in this case the court, in accordance with the suggestion of plaintiff, should refuse the order requested, upon the theory that the defendant could take the testimony of the witness anew, and that should be done, and the tenor of the evidence should be such as not to be pleasing to the defendant, and he in turn, following the example of the plaintiff herein, should notify the commissioner not to forward the deposition, what position would the court and the parties be in? It cannot be possible that such a practice can be permitted, without injury to the rights of clients. When a deposition is returned, it is always within the power of the court, upon a sufficient showing of surprise or the like, to require a witness to be re-examined, or to submit to further cross-examinations, if fair opportunity therefor has not been enjoyed, but it cannot be permitted to a party to cause depositions to be taken upon notice to the other party, and after the latter has, at expense, attended at the time and place named, and participated in the examination, to then nullify, at his own pleasure, all that has thus been done, by simply directing the commissioner to hold the deposition, instead of forwarding the same to the proper court. I do not suppose it would be claimed that after the deposition had reached the clerk's hands the party on whose motion it was taken could take possession thereof, and refuse

to produce it, or by directing the clerk to hold it he could deprive the other party of the right to use it on the trial. The deposition in the hands of the commissioner is just as much beyond the control of the parties as though the same had been filed in court. When filed in court, the party on whose motion the deposition was taken is not obliged to read the same in evidence unless he so chooses, but he cannot prevent the other party from reading it as part of the latter's case. So when a deposition has been taken before the commissioner, the party moving therein may ignore it,—that is, may refuse to further deal with the deposition on his own behalf,—but he cannot deprive the other party, who participated in the taking thereof, of the right to have the deposition returned into court in order that he may adopt it and read it as part of his evidence. The copy of the deposition taken shows that full opportunity was afforded to plaintiff's counsel to examine the witness at length, and at the beginning of the cross-examination, upon objection being made, that certain questions were not proper in cross-examination, defendant's counsel stated that all questions not deemed to be proper as matter of cross-examination he should ask the court to receive as testimony on part of the defendant. The witness being thus made, in part at least, a witness for defendant, was thus subjected to cross-examination on part of plaintiff; and, if the opportunity was not availed of to the extent now deemed desirable by counsel, it was not the fault of the witness or of defendant. I am therefore clearly of the opinion that the defendant is entitled to have the deposition in question promptly forwarded to the court by the commissioner. Not doubting that counsel, on being advised of the views of the court, will forthwith notify the commissioner that he is required to promptly forward the deposition, and that the latter will at once perform the duty which the statute places upon him, no further order in the premises will be made at the present time.

FELL v. NORTHERN PAC. R. CO.

(Circuit Court, D. North Dakota. November 19, 1890.)

1. TORTS OF SERVANT—EXEMPLARY DAMAGES.

Exemplary damages may be awarded against a master, though the wrong complained of was the act of his servant, not authorized nor ratified by him.

2. CARRIERS—EJECTION OF PASSENGER—DAMAGES.

The plaintiff bought a ticket, and was told by the agent that he could ride on a particular train. The conductor had not been informed of the order to carry, and ejected the plaintiff on a dark night, while the train was running at a dangerous rate of speed. *Held*, that the case was a proper one for exemplary damages.

3. SAME—EVIDENCE OF INJURIES.

The plaintiff having been forced by threats to jump from the train while it was running rapidly on a dark night, evidence is admissible that he was at the time afflicted with a rupture, though it was unknown to the conductor, and did not aggravate the injury sustained; the evidence being competent for the purpose of ascertaining the extent of his mental suffering as an element of damages.

4. SAME—DAMAGES.

The plaintiff suffered pain in one of his legs, caused by the fall, and felt faint, and had some difficulty in walking back to the station. The pain continued more or less for three weeks, during which he did no work. He suffered no permanent injury, and did not call a physician. He was delayed 12 hours in his journey. *Held*, that a verdict for \$600 damages should not be disturbed.

5. SAME—INSTRUCTIONS.

In such case, there is no error in refusing an instruction to find for the defendant if the conductor told the plaintiff, before the train started, that he could not ride on it, and the latter refused to get off, and was afterwards expelled without unnecessary force; the instruction assuming that the expulsion was at a proper time and place, and there being evidence to the contrary.

At Law. On motion for a new trial.

S. L. Glaspell, for plaintiff.

John S. Watson, for defendant.

THOMAS, J. This is an action for personal injuries, alleged to have been sustained by the plaintiff by reason of being expelled from defendant's freight train. The action was tried by a jury, before Judge Rose, at Jamestown, in the district court in and for the sixth judicial district of the territory of Dakota, at the April term of that court, 1889. The plaintiff had a verdict for \$600. A motion for a new trial was made by the defendant in said territorial court, which was pending at the time the state of North Dakota, including all of said sixth judicial district, was admitted into the Union. The judge of the trial court settled a bill of exceptions. Upon the admission of said state, this action was transferred to this court upon the request of the defendant, pursuant to section 23, c. 180, Laws 1889, (25 St. at Large, pp. 676-683.) On the 8th day of October, 1890, said motion was brought on to be heard before this court, sitting at Fargo, in the south-eastern division of the district. It appears from the bill of exceptions that on the evening of the 26th day of July, 1888, the plaintiff applied to the defendant's ticket agent at Eldridge station, on defendant's line of road, in the territory of Dakota, for a ticket to ride on freight train No. 16, from that station to Jamestown, a station a few miles east of Eldridge, and also on the line of its road. Said freight train was due at Eldridge at 11:40 that evening. Prior to that day said train was not allowed to carry passengers. The ticket agent, in answer to said application, told the plaintiff that he would sell him a ticket for passage on train No. 16, as requested, and at the same time showed plaintiff an order of the company permitting passengers to ride on that train, which had been issued that day; and the plaintiff then and there purchased of said agent a first-class ticket for passage on said freight train No. 16 from Eldridge to Jamestown, aforesaid, and paid therefor 30 cents, the regular price. Said freight train was run in two sections on that evening. The agent flagged the first section, and after it had stopped the plaintiff showed the conductor thereof his ticket, and the ticket agent told the conductor that he had orders to sell tickets for that train, and showed the conductor thereof the order. The conductor thereupon told the plaintiff, as he claims, that the first section did not carry passengers, but that the second section

would carry passengers. The plaintiff did not attempt to get onto the caboose of the first section. In this respect the conductor of the first section and the brakeman testify that the plaintiff did get onto the caboose of the first section, and, when told that he could not ride thereon, the plaintiff got out and walked back to the station. The conductor also denies telling him that he could ride on the second section. The ticket agent then flagged the second section, as it came up about five minutes after the first section had passed, and the plaintiff, as he claims, at once walked back to the caboose attached to the second section, then standing some distance west of the station. As he walked up to the caboose, some one called out therefrom: "What do you want?" Plaintiff replied that he wanted to ride to Jamestown, and thereupon stepped upon the platform of the caboose, and found the door locked. The train started while plaintiff was standing upon the platform, and was in motion when the conductor opened the door of the caboose. The plaintiff passed into the caboose when the door was opened, and showed the conductor his ticket, and the conductor thereupon said: "That ticket is not good on this train. You will have to get off." The plaintiff then told the conductor that he had bought that ticket to ride on that train, and that he was told by the agent that it was good on that train. The conductor then said to plaintiff: "By God, you must get off this train; you have got to get off this train." Plaintiff then turned around and picked up his carpenter tools, which he had laid on the seat, and started towards the door, and said to the conductor: "I can't get off this train." The conductor thereupon said: "By God, you've got to get off." By that time plaintiff was out on the platform, and saw that the train was running very fast, and again told the conductor that he could not get off, and the conductor said: "By God, you have got to get off, and if you don't, I will help you off." The plaintiff then stepped down onto the lower step of the platform. The conductor followed him there, and put his hand on plaintiff's shoulder, and said: "If you don't get off, I will throw you off." Plaintiff said: "Don't throw or push me off, I had rather jump." The plaintiff thereupon jumped off and struck on his feet, and then fell on his head and shoulders. Plaintiff had in his arms and pockets a saw, plane, hammer, and other tools at the time he jumped from the train. The train was in motion, and running very fast, as plaintiff claims, and was at that time about 800 feet from the place where plaintiff got onto the caboose, and it was quite dark at the time. The plaintiff picked up his tools, and walked back to the ticket office with some difficulty, and remained at the hotel near the ticket office until the next morning. Plaintiff suffered pain in one of his legs in the fall, and felt faint, and had some difficulty in walking back to the station. The pain continued more or less for three weeks, during which time he did no work. He suffered no permanent injury, and did not call a physician. He was delayed about 12 hours at Eldridge. The conductor and officials of the train give a somewhat different version of this affair. The defendant gave evidence tending to show that the conductor of the second section notified the plaintiff that he could not ride

on No. 16 just before the train started up. In this respect the conductor testified:

"I was in the cupola, and I thought he was a railroad employe at first, and I stepped down and asked him what he had to ride on, and he showed me a ticket. I don't remember whether I took the ticket in my hand or not, and I told him we did not carry passengers, and he tried to explain to me that we did, and while I was talking to him we started up."

Defendant also gave evidence tending to show that the conductor of the first section told plaintiff that he could not ride on the second section. Neither conductor had been notified, prior to arriving at Eldridge, of the new order.

The defendant contends that the court erred in refusing to give certain instructions, based on the evidence given on defendant's behalf, to the effect that plaintiff was notified, prior to the starting of the train, that he could not ride on it. After a careful examination of the evidence and the instructions asked and refused, I am of the opinion that none of the instructions refused distinctly raise the point suggested. They all assume some material fact neither admitted nor proved, which warranted the rejection by the trial court of the instructions. The following will illustrate them:

"(2) If you believe from the evidence that the plaintiff was advised or informed by the conductor before the train left the station at Eldridge that he, the plaintiff, would not be allowed to ride on the said train, and that the plaintiff neglected or refused to leave the train, and was afterwards expelled by the conductor without unnecessary force or violence, then your verdict must be for the defendant. (3) If you find from the evidence that the plaintiff purchased from the defendant's ticket agent at Eldridge a ticket which entitled him, plaintiff, to transportation from said station to Jamestown, and that said ticket agent advised him, plaintiff, that he could ride upon the freight train then about to arrive at said station, and that plaintiff, pursuant to said advice, thereupon mounted the caboose attached to said freight train, and if you shall also find that if, before said freight train started from Eldridge station, the conductor, or any other agent or servant of the defendant, advised or informed the plaintiff that he would not be allowed to ride upon said train, then the plaintiff had no right to rely upon the information given by the ticket agent; and if he chose, under such circumstances, so to do, and was afterwards expelled from the train without unnecessary force or violence, he cannot recover in this action."

The first instruction above quoted assumes that the undisputed evidence clearly shows that the plaintiff was expelled from the train at a proper time and place. The giving of this instruction would evidently warrant the jury to find for the defendant, although it appeared from the evidence that the plaintiff was ejected while the train was running at a dangerous rate of speed for him to jump, and at a dangerous place, and in a dark night. The second instruction in effect required the court to charge the jury that, although the plaintiff had bought his ticket upon the assurance of the ticket agent that he could ride on that train, and had paid his money therefor, relying on such assurance as a part of his contract, if any other servant of the company had informed him that he could not ride on that train before he entered the car, the conductor

would be justified in ejecting him. Such a proposition cannot be maintained. The only evidence contained in the bill of exceptions tending to show that any agent or servant of the company except the conductor of the second section informed the plaintiff that he could not ride on the second section was the evidence to the effect that the conductor of the first section had so informed him. This conductor had seen plaintiff's ticket, and had been told by the ticket agent that an order had been issued permitting passengers to ride on No. 16, and the order was shown to that conductor. He was in possession of all the facts, and had no right to refuse plaintiff admission to his car, and had no right to prevent plaintiff from taking passage on the second section, over which he does not appear to have had any control, and notice from him to the plaintiff, under the circumstances disclosed by the evidence, would not justify the second conductor in excluding him from his car; at least that evidence would not justify the court in giving the instructions above quoted, or either of them.

The defendant also contends that the court erred in refusing to instruct the jury that, under the evidence introduced, the plaintiff was not entitled to recover exemplary damages, and in instructing them that they might allow such damages in case they found that the conductor expelled plaintiff from the train in a wanton, gross, malicious, and outrageous manner. At the time of the trial of this action, the following section of our Civil Code was in force in the territory of Dakota, and is now the law of this state:

Sec. 1946, Civil Code. "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

Whatever conflict existed prior to the adoption of this statute on the question of exemplary damages, the rule that they may be allowed in cases coming within the terms of this statute is settled in this state, and such was the rule applicable to proper cases when this case was tried in the territorial court. And that the rule is applicable to corporations in cases where there has been some willful misconduct, or that entire want of care which raises the presumption of a conscious indifference to consequences, is settled by the supreme court of the United States in *Railway Co. v. Arms*, 91 U. S. 489-495. These rules are not questioned in this case, but the contention is that the act complained of must have been that of the principal, and not of the mere agent or servant. It is insisted that that fact must be shown, or it must appear that the act of the servant was authorized or ratified by the principal. The rule contended for by defendant's counsel has been laid down in a great number of decided cases, but the rule has been criticised and abandoned in other cases. There was evidence in this case from which the jury were justified in finding that there was willful misconduct on the part of the conductor in ejecting plaintiff from the train, and that he manifested a reckless indifference to the rights of the plaintiff, and the consequences that

might result to him in ejecting him from the platform of the car while the train was moving rapidly, and in a dark night, knowing not how or where he would strike or fall. He was in the employ of the defendant, and in charge of its train, and was acting within the scope of his authority. The defendant's employment afforded the conductor the means or opportunity, which he used, while so employed, in committing a willful injury, and his willful misconduct must be attributable to the company for which he acted, though it did not authorize the wrongful act or ratify it. Upon the facts and circumstances of this case, I think the learned judge was justified in instructing the jury that they were at liberty to allow exemplary damages. *Id.* 489; *Gallena v. Railroad Co.*, 13 Fed. Rep. 117-124; *Barry v. Edmunds*, 116 U. S. 550-563, 6 Sup. Ct. Rep. 501; *Malloy v. Bennett*, 15 Fed. Rep. 371-374; *Shumacher v. Railroad Co.*, 39 Fed. Rep. 175; *Manufacturing Co. v. Boyce*, 13 Pac. Rep. 609, and cases cited on page 610.

The next alleged error relates to the admission of evidence as to the plaintiff's physical condition at the time he was ejected from the car. The following question was propounded to the plaintiff by his attorney in his examination in chief: "You may state whether or not at the time of this occurrence you were suffering from any serious bodily infirmity." This question was objected to as incompetent, irrelevant, and immaterial, and inadmissible under the pleadings, and for the further reason that it had not been shown that such disability, if any there existed, was known to the defendant or any of its servants. The objection was overruled, and the evidence admitted as going to the point of his mental suffering occasioned by the threat to put him off, and fearing the consequences of his jumping and alighting from the train. To this ruling the defendant excepted. The plaintiff then testified that he had been afflicted with a rupture since the spring of 1864; that it is of a very serious nature; that it interfered with his work; that he was unable to wear a truss; unusual exertion has an effect on the malady,—the more exertion the more irritation; that he was not able to perform the ordinary work of a carpenter; that he could not jump from the train because he was in fear of being hurt; but that he did jump for the reason that he had rather jump than be pushed off. The rupture did not contribute to his inability to work during the three weeks. It was not aggravated or in any way irritated by the jumping from the train on that occasion. I think the evidence was competent for the purpose for which it was admitted. The mental anguish arising from the nature or character of the wrong is a proper element of compensatory damages. *McKinley v. Railroad Co.*, 44 Iowa, 314. The conductor put the plaintiff in fear by compelling him to accept the alternative of jumping from the platform or being pushed off in the dark, while the train was moving very fast, as it appeared to the plaintiff, and his fear must naturally have been greatly intensified by reason of his physical condition, and it was proper to put the jury in possession of all the facts relating to his physical condition, for the purpose of ascertaining the extent of his mental suffering as an element of damage. *Railway Co. v. Fize*, 11 Amer. & Eng. R. Cas.

109. That the conductor did not know of the rupture is immaterial. The plaintiff was rightfully on that train, and had a legal right to be carried according to his contract, without interference, so long as he conducted himself in a proper manner; and when the defendant, through its conductor, trespassed upon his rights, and expelled him from the train, as shown by plaintiff's testimony, to which the jury had a right to give credit, it became liable for the natural and legitimate consequences of the willful and unlawful act. If the plaintiff had sustained physical injury by reason of the ejection, which became seriously aggravated by reason of the rupture, the defendant could not claim immunity for the aggravated result because it did not know of the physical condition of the plaintiff. *Railway Co. v. Buck*, 18 Amer. & Eng. R. Cas. 234. Upon principle the same rule must apply in a case like this, where the mental injury and anguish was intensified and aggravated by the physical condition, though not known to the party guilty of willful wrong.

It is also claimed that the court erred in admitting the evidence of the surgeon, who testified under objection, that he had some two years prior to the trial examined the plaintiff, and found that he was then suffering from a permanent rupture, which would interfere with physical exercise on the part of the plaintiff; that it would interfere with physical exertion in the manner and to the extent that it was liable to produce strangulated hernia, and the consequences following might reach considerable ways. This evidence was practically corroborative of the testimony of the plaintiff on the same point. It is evident that it would or might require great physical exertion in jumping from that moving train at the time and place, or in the shock resulting from the jump or fall to the ground. I see no objection to the testimony. The case of *Hubbard v. Railroad Co.*, (Mich.) 18 Amer. & Eng. R. Cas. 338, cited by defendant, is not in point, and does not sustain the objection to the testimony of the surgeon.

The last point made and urged by the defendant in this motion is that the verdict should be set aside for the reason that the damages are excessive. Upon the well-settled rules for the guidance of courts on this question, I do not think I would be justified in setting this verdict aside on that ground. I cannot see that this verdict is so excessive or outrageous with reference to all the circumstances of the case as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to misdirect them. *Barry v. Edmunds*, 116 U. S. 565, 6 Sup. Ct. Rep. 501; *Railroad Co. v. Fixe*, 11 Amer. & Eng. R. Cas. 109; *Railroad Co. v. Myrtle*, 51 Ind. 566.

The case was fairly submitted to the jury, and, finding no error, the motion for a new trial is denied, and judgment for the plaintiff is ordered accordingly.

UNITED STATES v. GEORGI *et al.*

(District Court, S. D. New York. October 23, 1890.)

CUSTOMS DUTIES—LIQUIDATION—BOND—PAYMENT—SUBSEQUENT RELIQUIDATION—SURETY—REV. ST. §§ 2964, 2970.

The liquidation of duties by the proper customs officers fixes for the time being the amount of duties to which the goods are "subject by law," under Rev. St. §§ 2964, 2970. On a bond conditioned for withdrawal of the goods within one year, "on payment of the duties and charges to which they may be subject by law at the time of such withdrawal," *held*, that a payment within the year of the amount of duties as thus liquidated was a discharge of the bond, and that, upon a subsequent reliquidation at a higher rate of duty, no recovery could be had upon the bond against the surety, though the importer would be liable in a different action for the additional amount.

At Law. Motion for new trial.

Edward Mitchell, U. S. Atty., *J. T. Van Rensselaer*, Asst. U. S. Atty.
Hartley & Coleman, for defendants.

BROWN, J. This suit was brought upon a warehouse bond to recover a balance of \$98.25, alleged to be due upon an importation of goods by the defendant Georgi in March, 1888. The bond was executed by Georgi as principal, and by the other defendant as surety. The condition of the bond provides that it shall be void if the importer shall, within one year from the date of importation, withdraw the merchandise, "on payment of the duties and charges to which it may be subject by law at the time of such withdrawal." The amount of duties estimated at the time of the entry was \$1,150. On appraisement and liquidation, completed May 23, 1888, the duties were liquidated at \$1,184.15. The goods were withdrawn in three different installments in April and May, 1888, and payments on account of the duties made at each withdrawal. On the 16th of June, 1888, the sum of \$34.15 was paid, which made the full amount of \$1,184.15, and the bond was marked "Canceled" by the clerk in the ordinary course of business at the custom-house, and the account supposed to be closed and settled. A protest and notice of appeal had, however, been duly served upon the collector by the importer, claiming a lower rate of duty. These were never transmitted to the secretary of the treasury for his action thereon, but the collector having directed a further consideration of the matter by the appraiser, the same deputy assistant appraiser who had previously examined the goods reported, in August, 1888, a different classification of the goods with a higher rate of duty, and a reliquidation of the duties was accordingly made on October 6, 1888, fixing the duties at \$1,282.40, being \$98.40 in excess of the original liquidation, to recover which this suit was brought. No notice was given to the importer of the reliquidation, or of any action upon his protest and appeal. He had no notice of the reliquidation until more than 10 days afterwards,—too late to make any protest or appeal upon the reliquidation. On the trial the assistant appraiser testified that, although he had none

of the goods before him upon the reappraisement, he knew the goods perfectly well, and that they were the same in character as those to which a new classification had been given by decision of the treasury department, involving a higher rate of duty. On the reappraisement and reliquidation no change was made in the value, but only a different classification, in accordance with the ruling in the treasury department as regards similar goods. The court directed a verdict for the defendant, and a motion for a new trial is now made.

The suit being brought on the bond, the only question is whether its condition has been complied with by "withdrawal of the goods within one year on payment of the duties to which the goods were subject by law at the time of the withdrawal." This is resolved into the further question whether the duties to which the goods "are subject by law at the time of such withdrawal" are the duties as they stand legally determined by the liquidation in force at the time of withdrawal, or whether this phrase includes also any further duties that may be determined upon a future reliquidation at any indefinite time after the withdrawal, so long as the right to reliquidate may be lawfully exercised. In the case of *U. S. v. Campbell*, 10 Fed. Rep. 816, the meaning of this phrase was considered; and, following what was conceived to be the decision of Mr. Justice BLATCHFORD in the case of *U. S. v. Cousinery*, 7 Ben. 255, this court held that the legal duties to which the goods were "then subject" were in legal contemplation the duties as they then stood liquidated and fixed by the collector. I do not find reason to add much to what has been said in the former decisions. The object of the warehouse system is the convenience of the importer. It contemplates the withdrawal of the goods during the periods specified, upon the payment of some fixed, "liquidated" sum. By section 2964 the goods are declared to be "subject at all times to the importer's order, upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing." And by section 2970 it is declared that warehoused merchandise may be withdrawn for consumption within one year from the date of the original importation, "on payment of the duties and charges to which it may be subject by law at the time of such withdrawal." From both these provisions, it is obvious that it is not only the duty of the collector to ascertain the duties upon entry for warehousing, which is done by the "liquidation," but that the importer has an absolute right to withdraw his goods at any time within one year, upon payment of the duties as they stand thus fixed and liquidated at the time of the withdrawal. The collector could not refuse to deliver the goods upon a tender of the liquidated duties on the mere possibility that some future liquidation might fix a higher rate; nor would he be authorized to deliver the goods to the importer upon tender of a less sum, even though error had been made in the liquidation, which a subsequent reliquidation, or an appeal to the secretary, might correct. If the amount of duties which the importer was required to pay in order to obtain his goods must be some undetermined and unknown sum, different from the liquidation, and dependent upon some possible future legal

determination, since neither the importer nor the collector could determine this sum, the goods could not be withdrawn at all until the period for possible reliquidation had passed. This is plainly contrary to the intent of the law. The necessary construction of the statutory phrase, therefore, is for the payment of the duties as they stand liquidated at the time of withdrawal. Upon any other construction, moreover, in the case of warehoused goods, the twenty-first section of the act of June 22, 1874, would have no application, and there would be no limit to the period for reliquidation, since that statute applies only to cases where duties have been paid and the goods delivered. For if the importer could not lawfully obtain his goods by paying the duties as they stand liquidated, as being the duties to which they are "legally subject at the time of withdrawal," he could never lawfully withdraw them at all, since the right to reliquidate would never expire, and the duties payable would never be absolutely determined. Necessarily, therefore, in the practical construction and application of the statute, the amount of duties fixed by the collector by the liquidation is, in the language of Mr. Justice BLATCHFORD in the *Case of Cousinery*, above cited, "by the statute made the duty for the purpose of collecting it as a duty." The same language in this bond must have the same construction that it has in section 2970. The condition of the bond is not directly for the payment of duties, but for the "withdrawal of the goods on payment of the duties." Upon such a condition, therefore, I must hold that the condition is performed by the withdrawal of the goods within the time limited, on the payment of such duties as by law were required to be paid as the condition of the right to withdraw the goods; and those duties were the duties as they stood liquidated at the time of withdrawal. The condition of the bond being rightly, lawfully, and fully performed, the liability of the surety was thereby extinguished, and could not be revived by a reliquidation, made several months afterwards. *Dumont v. U. S.*, 98 U. S. 142; *U. S. v. Campbell*, 10 Fed. Rep. 816; *U. S. v. Du Visser*, Id. 642.

This construction seems to me not alone the only construction consistent with the different provisions of the warehouse act itself, but to satisfy entirely the presumed purposes of the act as respects security to the government. On the entry of goods for consumption, the importer, on paying the duties as liquidated, is not required by any provisions of law to furnish a surety for the payment of additional duties that may possibly be fixed by some future reliquidation. The government, in providing the importer the conveniences of the warehouse system, requires him to give security that he will withdraw the goods on payment of the duties to which they are subject at the time of withdrawal, because the government does not intend either to hold the goods indefinitely, or to look to the goods alone for the payment of the duties, or to take the risk of loss that may attend holding them. By paying the duties, as they stand legally determined at the time of withdrawal, the government is fully protected to the same extent as upon payment of duties entered for consumption. Nothing more would seem to be re-

quired by the purposes of the act, and the language of it is in strict accordance with this construction.

There is nothing in the warehouse act that I can discover showing any purpose to hold the surety liable for the mere possibility of a reliquidation, after the goods have been delivered, and the liquidated duties paid. There is no more reason for security against such a possibility in the case of warehoused goods, than in the case of entry for consumption; and no reason to suppose the warehouse act had any such purpose in view. Nothing in this construction affects the right of the government to recover against the importer any additional duties fixed by reliquidation after withdrawal in the case of warehoused goods, any more than in the case of goods withdrawn for consumption.

I do not perceive that the service of a protest and appeal by the importer affects at all the construction of the language of this bond, or of section 2970. Until a reliquidation, whether the first liquidation was in fact correct or erroneous, the importer, on withdrawing his goods, must pay the duties as they stood liquidated at the time of withdrawal; and by paying that sum, whether the subsequent liquidation were greater or less, the condition of the bond was fulfilled.

The motion for a new trial must be denied.

WRIGHT & LAWTHORP LEAD CO. v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 31, 1890.)

CUSTOMS DUTIES—FLAXSEED—ALLOWANCE FOR IMPURITIES.

Rev. St. U. S. § 2898, prohibiting the allowance of "draught" in assessing customs duties, does not forbid deduction for impurities from an article subject to a specific duty; and, under Act March 3, 1883, cl. 466, (Heyl,) making linseed or flaxseed dutiable "at 20 cents per bushel of 56 pounds," a deduction should be made for dirt and similar impurities contained in such seed.

At Law.

Shuman & Defrees, for plaintiff.

W. G. Ewing, U. S. Dist. Atty., for defendant.

BLODGETT, J. Plaintiff imported a quantity of flaxseed from Liverpool, which had been brought from Calcutta. The invoices showed the gross weight and a tare of five pounds per bag, and a deduction of "4 per cent. for impurities." The collector, in assessing the duties, deducted the tare, which was the weight of the bags, but refused to allow anything for impurities, assessing a duty of 20 cents per bushel of 56 pounds upon the gross weight, less the tare. Plaintiff paid the duties so assessed under protest, appealed to the secretary of the treasury, by whom the action of the collector was affirmed, and brought this suit in apt time to recover the excess of duties paid by reason of the refusal to make any deduction for impurities. The proof in the case shows with-

out dispute that the seed contained dust, composed of clay, sand, and gravel, to an average of 4 per cent., and the question is whether this deduction should have been allowed the plaintiff, or, in other words, should the plaintiff have been compelled to pay duty on anything but the clear flaxseed. It is contended on the part of the defendant that, under the last clause of section 2898, which prohibits the allowance in any case for "draught," the collector has no authority to make the allowance claimed for impurities. By the thirty-fifth section of the act of August 4, 1790, it was provided—

"That the following allowance shall be made for the draft and tare of the article subject to duty by weight; that is to say: for draught on any quantity of one hundred weight, or one hundred and twelve pounds, and under, one pound; on any quantity above one, and not exceeding two, hundred weight, two pounds; on any quantity above two, and not exceeding three, hundred weight, three pounds; on any quantity above three, and not exceeding ten, hundred weight, four pounds; on any quantity above ten, and not exceeding eighteen, hundred weight, seven pounds; on any quantity above eighteen hundred weight, nine pounds."

The same provision is found in section 58 of the act of March 2, 1799, and this continued to be the law until, by the sixteenth section of the act of July 14, 1862, the provision which I have quoted from section 2898 was enacted, and still remained in force. The contention on the part of the collector is that section 2898, which prohibits the allowance of "draft" or "draught," prohibits him from making any deduction from an article subject to specific duty by reason of the impurities contained in it.

I am, however, of opinion that the words "draft" and "draught," used in these acts of congress, do not apply to or mean the impurities contained in an imported article, but mean the arbitrary allowance of certain deductions for loss of weight in handling, or shrinkage, or variations in scales, or devices for weighing, and have no reference to such deductions as should be made to ascertain the exact, or, as nearly as possible, the exact, amount of clean seed imported. By the tariff act of March 3, 1883, ch. 466, (Heyl,) "linseed or flaxseed is made dutiable at twenty cents per bushel of fifty-six pounds," and I can give no other construction to this provision of the law than that it means 56 pounds of clean seed, or as nearly as the same can be ascertained and determined. I am not prepared to say whether any deduction could be allowed where the impurity consists of flaxseed or linseed made foul by mixture with other oleaginous seeds, such as rape and mustard seeds, but I am quite clear in my conclusion that the importer has the right to have a deduction made for dirt, and impurities of that character, which are contained in the seed, and that he should only be required to pay duty upon the weight of the seed after ascertaining and deducting, with approximate accuracy, the quantity of such impurities.

DAVIS v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 31, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—MARBLE PAVING TILE.

Small pieces of marble, from three-quarters of an inch to half an inch square, used in making marble mosaic floors, which are worked into figures in the floor, and, after being imbedded in cement, are polished, are dutiable under the tariff act of March 3, 1883, (Heyl, cl. 467b,) as "marble paving tile," there being no specification in the law as to the size of the latter, and not as a "manufacture of marble," under clause 468, though they are often arranged in patterns, and held so by gummed paper, before importation.

At Law.

Shuman & Defrees, for plaintiff.

W. G. Ewing, U. S. Dist. Atty., for defendant.

BLODGETT, J. Plaintiff imported a quantity of small marble cubes or blocks for use in making marble mosaic floors, upon which the collector assessed a duty of 50 per cent. *ad valorem*, under clause 468 of Heyl's arrangement of the tariff of March 3, 1883, as a manufacture of marble not specially enumerated or provided for. Plaintiff insisted that the article was dutiable under clause 467b of Heyl, by reason of the assimilating clause in the tariff act, "as a marble paving tile, at one dollar and ten cents per cubic foot," paid the duties imposed by the collector under protest, appealed to the secretary of the treasury, by whom the action of the collector was affirmed, and brought this suit in apt time to recover the excess of duties so paid. The article in question consists of small pieces of marble in a cubical, or nearly cubical, form, which are used to work into figures in the class of floors lately introduced in this country known as "marble mosaic." These pieces or small blocks, from three-quarters of an inch to half an inch square, made up of different colored marbles, are worked, in the laying, into figures, and, after being imbedded in the cement, are polished by the application of polishing stones and rubbing, so as to bring out the colors and figures in contrast. It seems quite clear to me that, as imported, these little cubes are not a "manufacture of marble," for, by themselves, they make nothing but a bag of little stones. The words "manufacture of marble," under clause 468, seem to me to mean some article manufactured,—some completed, or approximately completed, article,—such as a statue, or a table top, or a marble column or pillar, or any other article which is imported complete for use; but the commodity in question has to be laid into the floor, and then laboriously rolled and solidified into the cement bedding, and after that polished by rubbing. It is true the proof shows that a part, and perhaps the larger part, of these small cubes are arranged in patterns before importation, and held there by gummed paper; but this does not make a manufacture of marble, as the bulk of the work is yet to be done upon them after they are laid into the cement. Marble paving tiles, the duty on which is provided for in clause 467 (Heyl) are usually understood to mean the small squares of marble intended to be

laid into floors in corridors, halls, etc., of public and private houses; but there is no language used in the statute which determines the size of a marble paving tile, or whether it shall be polished before importation, and several of the witnesses who were examined in the case on behalf of defendant say they understand by the term "marble paving tile" small slabs of marble, adapted to be laid into such floors as I have named, the smaller ones being from one and a half to two and a half inches square, or in octangles or triangles. There being no specification in the law as to the size of marble paving tile, it seems to me that the article in question assimilates more nearly in its use, as well as in the material of which it is composed, to "marble paving tile" than to any other description used in the law. I am therefore of opinion that the collector erred in assessing these bits of marble as a manufacture of marble, and that they should have been assessed as marble paving tiles, to which they are certainly more analogous than anything else described.

MILLER v. SEEBERGER, Collector.

(Circuit Court, N. D. Illinois. July 31, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—BROWN GREASE.

The fatty matter known as "de gras," or brown grease, obtained from wool in the process of cleansing, and principally used by tanners for stuffing leather, which remains of about the solidity of lard at the ordinary temperature, is not dutiable as an "expressed" or "rendered" oil, under the tariff act of March 3, 1883, cl. 92, (Heyl,) but as grease "not specially enumerated," under clause 437.

At Law.

Shuman & Defrees, for complainant.

W. G. Ewing, U. S. Dist. Atty., for defendant.

BLODGETT, J. Plaintiff imported an article known as "de gras," or brown grease, upon which the collector assessed a duty at the rate of 25 per cent. *ad valorem*, as "expressed oil" or "rendered oil," under clause 92 of Heyl's Arrangement of the Tariff Act of March 3, 1883. Plaintiff insisted that the article in question was dutiable under clause 437 of Heyl, which reads: "Grease, all not specially enumerated or provided for in this act, ten per centum *ad valorem*,"—paid the duties under protest, appealed to the secretary of the treasury, by whom the action of the collector was affirmed, and now brings this suit in apt time to recover the excess of duties so paid. The proof shows that the commodity in question is the fatty matter which is obtained from wool in the process of cleansing for manufacture, it being perhaps well known that all wools contain more or less of this peculiar fatty substance, and of late years it has become the usage, among manufacturers of woollen goods, especially in France, Germany, and Belgium, to save this fatty or greasy substance, and it has gone into use, mainly by tanners, for stuffing

leather. It is not a liquid or fluid oil, but at the ordinary temperature maintains about the same degree of solidity as lard. It has some peculiar qualities,—for instance, only a small proportion of it will unite with alkali and form soap, and yet it is very penetrating, and makes leather very soft and pliable. It is not, as the proof shows, an “expressed oil” nor a “rendered oil,” but it is gathered from the water with which the wool is washed by several processes, which have been lately put in use.

The case bears, I think, wholly upon the question of fact as to whether this is an “expressed” or “rendered oil.” The ordinary definition of oil is a fatty or oleaginous substance, which remains fluid in ordinary temperature; and by the term “ordinary temperature” in these definitions I think is meant the temperature at which the animal system comfortably exists. It does not mean a temperature so cool as that artificial heat is requisite for personal comfort, nor so warm that persons are uncomfortable by reason of the heat, but the ordinary temperature in which people work and study with comfort. The substance here in question is solid at this ordinary temperature, and hence it cannot, I think, be classed as an oil, but, by reason of the chief use to which it has so far been applied in this country, it seems to me to come clearly within the definition of “grease not otherwise enumerated,” and should have been assessed for duty at 10 per cent. *ad valorem*.

NATIONAL BANK OF COMMERCE v. TOWN OF GRENADA.

(*Circuit Court, D. Colorado.* December 20, 1890.)

1. MUNICIPAL CORPORATIONS—INDEBTEDNESS—BONDS—ELECTIONS.

Gen. St. Colo. § 3312, subd. 6, (section 14 of the act concerning towns and cities,) empowers the city council to contract debts for certain purposes, and declares that “no loan for any purpose shall be made except it be by ordinance * * * providing for the levying of a tax,” etc. Subdivision 66 authorizes the council to pass all ordinances and rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or towns. Subdivisions 68, 70, and 76 confer various powers and provide for their being carried into effect by ordinance. Section 15 declares that “municipal corporations shall have power to make and publish * * * ordinances * * * for carrying into effect or discharging the powers and duties conferred by this act.” *Held*, that an election for funding municipal indebtedness providing for the issue of bonds should be called by ordinance, though section 3419, which provides for the funding of municipal indebtedness, does not expressly declare that the submission of such question to the voters shall be by ordinance.

2. SAME—ORDINANCES—PUBLICATION.

Under the provision of section 14, that ordinances providing for a loan of the city's credit “shall be irrevocable until the indebtedness therein provided for shall be fully paid,” such an ordinance is of “a general and permanent nature,” within the meaning of section 25, which provides that ordinances of that nature shall not be in force “until the expiration of five days after” publication. Overruling 41 Fed. Rep. 87.

3. SAME—CONSTRUCTION OF STATUTE.

Section 25 provides that “all by-laws of a general or permanent nature and those imposing any fine, penalty, or forfeiture shall be published * * *, and it shall

be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture, to show that no such publication was made," and enacts that "such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been published." *Held*, that the last provision applied as well to by-laws and ordinances "of a general or permanent nature" as to those imposing a fine, etc.

4. SAME—ACTION ON BONDS—ESTOPPEL.

A recital on the face of municipal bonds that they were issued under an ordinance "adopted" does not estop the city to show as against a purchaser thereof that such ordinance was never published as required by law, and that the bonds were therefore invalid.

At Law. On motion for rehearing. See 41 Fed. Rep. 87.

Gen. St. Colo. § 3323, (section 25 of the act relating to towns and cities,) provides that "all by-laws of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published * * *, and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture to show that no such publication was made;" and, after providing for publication by posting in case there are no newspapers published in the municipality, enacts that "such by-laws and ordinance shall not take effect and be in force until the expiration of five days after they have been published."

Chas. B. Riley and Rhodes & Carpenter, for plaintiff.

Alvin Marsh, for defendant.

PHILIPS, J. This case will be found in 41 Fed. Rep. 87. The motion for rehearing is based mainly on the construction given in the opinion to section 25 of the Colorado statute respecting the publication of certain by-laws and ordinances, and the effect of a non-compliance therewith on the validity of the bonds in question. On further consideration I am persuaded that in so far as the opinion delivered herein is open to the construction that the requirement respecting the publication of by-laws and ordinances should be restricted to such as are of a penal character, it is not tenable. The words, "and such by-laws and ordinances," include and refer to the term, "all by-laws and ordinances of a general or permanent nature," as much so as to "those imposing any fine, penalty, or forfeiture." The terms "by-laws" and "ordinances" are used in their ordinary sense, and imply one and the same thing. 1 Dill. Mun. Corp. (4th Ed.) § 307. Two principal questions are presented, therefore, on this branch of this motion: *First*, was an ordinance essential to authorize the funding of the debts of the town and the issue of the bonds? and, *second*, is such an ordinance "of a general or permanent nature" within the meaning of the charter?

It is true that section 3419 of the Colorado statute, which provides for the funding of the debts of towns, does not in terms say that the submission to the qualified voters of the question of funding and the order directing the issue of the bonds shall be by ordinance. But an examination of the whole statute, concerning towns and cities, has satisfied my mind, beyond a doubt, that it was in the contemplation of the law-makers, and is a necessary deduction from the tenor of the whole act, that wherever the governing body of such municipalities is empowered

to create a debt on the whole constituency, or to take action looking to the issue of municipal bonds, it should proceed in the more formal and solemn mode of an ordinance. By section 3312, subd. 6, the city council are empowered to contract indebtedness for certain purposes; and it expressly declares that "no loan for any purpose shall be made, except it be by ordinance, which shall be irrevocable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be applied, and providing for the levying of a tax," etc. This language is most comprehensive. It applies to every loan for any purpose, and requires that the ordinance shall provide for the levying of the tax to raise the fund for its liquidation. Then the 66th subdivision authorizes the council "to pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or towns." The 68th subdivision empowers the council to construct water-works, or to authorize their construction, "and to enact all ordinances and regulations necessary to carry the powers herein into effect." Then the 70th subdivision authorizes the condemnation for such purpose of private property, "in such manner as is or may be prescribed by law." From which it is clear that in all such proceedings an ordinance is the appropriate method of inaugurating the public enterprises. Subdivision 76 provides for the founding of city or town libraries. "But no appropriation of money can be made under this section unless the proposition is submitted to a vote of the people at a municipal election * * * in such manner as may be prescribed by ordinance." Section 15 declares that "municipal corporations shall have power to make and publish from time to time ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this act." In *City of Central v. Sears*, 2 Colo. 588, it was held that the legislative power of the council in fixing the salary of the officers must be exercised by ordinance and not by resolution. Chief Justice HALLETT said:

"That some of the powers conferred by the charter may be exercised by resolution of council, or in any other manner which may indicate the will of that body, is not and cannot be denied; and it is equally plain that other powers are of a legislative character, and can only be carried into effect by ordinance. In the 38th section power to enact ordinances for purposes of carrying into effect provisions of the charter is expressly conferred, and generally the authority conferred upon the council is to be performed in that way. Express authority is given in the 35th section to fix the compensation of city officers, and it is desirable that this should be done by ordinance, so that both the officers and the public may know that it is to be paid."

Citing *Smith v. Com.*, 41 Pa. St. 335, in which Chief Justice LOWRIE observed:

"But as a general principle we receive it with great favor, because councils, who are mere trustees of public functions, ought not to vote away the people's money as matter of grace."

This was said of the necessity of an ordinance.

It seems to me to be wholly inconsistent with the tenor and specifications of the Colorado law concerning towns and cities that so important

a matter as calling elections for the funding of the municipal indebtedness and providing for the issue of bonds, fixing their character, interest, and maturity, should be done by mere informal resolution on motion. The promoters of these bonds understood and acted upon the idea that an ordinance was the proper mode. And having adopted this method of bringing into existence the bonds in suit, the only remaining question in this connection is, is such ordinance of a "general or permanent nature" within the meaning of the said section 25?

In the original opinion herein it was held that such an ordinance is special in its character, "not for the government and guidance of the people, but designed only to authorize a change in the form of the municipal indebtedness," citing *Amey v. Mayor*, 24 How. 365, and *Blanchard v. Bissell*, 11 Ohio St. 103. The first of these cases clearly is inapplicable, for the reason that the bonds in question were issued under a subsequent legislative act, which did not require publication, and the holding of the court was predicated of this fact. In the Ohio case it was held that the levying of a tax for a special purpose could be authorized by resolution, in the absence of any positive requirement that it should be done by ordinance; that such act was of "a temporary character, and prescribes no permanent rule of government." Without undertaking to affirm or deny here that the ruling as applied to the facts of that case was correct or incorrect, further consideration and investigation have satisfied my mind that such an ordinance as the one under review comes within the term "of a general or permanent nature." A by-law sustains the same relation to the municipal corporation as a legislative act does to the state. A general law is synonymous with a public act. *Clark v. City of Janesville*, 10 Wis. 178, 179, and local citations.

"Public or general statutes are in England those which relate to the kingdom at large. In this country they are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation, or by constitutional restraints. Private or special statutes relate to certain individuals or particular classes of men. * * * In this country the disposition has been on the whole to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at large. * * * Acts, too, which although affecting only a particular locality apply to all persons, are public acts." *Sedg. St. & Const. Law*, 24, 25.

So Potter's Dwar. St. p. 53, says:

"The most comprehensive, if not the most precise, definition is that given by Dwarrris, 'that public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals, or of particular classes of men.' * * * A general or public act, then, regards the whole community; special or private acts relate only to particular persons, or to private concerns."

These general rules were applied by the court in *Clark v. City of Janesville*, *supra*, to the provision of the state constitution, which declared that "no general law shall be in force until published." It was held that municipal bonds issued under a statute not published properly were void, because the act was general. In a certain sense the funding act in ques-

tion was for a special purpose,—a provisional arrangement; but it created an obligation in a specified, arbitrary form, binding upon the entire constituency, and subjected and bound the property of all to taxation for the payment of the accruing interest through a series of years, and for the ultimate liquidation of the principal sum. Then it concerned the public,—the whole body of the municipality. The ordinance in its effect, it seems to me, was also permanent. This term, (permanent,) in its ordinary acceptance, means “continuing in the same state, or without any change that destroys form or character, remaining unaltered or unremoved,” etc. Webst. Dict. Recurring to section 3312, subd. 6, Gen. St. Colo., it is declared that an ordinance providing for a loan of the city’s credit “shall be irrevocable until the indebtedness therein provided for shall be fully paid.” By necessary implication, an ordinance providing for the funding of the city indebtedness into bonds could not be repealed before the bonds were paid. It would continue in the same state without any change that could destroy form or character, and therefore it is permanent in its nature. The object of such provision for publication, as said by the court in *Clark v. City of Janesville*, “was the protection of the people, by preventing their rights and interests from being affected by laws which they had no means of knowing.” And the manner in which this entire transaction was conducted demonstrates the protecting wisdom of the statute. What, then, is the effect of the non-publication of the ordinance? Said section 25 of the Colorado statute declares that the ordinance “shall not take effect and be in force until the expiration of five days after” publication. And as the ordinance was never recorded, no *prima facie* case was made out as to the fact of publication by putting in evidence the book of ordinances, as said section 25 provides.

The only remaining question is, is there any recitation on the face of the bonds which estops the defendant from interposing this objection to the validity of the bonds? The only recital pertinent to the issue is that the bonds were issued “under ordinance of the city council of the city of Grenada adopted,” etc. The recitation that an ordinance was adopted, if in fact it was adopted, would conclude the city as to the existence of any fact, *in pais*, necessary to be found by the governing body passing the ordinance prior to its passage. It would likewise conclude the city as to any irregularity or fraud preceding its adoption, of which the purchaser had no notice at the time of his purchase. But the recitation that an ordinance had been adopted would not conclude the city as to any fact, such as a condition precedent or subsequent which the law did not make it the duty of the body issuing the bonds to pass upon and determine. This rule was recognized in *Town of Coloma v. Eaves*, 92 U. S. 484. Mr. Justice STRONG said:

“Where it may be gathered from legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds issued by them and held by a *bona fide* purchaser is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.”

But, as said by Mr. Justice MATTHEWS, in *Dixon Co. v. Field*, 111 U. S. 94, 4 Sup. Ct. Rep. 320:

"The converse is embraced in the proposition and is equally true. If the officers authorized to issue the bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of the power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals, and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

And as a corollary to this proposition it would result, as maintained in the preceding part of the foregoing opinion by Mr. Justice MATTHEWS, that if the fact recited was one which the law devolved upon some other body or person to ascertain and determine no recital in the bond by any other set of officers issuing it, would preclude the admission of the real fact.

"So," says Mr. Justice MATTHEWS, *supra*, "if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in the instrument."

The only fact recited, as already shown, on the face of the bond in question is that an ordinance was adopted. It does not recite that the ordinance was ever published. The adoption of the ordinance devolved upon the city council in organic capacity at its lawful assembly. Proof of this fact, as shown in the former opinion herein, could be made *aliunde* without the ordinance being signed by the president of the council, or having been entered in the book of ordinances. But its publication, while a duty devolving upon the board, and in the prescribed manner, in the absence of any prescription in the statute as to how its publication shall be proved, cannot, in my opinion, be successfully claimed to be included in the mere recitation that the bond was issued under an ordinance adopted. The act of publication is subsequent to and independent of the act of adoption. The statute being silent as to how this fact of publication shall be evidenced, and no prescription that its certification shall be filed or entered of record by the clerk or other officer of the council, it was as much accessible to the purchaser of the bonds as to any one. The recitation on the face of the bond that it was issued under ordinance referred the purchaser to the law requiring the publication of such an ordinance. Should he not have informed himself respecting this matter, by which he could have learned that no publication had been made? The ordinance, though adopted, fell still-born for want of publication.

This case has given me deep concern, and the questions involved have embarrassed me no little. As owing to the amount involved in this suit there is no appeal from the judgment herein, and the decision involves such a large sum of money, I have given the case due consideration. In view, therefore, of the gravity of the situation, I have concluded to reconsider my former opinion, and to grant the motion for a new trial, in the hope that the case may receive the attention of the circuit judge on retrial. The motion for a new trial is sustained.

In re COUNSELMAN.

(Circuit Court, N. D. Illinois. December 11, 1890.)

PRIVILEGE OF WITNESS—GRAND JURY—CONSTITUTIONAL LAW.

Under Rev. St. U. S. § 860, providing that "no * * * evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in any evidence, or in any manner used against him * * * in any court of the United States, in any criminal proceeding," a witness before a grand jury which is investigating alleged violations of the interstate commerce law by a certain railroad company cannot claim the privileges of the fifth amendment to the United States constitution, which provides that no person shall be compelled to be a witness against himself in a criminal case, and refuse to answer questions on the ground that the answer would tend to criminate him.

Petition for Writ of *Habeas Corpus*.

Mr. Milchrist, U. S. Dist. Atty., Mr. Ingham, and Mr. Lamberton, for the United States.

J. M. Jewett and Sidney Smith, for Counselman.

C. M. Osborn, for Rock Island Railroad Company.

GRESHAM, J. On November 20, 1890, the grand jury for the northern district of Illinois was engaged in investigating alleged violations of the interstate commerce law by the officers and agents of the Chicago, Rock Island & Pacific Railway Company, the officers and agents of the Chicago, St. Paul & Kansas City Railway Company, and the officers and agents of the Chicago, Burlington & Quincy Railroad Company, and, in obedience to a subpoena served on him, Charles Counselman, a commission merchant of Chicago, who was engaged in shipping grain from points west of Illinois to the city of Chicago, over all or some of the roads named, appeared, and was sworn as a witness. After testifying that during the summer of 1890 he had received grain over the Rock Island and Burlington roads, he refused to answer the following questions propounded to him by the grand jury, for the reason that his answers would tend to criminate him:

"Have you, during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the roads coming to Chicago from points outside of this state less than the tariff or open rate? During the past year, have you received rates upon the Chicago, Rock Island & Pacific and the

Burlington from points outside of the state to the city of Chicago at less than the tariff rates? Have you, or the firm of Charles Counselman & Company, received any rebate, drawback, or commission from the Chicago, Rock Island & Pacific Railroad Company, or the Chicago, Burlington & Quincy Railroad Company, on the transportation of grain from points in the states of Nebraska and Kansas to the city of Chicago, in the state of Illinois, during the past year, whereby you secured transportation of said grain at less than the tariff rate established by said railroads?"

On November 22, 1890, the grand jury appeared in the district court, and informed it, in writing, of the questions which had been submitted to Counselman, and of his refusal to answer the same, and asked for direction in the premises. The court at once entered an order requiring Counselman to show cause why he should not answer the questions. Counselman appeared by counsel, and, after argument, the court ordered that the witness appear before the grand jury without delay, and make full answers to the questions which he had refused to answer. On November 25th, the grand jury again appeared in open court, and filed a written report, showing that the questions had been repeated to Counselman, and he had refused to answer them, giving the same reason therefor that he had given in the first instance; and, being present in court, and still persisting in his refusal, it was adjudged that he was in contempt, that he be fined \$500, and held in custody by the marshal until he paid the fine, and made full answers to the questions before the grand jury. Counselman was taken into custody, after which he filed his petition before this court, alleging that the action of the grand jury and the district court was unauthorized and void, and praying that a writ of *habeas corpus* be issued, directed to the marshal, requiring him to bring the petitioner before this court, and that he be discharged from arrest. In his return the marshal set up the order of the district court as his authority for depriving the prisoner of his liberty.

The fourth amendment to the constitution of the United States declares that the people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and the fifth amendment declares that no person shall be compelled in any criminal case to be a witness against himself. It was urged in behalf of Counselman that the questions which he refused to answer violated the privilege secured to him by these amendments. By the interstate commerce law, it is made a criminal offense, punishable by fine and imprisonment, for any officer or agent of a railroad company to grant to any shipper of merchandise from one state to another, and for any shipper to contract for or receive, a rate less than the tariff or open rate. Shippers, as well as officers, agents, and employes of corporations engaged in the carrying business between states, are made subject to the penalties of the statute. Section 860 of the Revised Statutes of the United States declares that—

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

Under the fifth amendment, a person cannot be compelled to disclose facts before a court or grand jury which might subject him to a criminal prosecution, or his property to forfeiture. If, however, there be a statute which declares that the testimony of a witness in a case or proceeding shall never be repeated against him or his property in any other case or proceeding, there is no necessity for claiming the privilege secured by the amendment. If the protection of section 860 is co-extensive with that of the constitution, a witness is entitled to no privilege under the latter. In effect, Counselman says: If I should answer the questions, it would appear that I have violated the interstate commerce law, and my admissions might be offered against me hereafter. The sufficient answer to that position is, should he hereafter be prosecuted for the offense, section 860 would not permit his admissions to be proven against him. The privilege cannot be claimed when it appears that the witness has been acquitted or convicted of the offense about which he is asked to testify, that he has been pardoned for it, or that it has been barred by lapse of time; and, should Counselman answer the questions which he refused to answer, his disclosures could never be used against him or his property in any subsequent proceeding.

Boyd v U. S., 116 U. S. 616, 6 Sup. Ct. Rep. 524, is relied on as justifying Counselman in his attitude before the grand jury. That was an information against 35 cases of plate-glass, which had been seized as forfeited to the United States for fraud against the customs laws. The penalty prescribed by the section under which the seizure was made was fine and imprisonment, and forfeiture of the merchandise fraudulently entered. The information charged that the alleged fraud was committed by the owner of the goods. The owner entered a claim for the goods, and in his answer denied that they had become forfeited. It became necessary to show the quantity and quality of 29 cases of plate-glass previously imported by the owner, and, for the purpose of doing that, the district attorney offered in evidence an order which he had obtained from the district judge, requiring the claimant to produce the invoice of the 29 cases. The owner obeyed the order under protest, insisting that he could not be required to furnish evidence against himself, and that the statute under which the district attorney had obtained the order was in violation of the fourth and fifth amendments to the constitution. The invoice was read in evidence, and there was a verdict and judgment of forfeiture against the property. The statute under which the district court entered the order for the production of the invoice declared that if a defendant or claimant failed or refused to produce any book, invoice, or paper, in obedience to an order of the court for its production, the allegations contained in the petition for the order should be taken as confessed.

The supreme court held that, although the proceeding was in form one against the property, it was, in effect, against the owner for its forfeiture, and that the order of the district court, and the statute under which it was made, were both in violation of the fourth and fifth amendments. This case is clearly distinguishable from the Counselman case. In the former

the owner was treated as defendant, and he was required to produce evidence upon which a judgment of forfeiture might be entered against his own goods. Counselman refused to testify in a proceeding before the grand jury, to obtain evidence, not upon which he might be indicted, but upon which others might be indicted. It is further urged in behalf of Counselman that, should he testify before the grand jury in obedience to the order of the district court, he might disclose facts and circumstances which, although immaterial in themselves, would open up sources of information to the government, whereby it might obtain evidence not otherwise obtainable to secure his conviction, and that therefore the immunity secured by section 860 is not equal to the protection of the fifth amendment. That amendment was adopted, not to shield men from the consequences of their crimes, but that they might not be obliged to furnish evidence of their own guilt; and when the disclosures of a witness, however guilty they may show him to be, can never be repeated in any subsequent proceeding against him or his property, he is as fully protected as the constitution intended he should be. If, through threats or fear of violence, a man confesses that he has committed murder, and states who was present at the time, and where the weapon and the dead body may be found, and he is afterwards put on trial for the offense, he cannot be confronted with his confession; but the person who saw the crime committed is a competent witness, although the prosecutor might never have known there was such a witness but for the confession, and it may be shown by others that the weapon and dead body were found where the defendant said they could be found.

The petition is dismissed, and the petitioner will remain in the custody of the marshal.

In re PEASLEY.

(Circuit Court, N. D. Illinois. December 11, 1890.)

1. PRIVILEGE OF WITNESSES—GRAND JURY—CONSTITUTIONAL LAW.

Where the testimony of a witness before a grand jury, which is investigating alleged violations of the interstate commerce law by the agent of a railroad company, shows that such witness is not himself guilty of the offense, he cannot refuse to produce certain documents demanded by the grand jury on the ground that their production will tend to criminate him.

2. SAME—INTERSTATE COMMERCE LAW.

An officer of a railway company doing business between states, when a witness before the grand jury, investigating alleged violations of the interstate commerce law, cannot refuse to produce certain documents demanded by the grand jury, on the ground that their production would tend to criminate the company, as such a company is not liable criminally for violations of the interstate commerce law, nor subject to its penalties and forfeitures.

Petition for Writ of *Habeas Corpus*.

Mr. Milchrist, U. S. Dist. Atty., *Mr. Ingham*, and *Mr. Lambertson*, for the United States.

John Herrick and *Chester M. Dawes*, for Chicago, B. & Q. R. Co.

Sidney Smith, for J. C. Peasley.

GRESHAM, J. The grand jury was engaged in the investigation of alleged violations of the interstate commerce law, by Thomas Miller, general agent of the Chicago, Burlington & Quincy Railroad Company, and on November 26, 1890, James C. Peasley appeared in obedience to a *subpœna duces tecum* commanding him to bring before the grand jury specified papers. After being sworn Peasley answered some questions propounded to him and refused to answer others, and he also refused to produce the papers described in the *subpœna*. The grand jury thereupon appeared in the district court and submitted the following report:

"To the Hon. Henry W. Blodgett, Judge of said Court: The grand jurors in attendance upon said court respectfully report that on the 26th day of November, 1890, they were engaged in investigating and inquiring into certain alleged violations of an act of congress, entitled 'An act to regulate commerce,' approved February 4, 1887, and the amendments thereto, approved March 2, 1889, by Thomas Miller, general agent of the Chicago, Burlington & Quincy Railroad Company, said company being a common carrier, subject to the provisions of said act of congress; that on the said 26th day of November one James C. Peasley, in obedience to a *subpœna duces tecum* theretofore served upon him, commanding him to bring all checks paid to or given to Oliver Gallup or O. D. S. Gallup, or any one by the name of Gallup, at any time during the year last past, by the Chicago, Burlington & Quincy R. R. Company, or any officer thereof, for commissions for services rendered by said Gallup for said company, or for pretended services rendered by said Gallup for said company, or for any other cause, together with the bills rendered by said Gallup for the services or pretended services for which said checks were issued, and the vouchers of said company upon which said checks were issued. In obedience to said *subpœna* said James C. Peasley appeared before said grand jury, and, being first duly sworn, questions were propounded and submitted to the said witness, and certain answers and certain refusals to answer were made by the said witness, with the grounds for such refusal, touching the matters under investigation, and the papers and documents mentioned in said *subpœna duces tecum*, which questions, answers, and refusals are as follows: * * * Question. What is your business? Answer. I am the treasurer of the Chicago, Burlington & Quincy Railroad Company. Q. What are your duties as such treasurer? A. To supervise, in a general way, the collection of moneys due to the company, and the proper disbursements of those moneys. Q. When checks have been given by the company to any one, and those checks have been paid and returned to the company, in whose custody are they then? A. I suppose they are in the custody of the company. They are held by Mr. William G. Gordon, the assistant auditor of the company, who checks up the bank pass-book. Q. Are such checks under your control and direction? A. They are. Q. A *subpœna* has been served on you to produce before this grand jury all checks paid to or given to Oliver Gallup, or O. D. S. Gallup, or any one by the name of Gallup, at any time during the year last past, by the Chicago, Burlington & Quincy Railroad Company, or any officer thereof, for commissions for services rendered by said Gallup for said company, or for pretended services rendered by said Gallup for said company, or for any other cause, together with the bills rendered by said Gallup for the services, or pretended services, for which said checks were issued, and the vouchers of said company, upon which said checks were issued. Have you those documents with you? A. I have not. Q. Why not? A. Because I was advised by counsel not to bring them. Q. Do you refuse

to produce those documents before this jury, in obedience to the subpoena? A. I do. Q. Why? A. Because I am advised by counsel that it might tend to criminate myself. Q. Do you refuse to produce them for any other reason than that they might tend to criminate yourself? A. Well, I decline by advice of counsel. Q. Do you base your refusal upon the ground that the production of those papers would tend to criminate yourself? A. On the ground that it might tend to criminate myself. Q. To whom do those papers belong? A. To the Chicago, Burlington & Quincy Railroad Company. Q. Had you ever seen the checks described in the subpoena before you were subpoenaed to produce them in court? A. No; I have never seen them before or since. Q. Had you ever O. K.'d any of the checks or vouchers upon which the checks were issued? A. I had not. Q. Did you in any wise authorize the giving of the checks, or the making up of the vouchers upon which the checks were issued? A. I never gave any authority of any kind in regard to the vouchers. I did authorize by general orders the drawing of checks by our cashier in payment of vouchers properly approved. Q. To Mr. Gallup? A. No; except under general orders to issue checks to pay approved vouchers. In other words, he was authorized to pay such claims as were presented to him to pay if properly approved. Q. Did you yourself have any knowledge of the consideration for which these checks were given, or of the transaction out of which they grew? A. I did not. Q. Did you know prior to the time a subpoena was served upon you to produce these documents that said documents were in existence? A. I did not. Q. What officer in your company now has the documents mentioned in the subpoena in his possession? A. That is a pretty broad question. It is one I could not answer fully. It is beyond my power. Checks, as I have explained, are in the custody of the assistant auditor, who checks them over. Q. Do you know where the documents mentioned in the subpoena now are? A. I do not. Q. Have you given orders or directions to any person not to produce the documents mentioned in the subpoena? A. Yes; I have. Q. To whom did you give those orders? A. To Mr. Fabian, who is the cashier, and to Mr. Gordon, who is the assistant auditor. Q. When did you give those orders? A. To Mr. Gordon this morning, and to Mr. Fabian one day last week. I don't remember the day. Q. Were the orders to Mr. Fabian delivered by you after the service of this present subpoena upon you, or the orders to Mr. Fabian given after the first subpoena upon you? A. Yes; they were. Q. Did you give those orders to the gentlemen whom you have mentioned for the purpose of preventing them from producing those documents before the grand jury? A. I did, and by advice of counsel. Q. Upon what ground did you give such orders? A. That the papers might tend to criminate them and to criminate me. Q. Your refusal to produce the checks, papers, and documents referred to in the subpoena is based solely upon the ground that the production of the same might tend to criminate yourself? A. I wish to add that whatever papers and books of the Chicago, Burlington & Quincy Railroad Company are in my custody and control are so only in my custody as an agent and employe of the company. I have no authority from the company to produce any such books or papers before the grand jury, or to furnish them for inspection by the grand jury. I decline to produce the books and papers described in the subpoena for the reason aforesaid, and because the production thereof would tend to criminate the Chicago, Burlington & Quincy Railroad Company, and would subject it to penalties and forfeitures. Q. If those checks and other documents mentioned in the subpoena are in existence, can you produce them if ordered to do so by the court? A. I can.' The grand jury further report and say: That prior to the appearance before it of the said James C. Peasley, as a witness, testimony had been heard by said grand jury tending to show that certain checks had been given and paid to one O. D. S. Gallup, by certain

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officers and agents of said Chicago, Burlington & Quincy Railroad Company, on behalf of said company, and that said checks were ostensibly given in payment of pretended services, but that in fact they were given as a rebate, refund, or drawback on grain transported from points in other states to the city of Chicago, in the state of Illinois, whereby the consignees of such grain were enabled to obtain a less rate than the rate established by said company, which said payments, rebates, drawbacks, and commissions were paid under an arrangement and agreement with the said Thomas Miller, general freight agent of the said Chicago, Burlington & Quincy Railroad Company, and pursuant to his orders, and on vouchers certified by him.

"JOHN W. CHERRY, Foreman."

Peasley was ruled to show cause why he should not answer the questions he had refused to answer, and produce the papers and documents he had refused to produce, and, failing to do so to the satisfaction of the court, it was ordered that he appear before the grand jury without delay, and make answer to the unanswered questions, and produce the papers set forth in the report. He appeared before the grand jury in obedience to this order, and, upon being interrogated as before, again refused to answer the questions, and he also refused to produce the papers before demanded, for the reasons that his answers to the questions would tend to criminate him, and that the production of the papers and documents would also tend to criminate him, and subject the Chicago, Burlington & Quincy Railroad Company, of which he was an agent, to penalties and forfeitures. The grand jury again appeared in open court, and submitted another report, informing the court that Peasley still refused to answer the questions and deliver the papers demanded, and, being present in person and by counsel, and persisting in his refusal, he was adjudged to be in contempt, fined in the sum of \$500, and ordered into the custody of the marshal, to be held until he paid the fine, answered the questions, and produced the papers. After Peasley had been taken into custody, he presented his petition, reciting the foregoing facts, and praying that a writ of *habeas corpus* be issued, directed to the marshal, requiring him to bring the petitioner before the court, and that upon a proper hearing he be discharged. The petition averred that the fourth and fifth amendments to the constitution of the United States justified the attitude of the petitioner before the grand jury and the district court, and that the action of both was without jurisdiction and void.

It appears from the first report of the grand jury that Peasley's examination was limited to a criminal charge against Miller. Evidence had already been obtained tending to show that Miller had violated the statute, and it was deemed necessary that the grand jury should see the papers which Peasley was asked to produce. He testified that while, by general orders, he had authorized the payment of checks on vouchers properly approved, he had never seen or approved the papers described in the subpoena; that he had no knowledge of the consideration for which the Gallup checks were given, or of the transactions out of which they grew; that he did not even know of the existence of the checks or papers when he was served with the subpoena requiring him to produce them; that after he heard of their existence, he ordered the officers in whose

custody they were to hold them, and not produce them before the grand jury; that he had no authority from the company to produce the papers called for, or any others, and that he declined to produce them for the reason that their production would tend to criminate him and the company, and subject it to penalties and forfeitures. Peasley's testimony shows that he was not guilty of the offense which the grand jury was investigating, and therefore the production of the papers demanded would not criminate him. He needed no privilege, and his refusal to produce the papers was unauthorized. If, however, the showing which he made before the grand jury had been different, and it had appeared that the production of the papers might criminate him, then, for the reasons given in the *Counselman Case*, ante, —, he could not claim immunity under the fourth and fifth amendments. If a witness cannot claim the privilege for the benefit of himself, he cannot claim it for the benefit of another, and Peasley's refusal to produce the checks and vouchers, because their production would tend to criminate the company, of which he is an officer, is based upon nothing in the interstate commerce law or the constitution. Corporations acting as common carriers between states are not liable criminally for violations of the interstate commerce act, nor are they exposed to its penalties and forfeitures. For some reason, satisfactory to congress, only the officers of such corporations and shippers may be punished for violating the statute.

It follows that the order of the district court, adjudging Peasley in contempt, and that he be fined and imprisoned, was authorized, and he will remain in the custody of the marshal.

In re MANNING.

(*District Court, S. D. New York. December 16, 1890.*)

PRACTICE—CONTEMPT—WRIT TO FOREIGN DISTRICT.

A writ or order for the punishment of an officer of the court for contempt under section 725, Rev. St., cannot run to the marshal of another district. The accused, if in another district, can only be reached through a proceeding for his arrest there, as for a criminal offense, and then must be transferred by order of the court there, under section 1014, Rev. St. In that section the clause "or any state where he may be found" applies to the magistrates therein previously named. Following *U. S. v. Case*, 8 Blatchf. 250.

In Bankruptcy.

Evarts, Choate & Beaman, for application.

BROWN, J. The desired writ, which is for the punishment of an officer of the court for contempt in not paying over money as ordered, should not be addressed to any marshal beyond the territorial jurisdiction of the court. A United States court cannot send its process into another district, except where specially authorized so to do by some act of congress.

Ex parte Graham, 3 Wash. C. C. 456, 462. Subpœnas are thus authorized to the distance of 100 miles. Such contempts as fall within section 725 of the United States Revised Statutes are criminal offenses against the United States, (*Fischer v. Hayes*, 19 Blatchf. 13, 6 Fed. Rep. 63; *In re Pitman*, 1 Curt. 186; *New Orleans v. Steam-Ship Co.*, 20 Wall. 387,) and must be unhesitatingly punished. The accused person may be reached by proceedings under section 1014 when found in another district, and may be arrested there, and then transferred in the usual manner under that section; the proceedings there being based upon the writ of attachment previously issued by the court having jurisdiction of the cause. For all ordinary crimes there is no other means of reaching persons in other districts. No process issues from the judge or court of one district to the marshal of another district. The transfer is made pursuant to section 1014 only. Proceedings in extradition cases under section 5270 stand on a wholly different footing. *In re Henrich*, 5 Blatchf. 414, 421. I have not been referred to any United States statute or precedent that authorizes the process of the court in cases of contempt or of any ordinary criminal proceeding to run to the marshal of another district. In section 1014 the clause "or any state where he may be found," and the next following clause, are both of them qualifications and limitations applicable to all the magistrates previously named in that section. It was thus construed and applied in *U. S. v. Case*, 8 Blatchf. 250. The above view is in accordance with the decision of Judge WITHEY in the case of *U. S. v. Jacobi*, 4 Amer. Law T. R. 148, 151, where a similar question was examined at length. The warrant must be limited to the marshal of this district.

In re GOOCH.

STATE OF MINNESOTA *v.* GOOCH.

(Circuit Court, D. Minnesota, Third Division. November 25, 1890.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—OLEOMARGARINE—ORIGINAL PACKAGES.

One who sells oleomargarine in the original package, as imported into the state from another state, is not subject to arrest under a law of the state in which the sale occurs entirely forbidding the sale of oleomargarine, as such statute is an unconstitutional interference with interstate commerce. Following *Laisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681.

Habeas Corpus.

John B. & W. H. Sanborn, for petitioner.

W. D. Cornish, for the State.

NELSON, J. The petition of Charles E. Gooch is presented, praying for a writ of *habeas corpus* to discharge him from an imprisonment alleged to be in violation of the constitution of the United States. The writ is—

sued, and proper steps were taken to bring the legal questions before the court. The petitioner is the agent of Armour & Co. of Chicago, manufacturers of oleomargarine, in the state of Illinois, and he was arrested under a warrant issued by a justice of the peace, being charged with selling oleomargarine in violation of the laws of the state of Minnesota, and at the hearing was committed on failure to pay a fine imposed of \$100. The conceded facts before this court are that he sold as agent, in the original package, oleomargarine, stamped and put up in accordance with the laws of the United States, and which had been imported into the state of Minnesota from Illinois by the owner and manufacturers, who were citizens and residents of the latter state. The law of the state of Minnesota forbids the sale of oleomargarine in the state of Minnesota, whether manufactured in this or any other state, and makes no distinction between the importer who sells in the original package, as imported, and one who sells it when the package is broken up.

The questions presented in this case were fully considered and decided by the United States supreme court in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, and that court decided, in brief, that commerce among the several states was subject only to the regulations imposed by congress, and that the states could not interfere with or regulate such commerce; and, further, that the right to transport an article of commerce from one state to another included the right to sell in the unbroken imported packages at the place where the transit terminated. The petitioner then, under the uncontradicted facts, is guilty of no offense in selling the oleomargarine in the original package, and his arrest and imprisonment for doing so is illegal, and in violation of the constitution of the United States. The prisoner is entitled to his discharge, and it is so ordered.

NEW YORK & R. CEMENT CO. v. COPLAY CEMENT CO.

(Circuit Court, E. D. Pennsylvania. October 9, 1890.)

TRADE-MARKS—INFRINGEMENT—INJUNCTION.

A suit to restrain the use of the name "Rosendale Cement" in the denomination of cement manufactured and sold by defendants, cannot be maintained, though such name is known by the public to mean cement made in Rosendale, and defendants' manufactory is in another state, unless it be shown that complainants have an exclusive ownership or property therein. It is not sufficient that they, in common with certain other persons, have a right to use it, and the public may be deceived by defendants' use of the name.

In Equity.

The defendants manufactured and sold cement, which they denominated and put upon the market as "Anchor Rosendale Cement," though made in Lehigh county, Pa., from stone quarried there. The complainants manufacture cement in the town of Rosendale, in the state of New York, where there are extensive quarries of cement rock, which are worked by some 15 or 20 different parties. Some of these Rosendale quarries have been worked for over half a century, but the

complainants commenced their operations about 1874. The cement made in Rosendale and its vicinity has always been called "Rosendale Cement," and the complainants contend that the term has acquired a generic signification, applicable to the hydraulic cement manufactured at Rosendale and its vicinity, and inhering in the marketable quality of the cements manufactured by the complainants and others. The bill was filed for the purpose of enjoining the defendants from using the word "Rosendale" in describing their cement, and to obtain damages and an account of profits for such use.

C. H. Mathews and Rowland Cox, for complainants.

P. K. Erdman and Chas. Howson, for defendants.

BRADLEY, Justice, (*after stating the facts as above.*) The relief sought is based on the charge that the denomination used is untrue, is calculated to deceive the public, and operates as an unfair and fraudulent competition against the business of the complainants. They do not pretend that they have any exclusive right to the use of the term "Rosendale," since it is equally used by the other manufacturers of cement in the town, some of whom have establishments of much longer standing than that of the complainants; but they insist that they have a right to use it, and to participate in the advantages which are attached to it as enhancing the marketable value of their cement. The defendants contend that the name "Rosendale Cement" has ceased to have a mere local significance or application, and has come to be a generic term, used to designate the common grade or class of cements otherwise known as American natural cements, to distinguish them from a higher grade or class of cements known as "Portland Cement;" this general class of cement being by force of accident called "Rosendale Cement" because it was first made in Rosendale.

Much evidence has been taken by the parties on this controverted question; but the view of the case which we have taken obviates the necessity of examining this evidence. Though it be conceded that the name "Rosendale Cement" is understood by the public as designating the place where it is made and comes from, and that the defendants untruly call their cement by that name, the question still remains whether they can be prosecuted therefor, at the suit of a private party, who is only one of the many who manufacture cement at Rosendale, and truly denominate their cement "Rosendale Cement." Would not the allowance of such an action be carrying the doctrine of liability for unfair competition in business too far? The counsel for the complainants frankly concedes that the principle for which he contends would enable any crockery merchant of Dresden or elsewhere, interested in the particular trade, to sue a dealer of New York or Philadelphia who should sell an article as Dresden china when it is not Dresden china. It seems to us that this would open a Pandora's box of vexatious litigation. A dry-goods merchant, selling an article of linen as Irish linen, could be sued by all the haberdashers of Ireland, and all the linen dealers of the United States. No doubt the sale of spurious goods, or holding them out to be different from what they are, is a great evil, and an immoral,

if not an illegal, act; but unless there is an invasion of some trade-mark, or trade-name, or peculiarity of style, in which some person has a right of property, the only persons legally entitled to judicial redress would seem to be those who are imposed upon by such pretenses. The public, of course, is deeply interested in their suppression, and if the laws are deficient, the legislature might very justly intervene to prevent impositions of this kind by public prosecution of the offenders; but to give a civil action to every honest dealer against every dishonest one engaged in the same trade would vex the courts and the country with an access of multitudinous litigation. The law furnishes us with an instructive analogy on this subject. No man can maintain a private action for a public nuisance, though he is injured by it, unless his injury is of a special character, different from that which is sustained by the public generally. This is a sound rule of the common law. It is intended to prevent vexatious litigation. When an injury is a public one it should be prosecuted as a public wrong. So here the wrong, if there is one, is committed against the public. If it be said that the cement manufacturers of Rosendale are specially injured, because their trade is affected, it may be properly answered that they are all injured alike. It is a public injury as to them, just as it would be to all the dealers in linen for a man to sell as Irish linen fabrics that are not such. It is a damage to the complainants and the other cement manufacturers of Rosendale for the defendants to sell their cement as Rosendale cement, but, like many other cases of damage, in our judgment, it is of that kind which the law calls *damnum absque injuria*. The defendants may lay themselves open to prosecution by their customers, or possibly by the state, if they are guilty of falsely selling their cement as of a class or sort to which it does not belong, but that is no reason for sustaining an action against them at the suit of those who deal in such cement. In our view, if a person seeks to restrain others from using a particular trade-mark, trade-name, or style of goods, he must show that he has an exclusive ownership or property therein. To show that he has a mere right, in common with others, to use it, is insufficient.

We may add to the considerations already suggested, that it is difficult to see how any just basis can be laid for an account of profits between the complainants and the defendants that would not equally apply to the 15 or 20 other manufacturers of cement at Rosendale, who, if this suit is sustained, might, with equal justice, prosecute for the same profits. These incidental suggestions, however, are apart from the main argument, which, of itself, seems conclusive of the case.

We have not thought it necessary to review the cases that have been cited and commented on by counsel. The question is nearly a new one, and we do not find ourselves confronted by any line of authorities which ought to control our own judgment and view of the matter. We have relied upon the general principles of the law which seem to be the most applicable to the case. The bill must be dismissed.

McKENNAN, Circuit Judge, concurs.

ECLIPSE MANUF'G Co. v. ADKINS *et al.*

(Circuit Court, N. D. Illinois. July 31, 1890.)

1. PATENTS FOR INVENTIONS—DESIGN FOR MANUFACTURE.

The idea of ornamenting the upper or lower portion of the pipes of a radiator to a uniform height so that it will present ornamental and plain parallelograms in contrast, is patentable as a "new and original design for a manufacture" under Rev. St. U. S. § 4929.

2. SAME—EVIDENCE OF INVENTION.

The patentee is not shown not to have been the inventor of the design by the fact that his draughtsman made a drawing of the radiator pipes, showing their form and size, and an architect drew the figures for the particular ornamentation adopted in the radiators manufactured and put on the market by the patentee.

Dyrenforth & Dyrenforth, for complainant.

E. S. Botum, for defendants.

BLODGETT, J. This is a bill in equity, charging defendants with the infringement of design letters patent No. 17,270, granted April 19, 1887, to Leon H. Prentice for a design for a radiator. The scope of the patent is described by the patentee in his specifications as follows:

"The leading feature of my design consists in the upright or vertical pipes of the radiator, having a comparatively plain or even surface for a portion of their length from the bottom up, and with an ornamented surface consisting, preferably, of embossed or depressed ornamentation at the top or upper part, the plain portion constituting the lower or base portion of the radiator, and the figured or ornamented portion constituting the top or crown of the same, the plain and figured portions offsetting each other, and presenting a contrasting appearance between the upper and lower parts of the radiator. These portions of the surface give the radiator a pleasing appearance. * * * The invention consists in the radiator, composed of a series of vertical pipes or loops of uniform height, having the crown or top portion of the pipes or loops ornamented or figured a uniform distance from the top downward, the portion below being comparatively plain. In this manner the ornamented and plain portions of the aggregate surface of the radiator constitute two rectangular parallelograms, one above the other. A similar effect would be produced by transposing the plain and figured portions. What I claim is the design for a radiator herein shown, consisting of a series of upright pipes or loops of uniform height, having the upper and lower portions of their aggregate surface distinguished from each other by ornamentation, so as to present rectangular figures, A, B, in contrast."

The defenses set up are:

"(1) That Prentice was not the original inventor of the design covered by the patent; (2) that defendants do not infringe; (3) that the patent is void, as not being within the provisions of the statute which authorizes the granting of design patents."

It will be seen that this patent is not for any specific form of ornamentation. It does not describe what the ornamentation shall consist of further than to say in the specifications that the patentee prefers "embossed or depressed ornamentation," but what kind of ornamentation it shall be, whether a Greek pattern of lines, or a leaf, or vine, or scroll, or any other embossed or sunken figures, is not indicated. The sole

scope of the patent is the idea of ornamenting the upper or lower portion of the pipes of a radiator to a uniform height, so that it will present ornamented and plain parallelograms, in contrast. As to the claim that Prentice was not the first to conceive the idea of thus ornamenting a radiator, there is no proof on the part of the defendant which shows that any person had preceded him in this field. The proof upon which the defendant relies in support of this part of the defense is that one Dixon, who was a draughtsman or designer for Prentice, was the originator of the design, and that a Mr. Root, who was an architect in the city of Chicago at the time, made the design for the particular figures which were adopted by Prentice as his ornament. I have no doubt, from the proof, that Mr. Dixon made a draft of the radiator pipes, showing their form and size, and that after he had so done, Mr. Prentice informed or directed Mr. Root, as to the locality of the ornamentation which he proposed to put upon the radiator; and that Mr. Root drew the figures for the particular ornamentation which Mr. Prentice adopted in the radiators which he manufactured and put upon the market. But it will be noticed that Mr. Prentice does not claim to have been the inventor of the radiator or the radiator pipes. He simply claims his patent for the idea of ornamenting a portion of the pipes, instead of leaving them entirely with plain surfaces, and for putting this ornamentation of uniform height on each pipe, so that the radiator would show an ornamented parallelogram and a plain parallelogram, in contrast. The drawing of the pattern, or figure, from which the pipe itself was to be cast, showing its shape and general form, is not what is covered by the patent, and this may have been the invention or product of Dixon's mind. So too, the particular style of scroll work which Mr. Prentice adopted for radiators, which he was himself to manufacture, under his patent does not imply that Root was the originator of the idea of ornamenting a radiator in parallelograms, as is shown and claimed by the patent.

This class of patents is allowed by section 4929, Rev. St., which provides:

"Any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture, bust, statute, alto-relievo, or bas-relief; any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, patent (pattern) print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication,—may, upon payment of the fee prescribed, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor."

I am of opinion that the design covered by this patent comes within the first clause of this section as a "manufacture," rather than within the third clause as an "original impression, ornament," etc., as is insisted by the complainant's counsel. The second clause requires, as I think, that there should be a description of the design which is to be "printed, painted, cast, or otherwise placed on or worked into any article of manufacture."

For illustration, a chair is an old article of household furniture of which many forms are found and known, but if a person has invented or originated a new mode of ornamenting a chair by placing ornamentation of any kind upon a certain portion of the article, so that the ornamented portion will stand in contrast to the unornamented portion, it seems to me that it comes within the provision for a "design for a manufacture;" that is, a manufacture of radiators which shall be ornamented in a special way by ornamentation upon a portion thereof. In this connection, I think the following paragraph from a recent decision of Judge Coxe in *Untermeyer v. Freund*, 37 Fed. Rep. 342, is pertinent:

"A design requires invention; but a different set of faculties are brought into action from those required to produce a new process or a new machine. In each case there must be novelty; but the design need not be useful in the popular sense. It must be beautiful. It must appeal to the eye. The distinction is a metaphysical one and difficult to put into words. A graceful pattern for the handle of a spoon or fork may attract many purchasers, and yet it cannot be said that the embodiment of these designs requires an exercise of the 'intuitive faculty of the mind' in the sense that this faculty is exercised in inventions like the telephone or the safety-lamp. The policy which protects a design is akin to that which protects the works of an artist, a sculptor, or a photographer, by copyright. It requires but little invention, in the sense above referred to, to paint a pleasing picture, and yet the picture is protected because it presents the personal characteristics of the artist, and because it is his. So with a design. If it presents a different impression upon the eye from anything which precedes it; if it proves to be pleasing, attractive, and popular; if it creates a demand for the goods of its originator, even though it be simple and does not show a wide departure from other designs, its use will be protected."

This being my view of the scope and intention of the statute under which the patent was granted, I am of opinion that the patent should be upheld, and there can be no doubt, from an inspection of the defendants' radiators, which are introduced in evidence, that the defendants infringe the patent by ornamenting their radiators for a uniform distance from the top downward, so as to show an ornamented rectangular parallelogram, and an unornamented rectangular parallelogram, one above the other. A decree may be entered finding that defendants infringe, and directing an accounting of profits and damages, and a perpetual injunction against further infringement.

HAKE v. BROWN *et al.*

(Circuit Court, S. D. New York. December 15, 1890.)

1. PATENTS FOR INVENTIONS—BEVEL-EDGED CARDS—NOVELTY.

The first claim of letters patent No. 219,464, granted to Philip Hake, September 9, 1879, for a device for making and ornamenting bevel-edged cards, is void, as it appears that the method of such claim was known and practiced prior to plaintiff's discovery thereof.

2. SAME—SUITS FOR INFRINGEMENT—REHEARING.

In a suit for infringement of a patent not previously adjudicated upon, after a decree for complainant, defendant's motion to reopen the case and take further proofs will be granted on condition that defendant pay complainant's counsel fee for the previous argument, where the testimony sought appears to be newly discovered, material, and not merely cumulative, and defendants have not been guilty of great laches.

In Equity.

Suit by Philip Hake against George F. Brown and another for the infringement of a patent. A motion for rehearing was made in this case, and denied. Another motion was thereafter made to reopen the case, amend answer, and take further proofs.

Arthur v. Briesen, for orator.

Walter D. Edmonds, for defendants.

WHEELER, J. This cause has now been heard on motion of defendants for leave to amend the answer and to take further proofs. The testimony sought appears to be newly discovered, material, and not merely cumulative. The defendants do not appear to have used all due diligence, but their laches do not seem so great that they should be deprived of all relief in this direction. A motion for a rehearing has been before made and overruled, but this motion has not been before made. This is the first adjudication upon this patent, and it should, if it can be consistently, made upon a full showing. Upon the whole, the motion is granted, without prejudice to the injunction now in force, upon the express condition that the defendants pay to the clerk of this court for the orator's counsel a reasonable counsel fee for the argument on final hearing already had, to be fixed by the clerk within 20 days, and that in case the defendants finally prevail upon the evidence sought, the orator shall recover of the defendants the taxable costs of the cause hitherto as they would be taxed in ordinary cases where costs are recovered.

ON REHEARING UPON ADDITIONAL PROOFS.

The new evidence in this case shows satisfactorily and beyond fair doubt that the method of making and ornamenting bevel-edged cards of the first claim of plaintiff's patent was known to and practised by Thomas J. Mooney and others prior to the plaintiff's discovery thereof, as set up in the answer of the defendants. The defendants are therefore entitled to a decree upon the terms imposed in granting the motion for a rehearing. Let a decree be entered dismissing the bill of complaint, with costs to the plaintiff to the granting of the motion for rehearing, and with costs to the defendant subsequent thereto.

BRUSH ELECTRIC CO. v. FT. WAYNE ELECTRIC CO.

(Circuit Court, D. Indiana. December 10, 1890.)

PATENTS FOR INVENTIONS—ELECTRIC LAMPS—INFRINGEMENT.

The lamp manufactured under letters patent No. 219,208, granted to Charles F. Brush, September 2, 1879, for "an electric lamp," is a duplex lamp, organized to burn two or more pairs of carbons successively, and its distinguishing features are the arrangement of the feeding mechanism, so that the carbons of the two pairs are dissimultaneously separated to form the arc, and after the arc is formed between two carbons one is fed towards the other as fast as it is consumed, and, when this pair is fully consumed, the electric current is automatically transferred to the other pair. This feeding mechanism is operated entirely by electricity. Brush showed in his specifications that the feeding could be done by a clutch mechanism, suggested that it might be done by clock-work, but expressly said that he did not limit himself to any specific mechanism for obtaining the desired result. *Held*, that the patent is infringed by a lamp having the same characteristics, and differing only in that the feeding mechanism is operated by clock-work, which, however, is brought into action and controlled by electricity; and it is immaterial that in the latter the carbons may be separated by hand, where it appears that if this is not done the machine will do it as in the Brush lamp.

In Equity.

H. A. Seymour and Offield & Fowle, for complainant.

R. S. Taylor, for defendant.

Before GRESHAM and BLODGETT, JJ.

BLODGETT, J. This is a bill for an injunction and accounting, by reason of the alleged infringement of patent No. 219,208, granted to Charles F. Brush, on the 2d day of September, 1879, for "an electric lamp." The suit was commenced on the 1st day of July last, and complainant very soon thereafter moved for an injunction *pendente lite*, which motion was heard in the early part of October last. This patent has been four times before the courts of this circuit, and once before the circuit court for the northern district of Ohio, presided over by Judges BROWN, of the eastern district of Michigan, and RICKS, of the northern district of Ohio, in all which cases the patent was carefully considered in the light of the prior art, and its novelty and utility fully sustained. The only question seriously contested upon this hearing for injunction was that of the alleged infringement of the defendant's device upon the device covered by the complainant's patent. The defendants manufacture electric lamps, made substantially in accordance with a patent granted to James J. Wood on the 24th of June last. The Wood lamp, like that of Brush, is a duplex lamp, organized to burn two or more pairs of carbons successively, but the feeding device of the Wood lamp is partially actuated by clock-work, instead of its being operated entirely by action of the electric current, as in the Brush. In the Wood lamp, however, the clock-work mechanism is brought into action and controlled by the electric current. The distinguishing features of the Brush lamp is the arrangement of the feeding mechanism, so that the carbons of the two pairs shall be dissimultaneously separated for the purpose of forming the arc, and that, after the arc is formed, one of the carbons of the

pair between which the arc is formed shall be fed towards the other as fast as it is consumed, so as to preserve a steady and uniform light, and that when the first pair of carbons is fully consumed, the current is automatically transferred to the other pair, and the arc is formed between them, which are in turn fed together by the feeding device until consumed. The Wood lamp has the same characteristics. The carbons of each pair are dissimultaneously separated, and the arc is formed by the action of the current passing through magnetic coils, as is done in the Brush lamp, but the feeding, as the burning carbons are consumed, is regulated in Wood's lamp by a clock-work. It does not seem to us that the interposition of this clock-work to do the feeding after the arc is formed essentially differentiates the Wood device from that of Brush. The electric current is the efficient motor in both lamps for forming the arc, and controlling the action of the finding mechanisms. Brush evidently saw that the feeding could be done in many ways after the arc was established. He showed a clutch mechanism for doing the feeding, but expressly says in his specifications:

"I do not in any degree limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished."

And further on in his specifications he suggests that clock-work may be substituted for his clutch mechanism. Before Brush entered the field, electric lamps had been contrived which burned two sets of carbons alternately, shifting the arc from one pair to the other at short intervals, making a flashing, unsteady, and unsatisfactory light. The problem which Brush set himself to solve was to secure the complete combustion of one pair of carbons before the arc was transferred to the other pair, and the transfer of the arc to the other pair by the automatic action of the electric current, so that no attendant was needed to light the second pair after the first pair was consumed, thus securing a lamp which would give a steady arc light of from 16 to 20 hours' duration. This he accomplished by his mechanism, which caused the dissimultaneous separation of the two pairs of carbons by the automatic action of the electric current actuating his separating devices, and a feeding device for bringing the carbons together as fast as they were consumed. This long step forward in the art was taken by Brush, and at the present stage of the art it seems that the inexorable law of the electric current requires that when two or more pairs of carbons are to be burned successively, the carbons of each pair must be dissimultaneously separated and the arc produced between the pair last separated. Having done this for the art, Brush is entitled to cover all means equivalent to his own for obtaining the same result, one of which is a clock-work feeding device.

The argument ingeniously and ably made in behalf of defendants is that Wood has evolved his lamp along the lines indicated by the inventions of Denayrouse and Meynall, who had preceded Brush. But neither of these inventors produced a lamp where the carbons would be burned

successively. It seems to be the history of many great inventions that the minds of many persons, without any concert of action, are at about the same time attracted to the subject, and each sets himself at work to invent a mechanism which shall produce the desired new result and meet the felt public want. One of the experimenters succeeds while all the rest fail. After the one has succeeded it is easy to go back into the limbo of these old failures and in the light of the successful machine, by perhaps slight changes, make these old abortive attempts do the work of the successful inventor. But it is the successful experimenter who has shown them the way, and he, and he alone, who is entitled to be called the inventor, and be protected by a patent. The successful inventor may even have taken advantage of hints and suggestions from the abortive attempts of others; but that does not entitle them, or any one else, to appropriate his successful machine.

It was strenuously urged by the able counsel for the defendant, both in his oral and printed arguments, that the Brush patent shows two feeding devices, while the Wood lamp shows but one feeding device or mechanism. This position, if correct, would hardly, we think, answer the charge of infringement; but we do not entirely agree with the learned counsel in his position that Wood has only one feeding device. The clock-work mechanism of Wood is practically as much a separate device for each pair of carbons as the clutch mechanism of Brush, for, while Wood's clock-work is made to feed each pair of carbons in turn, it feeds the first by one pinion and the next one by another pinion, after the arc has been produced between the second pair by the action of the electric current, thereby making his device as much a duplex feeding device as is that of Brush.

The feature of the Wood lamp which allows the attendant when he lights the lamp, or puts the lamp in circuit, to separate the carbons of one pair by hand, instead of allowing that to be done by the operation of the electric current, as is done by Brush, does not, it seems to us, in any degree evade the Brush patent, because it clearly appears from the proof and operation of the machines, as exhibited upon the hearing of the motion, that if the attendant did not latch up the upper carbon of one pair the machine itself would automatically do so, the same as it is done in the Brush lamp; and the manual separation of one pair of carbons, even before the lamp is lighted, is nothing but the adoption of Brush's dissimultaneous law, and it leaves the arc to be formed between the pair of carbons last separated. In this as in almost all cases on infringement, there are slight differences in mode of construction and devices for the result accomplished by the patent. It is rare that we find an infringing machine which is copied with Chinese fidelity from that which it is claimed to infringe, but the infringers always endeavor to escape the charge of infringement by some modifications which shall apparently cause their machine to differ from that of the patentee. The essential thing, however, to be considered in all such cases is whether the principle embodied and claimed in the patent has been substantially used by the defendant, and if we find that it has been so substantially

used it is the duty of the court to protect the patentee, however ingenious may be the mode of infringement. The motion for an injunction is therefore sustained.

KANE v. HUGGINS CRACKER & CANDY Co. *et al.*

(Circuit Court, W. D. Missouri, W. D. December 11, 1890.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

Injunction to restrain infringement of a patent will not be granted against a corporation which has disposed of the business in which the patented device was used before the bill was filed, and has not since used it.

2. SAME.

Nor will injunction be granted against the president of such corporation, who has been retained as an employe by the purchaser of the business of the corporation.

3. SAME—TEMPORARY INJUNCTION.

In the absence of a prior adjudication of the validity of a patent and of proof of general acquiescence therein, the court will not grant an injunction *pendente lite* on a bill to restrain infringement, where the proof leaves it uncertain as to the patentability of the patented article, and where it appears that respondents have large and valuable property, and are perfectly solvent, and the measure of complainant's damages in case his patent is finally established can be easily ascertained.

Banning, Banning & Payson and *Huston & Parrish*, for complainant.

Goudy, Green & Goudy, Offield, Towle & Linthicum, and *Warner, Dean & Hagerman*, for defendants.

PHILIPS, J. This is an application for injunction for the infringement of letters patent granted one George D. Moffat of Chicago, Ill., assignor of Thomas Kane, letters No. 356,394, dated January 18, 1887, entitled "Candy, and process of manufacturing the same." The Huggins Cracker & Candy Company is a corporation of the state of Missouri, at Kansas City, Louis Huggins is a citizen of the state of Missouri, residing in this district, and the American Biscuit & Manufacturing Company is a corporation of the state of Illinois, at the city of Chicago. Where the patent is clear on its face, and its validity is not assailed *aliunde*, injunction is not only an appropriate, but may be termed the natural, remedy for an infringement. Injunction is, however, an extraordinary remedy, and the discretion of the chancellor obtains in granting the writ in patent cases, as in other applications for injunction in equity. No further discussion of the merits of the patent in question will be indulged than is deemed necessary to warrant the conclusion reached on this application for a temporary writ.

As to the Huggins Cracker & Candy Company the writ is refused, for the reason that I am satisfied, on the showing now made, that some three months prior to the filing of the bill herein this company sold and conveyed its stock, material, and plant to the American Biscuit & Manufacturing Company, since which time it has not employed the patented device in question. As the office of the writ is to restrain an existing

user, it will not be granted after the use has ceased. *Brammer v. Jones*, 3 Fish. Pat. Cas. 340. It is true the bill avers that this transfer was and is simulated; that the Huggins Cracker & Candy Company but entered into what is commonly known as a "trust," retaining its corporate autonomy, still pursuing its customary business, with corporate responsibility, looking only to the success of the "combine" for its profits, and being subject to such compact. It is also true that some evidence of the continued business, *eo nomine*, by the Huggins Cracker & Candy Company is presented by the use of the letter-heads of the company in certain correspondence of Louis Huggins, its former president. But the counter-affidavits so clearly show an absolute sale and transfer and the retirement from such business by the corporation, as such, that it would be unreasonable to hold that the complainant had made out a prevailing *prima facie* case sufficient to warrant a restraining order against the corporation.

As to the respondent Louis Huggins, the facts disclosed are that he was the president of the Huggins Cracker & Candy Company, and, when the sale and transfer were made to the American Biscuit & Manufacturing Company, he was retained by the latter company merely in charge of the concern in Kansas City. At the time of filing the bill herein, he was only the employe of the American Biscuit & Manufacturing Company. Whatever he did in the matter of the imputed use of the patented device was for and on behalf of the latter corporation. In such case the injunction, if granted, should go against the corporation, and not the servant; for if the corporation be enjoined, the servant's occupation is gone.

The more important question is as to the right of an injunction *pendente lite* against the American Biscuit & Manufacturing Company. The record proofs and the evidence *aliunde* leave it uncertain as to whether or not Moffat was the first discoverer of the alleged patented device. A patent was granted on the 23d day of December, 1884, No. 309,720, to William P. and James W. Kirchoff, for an improved process of, and apparatus for, the manufacture of candy. There was no contention at the hearing that this Kirchoff process is not substantially identical with the process claimed by the Moffat patent, and the proofs confirm this. It is true there was an interference contest had before the patent-office, at the instance of the complainant, prior to the grant of the Moffat patent, and that the Kirchoffs withdrew from the contention in favor of Moffat, and authorized the issue of the patent to him. But the fact remains that, while Moffat asserts that he was the discoverer of the claimed process and resultant product anterior to the Kirchoffs, and had so publicly proclaimed his discovery, and that the Kirchoffs simply took advantage of his pecuniary inability to prosecute his invention to patent, and availed themselves of the fact to intercept his application by filing an earlier *caveat*, yet the Kirchoffs make affidavit that they conceived the invention in November, 1875, and made an apparatus to carry out the process as early as May, 1882, and practically and publicly used the same in 1882, while Moffat claims to have made his discovery in October, 1881, and put it to prac-

tical use in October, 1882. It also appears from the papers in the case that the complainant, Kane, paid the Kirchoffs \$6,500 for their patent, about the time of their consent, filed in the patent-office, that the patent might issue to Moffat. It may be true, as asserted by complainant, that this \$6,500 was paid by him solely by way of compromise, as the shortest road to peace, and the determination of a contest which could only postpone the realization of his expectations under a claim justly entitled to be protected by a patent. But as the matter stands, without more, there is grave misgiving as to the *bona fides* of this transaction. Again, if, as a matter of fact, Moffat made his discovery, as now claimed by him, a serious question arises, whether or not he has not slept upon his conception so long before applying for a patent as to warrant the presumption of a dedication to the public use. If the Kirchoffs in taking out their patent omitted to make claim of other devices of combination apparent on the face of their patent, which, as now claimed, were essential to its practical use and effect, the law presumes as to them that it was a dedication to the public use of the omitted matter, and they could make no subsequent claim thereto, until they had, with all due diligence, surrendered their patent for reissue, and made proof that the omission arose wholly from inadvertence, accident, or mistake. *Miller v. Brass Co.*, 104 U. S. 350. What is not claimed becomes public property. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174.

If, as a matter of fact, Moffat, living in the same town with the Kirchoffs, knew, as he seems to have known, of the grant to them, and stood by for two years without contest, now claims that the Kirchoffs appropriated his property in invention, is he in any better condition that would have been the Kirchoffs in laying claim to the omitted subjects? And will the law allow him, after such lapse of time, to obtain patent for the device known to him, and publicly put in use by the Kirchoffs and himself? 16 U. S. St. p. 201, § 24. Again, is not the Moffat patent invalid as to the third claim upon which relief in part is sought by this bill? His application was filed in 1886, and the patent was first issued in January, 1887. The third claim as laid by him was: "A new product, the herein described candy, composed of glucose and grape sugar, having, as distinctive characteristics, whiteness, clearness, hardness, and a resistance to atmospheric moisture." After he filed his application, and a month after the grant, the complainant, Kane, as assignee, tendered a surrender, and applied for a reissue, in which the specification was changed in lines 19 and 20, page 2, by striking out the words "grape sugar," and substituting therefor the words "cane sugar," and the reissued patent ran accordingly. There is such a radical difference between grape sugar, as thus employed, and cane sugar, as to make the change not only important, but an enlargement of the scope and effect of the original patent. The bill itself recites, respecting these amendments, "that such letters patent, being found to be inoperative or invalid by reason of an improper and defective specification, * * * was afterwards surrendered, and duly canceled by the commissioner." There was no affidavit made by Moffat, the inventor, that the omission

in the specification was through inadvertence, accident, or mistake, and nothing to this effect appears. Without such showing, the commissioner was not authorized to make the reissue. *Miller v. Brass Co. supra*; *Moffat v. Rogers*, 106 U. S. 423, 1 Sup. Ct. Rep. 70. The reissue could not enlarge the claim of the original patent. Its office is solely to perfect the description attempted in the original, or to narrow and circumscribe the grant. *Dunbar v. White*, 15 Fed. Rep. 747; *Nye v. Allen*, 15 Fed. Rep. 114; *Giant Powder Co. v. California, etc., Co.*, 6 Sawy. 508, 4 Fed. Rep. 720; *Knight v. Railroad Co.*, 3 Fish. Pat. Cas. 1.

The other two claims of the patent are as follows:

"*First.* The improved method of manufacturing candy, consisting in cooking a compound of cane sugar and glucose in *vacuo* until it acquires a consistency appropriate for the production of the candy demanded. *Second.* The improved method of manufacturing candy, consisting in cooking cane sugar and glucose in *vacuo* until it arrives at a hard crack or stick-candy consistency."

The commissioner of the patent-office had first rejected the application of Moffat for want of novelty, on account of prior grants to the Kirchoffs and to one Chase, which the commissioner said "fully met the invention." There were at that time three other prior patents touching this matter which do not appear to have been brought to the attention of the officer who had this question under consideration. One was a patent to Gossling in 1864, one to Nossian in 1874, and one to Gieseke and Hamlin in 1882. If the Chase patent influenced the action of the department in the rejection of the Moffat application, the other above-named patents ought to have presented quite insuperable obstacles. These prior patents clearly show that at the time of granting the Moffat patent there was nothing novel in the process of cooking a compound of glucose and cane sugar in water, nor was there any novelty in employing a vacuum pan for this cooking instead of the old fashioned open oven. Notwithstanding the claim of Moffat in his specifications to the contrary, the Nossian specification distinctly presented the vacuum pan or condenser for his process, and the boiling to a degree of heat approximating that of Moffat's. The specification recites:

"By my apparatus and process I am enabled to evaporate and reduce to syrup of proper consistency much more rapidly than has heretofore been done in open pans, without any possible danger of scorching or burning the same, and can manufacture all varieties of rock candy thereby at a much less cost than has been possible by the old method of manufacture, and produce it in large quantities, perfectly clear and colorless."

Nor was his invention and process limited to the manufacture of rock candy, as is manifested by the further statement in his specification, for he says:

"My invention is designed particularly for the manufacture of rock candy, in which case the syrup, after reaching the proper consistency, is run into the ordinary moulds, provided with strings, as usual, to facilitate crystallization. But it is evident to those skilled in the art of making candy that my invention may be employed with equal advantage for the manufacture of other varieties of candy."

The first of his claims was:

"The process herein described of reducing syrup to proper consistency for the manufacture of candy by evaporating the same at a temperature of 80° Reaumur in a vacuum, as and for the purpose described."

Moffat's especial claim is:

"To produce candy, more especially stick candy, of a quality superior to that resulting from the ordinary process as regards its clearness or brilliancy, its strength, and its resistance to atmospheric influences, and at the same time to lessen the cost of manufacture."

He further claims that hitherto in the manufacture of candy it had been customary to boil the cane sugar either alone or with a per cent. of glucose not exceeding 25 per cent., in open kettles or pans, and he had discovered that by the addition of a larger percentage of glucose he was enabled to produce the candy claimed by making use of a vacuum pan. The substance of these identical claims was embraced within the specifications of the preceding patents either taken separately or together.

The question of difficulty in my mind, as at present advised, is whether or not the Moffat patent does not simply take old and known appliances or apparatus, and, by combining well-known substances in an equivalent form, produce results or a product which require merely mechanical skill, vigilance, and care, without calling into requisition inventive genius. The stick candy produced by him is by boiling a compound of cane sugar and glucose syrup in *vacuo* to a certain consistency so as to avoid coloration and brittleness with liability to atmospheric influences on the one hand, and, reaching crystallization on the other. As in the processes of one or more of the patents above named, the characteristic is the evaporation of the syrups and in *vacuo* to such an extent that the stick candy will be produced. This is, it seems to me, after you have the compound boiled together and in the vacuum pan, substantially nothing more than carrying on the boiling process to a given point of evaporation, so as to pass the degree of brittleness and darker coloration, and yet not go so far as to reach crystallization. Does this require inventive genius, or merely mechanical skill, vigilance, and care, any more than that which a competent cook would exercise in boiling an egg or making angel food? As is said in *Smith v. Nichols*, 21 Wall. 112:

"A mere carrying forward of an original conception patented,—a new and more extended application of it,—involving change only in form, proportions, or degree; the substitution of equivalents, doing the same thing as did the original invention, by substantially the same means, with better effects,—is not such an invention as will sustain a patent. It is the invention of what is new, and not the arrival at comparative superiority or greater excellence in that which was already known, which the law protects as exclusive property, and which it secures by patent."

This rule of distinction was applied to the instance of a textile fabric possessing a certain substantial construction and essential properties long known and in use, and the patent was declared void when all that distinguished the new fabric was a higher finish, greater beauty of surface,

greater tightness of weaving, due to the observation or skill of the workman and of the perfection of the machinery employed. If the result attained is brought about simply by mechanical skill or knowledge that belongs to that department of labor rather than the result of mind or genius of invention, it does not entitle the party to a patent. *Tatham v. Le Roy*, 2 Blatchf. 474. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Simply bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is no invention. *Hailes v. Van Wormer*, 20 Wall. 353. This principle is aptly stated by Judge THAYER in *Brinkerhoff v. Aloe*, 37 Fed. Rep. 92:

"Where several old elements are so combined as to produce a better instrument than was formerly in use, but each of the old elements does only what it formerly did in the instrument from which it was borrowed, and in the old way, the combination is not a patentable one."

The application of these rules to the facts of this case, without further argument and demonstration, which may be expected on the final hearing, leaves my mind in such a state of uncertainty respecting the patentability of the complainant's device as to compel me to refuse the temporary injunction, in the absence of any prior adjudication determining the validity of the patent, and in the absence of satisfactory proof of general acquiescence. *Fraim v. Iron Co.*, 27 Fed. Rep. 457; *Dickerson v. Machine Co.*, 35 Fed. Rep. 143; *Booth v. Garelley*, 1 Blatchf. 247. In addition to all of which the proofs show clearly that the respondents are possessed of large and valuable property and are perfectly solvent. The complainant is not a manufacturer, but simply holds this patent for the sale of licenses. He has an established license fee, so that the measure of his damages if his patent be finally established is easily ascertained. In such case the court may well refuse the provisional writ. *Morris v. Manuf'g Co.*, 3 Fish. Pat. Cas. 67; *Machine Co. v. Hedden*, 29 Fed. Rep. 147; *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463; *Bell v. Stamping Co.*, 32 Fed. Rep. 549; *Smith v. Sands*, 24 Fed. Rep. 470; *Hoe v. Advertiser Corp.*, 14 Fed. Rep. 914.

The preliminary writ of injunction is refused.

FOUGERES *et al.* v. MURBARGER *et al.*

(Circuit Court, D. Indiana. December 12, 1890.)

1. EQUITY—PLEADING—MULTIFARIOUSNESS.

A bill in equity seeking an injunction and the recovery of damages for the infringement of plaintiffs' patent, and also an injunction and damages for the publication of slanderous circulars concerning the patent, is multifarious, no good reason being shown why relief for the slander should not be sought in a court of law.

2. PATENTS FOR INVENTION—NOVELTY.

Letters patent No. 334,842, for the improvement in anti-rattlers for thill couplings, consisting of a bent steel plate, which has been used before, with the addition of another plate, are void for want of novelty.

3. SAME—PRACTICE.

Where, on demurrer to a bill for the infringement of a patent, it appears upon inspection of the letters patent that they are invalid on their face, the court can so pronounce them without proof.

In Equity. On demurrer to bill.

Cowgill, Shively & Pettit, and *C. P. Jacobs*, for complainants.

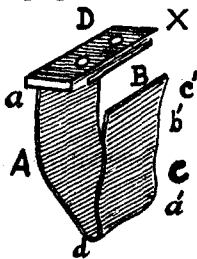
Foster & Freeman, Redding & Redding, and *Griffiths & Potts*, for defendants.

WOODS, J. The bill is multifarious. The complainants seek to enjoin and to recover damages for infringing their patent, and also to enjoin and to recover damages for the publication of slanderous circulars concerning the patent, and their rights thereunder. If entitled to relief at all, upon the facts stated, on account of the alleged slander, no good reason is shown why they should not seek it in a court of law. See *Chase v. Tuttle*, 27 Fed. Rep. 110; *Kidd v. Horry*, 28 Fed. Rep. 773; *Car-Wheel Co. v. Bemis*, 29 Fed. Rep. 95; *International Tooth Crown Co. v. Carmichael*, 23 Ch. Legal News, 141; *Francis v. Plinn*, 118 U. S. 385, 6 Sup. Ct. Rep. 1148.

In respect to the alleged infringement, the question is whether or not the patent sued upon is, upon its face, void for want of novelty. The patent in question is No. 334,842, for an improvement in anti-rattlers for thill couplings, of which the specifications and claim are of the tenor following:

"The object of my invention is the production of an anti-rattler for thill couplings, made of plate steel or other suitable elastic material, bent upon itself, and adapted to be inserted between the ears of the jack-clip, and having two curves or corrugations upon its face-front, one of which has a bearing against the thill-iron. In the accompanying drawing, forming a part of this specification, the figure is a perspective view of the anti-rattler embodying my invention. A represents a steel or other suitable elastic plate, bent forward at *a*, and having a returning bend at *a'*. The outer limb, B, is formed with a limb rib or corrugation, *b'*, and has a curved portion, *c*, between *a'* and *b'*. From *b'* to the end of the plate is a curve, *c'*, adapted to fit against the back part of the thill-iron, and, by pressure against the same, prevent rattling, as is well understood. To the forwardly projecting part, X, of the spring-plate, is secured by rivets, or in other appropriate manner, the plate, D, which forms a T-head, adapted to rest on top the ears of the jack-clip, thus preventing the spring from falling or working out in a downward direction, while the rib between the two curved portions, *c*, *c'*, prevents it from working out in an upward direction. By making the sharp return curves at *a'*, the spring is easily inserted between the end of the thill-iron and axle-clip. I am aware that anti-rattlers have heretofore been made of single plates of steel bent in various forms. I therefore desire to restrict my claim to the specific device herein shown and described.

"What I claim is the anti-rattler for thill-couplings hereinbefore described, made of a steel or other elastic plate, with the sharp return-curve at *a'*, the curved portions, *c* and *c'*, and rib, *b'*, in the outer limb thereof, and having



the back part bent forward at *a* to form the part, X, and with the plate, D, secured thereto."

With a distinct concession in the face of the patent that anti-rattlers had theretofore "been made of single plates of steel bent in various forms," it was insisted in argument that the claim of this patent for any feature of novelty must rest upon the introduction of the plate, D, in the manner and for the purpose indicated, and that this was not invention. On the other hand, after reciting the general averments of the bill in respect to invention and novelty "admitted by the demurrer to be true," counsel for the complainants says:

"And it can be shown, if the averments of the bill are true, that the improvement made by Blair was both new and useful, and involved invention. This was fully demonstrated to the patent-office officials, and they had the whole older art before them, when they allowed this claim."

But counsel made no suggestion how it was possible, in the face of the concession in the patent, to show any element of novelty or invention except the plate, D, and the court cannot see, and did not understand counsel to contend, that the introduction of that plate into the claim or combination could in itself be called invention. If it is possible, by specific averments beyond the general allegations found in the bill, to show that there was invention in this device, the bill may be amended for that purpose, but, as it stands, I do not think the defendants should be put to the trouble and expense of making proof. For cases upon demurrer to the bill, in which the courts have looked at the letters patent of which profert was made, and have held them invalid upon their face, see the following: *Bogar v. Hinds*, 25 Fed. Rep. 484; *West v. Rae*, 33 Fed. Rep. 45; *Studebaker Bros. Manuf'g Co. v. Illinois, etc., Co.*, 42 Fed. Rep. 52.

The demurrer is therefore sustained.

EDISON ELECTRIC LIGHT CO. v. UNITED STATES ELECTRIC LIGHTING CO.

(Circuit Court, S. D. New York. October 18, 1890.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—PRODUCTION OF DOCUMENTS.

Complainant in an action for the infringement of a patent made admissions, on an application for another patent on which letters never issued, which defendant contends greatly restrict the claim of the patent in suit. *Held*, that complainant could not refuse obedience to a *subpoena duces tecum* to produce such application, and the correspondence with the patent-office in regard thereto, on the ground that such documents, if produced, would be immaterial, as the court will not pass on that question until the evidence is before it.

2. SAME—CONFIDENTIAL COMMUNICATIONS.

The fact that the application for the unissued patent and the letters to the patent-office in regard thereto are the result of consultations between complainant and his counsel does not render them privileged as confidential communications, since they ceased to be confidential when complainant and his counsel parted with exclusive knowledge of their contents by sending them to the patent-office.

3. SAME—COMMUNICATIONS TO PATENT-OFFICE.

Communications between an applicant for a patent and the patent-office touching an unissued patent are not recognized as privileged either by any express legislation or by any rule of law.

4. SAME.

Rev. St. U. S. § 483, provides that the commissioner of patents, subject to the approval of the secretary of the interior, may establish regulations "not inconsistent with law for the conduct of proceedings in the patent-office." *Held*, that rule 15 of the patent-office, which provides that pending applications for patents shall be preserved in secrecy, was inoperative to change rules of law in courts of justice by making such applications privileged communications, both because to that extent it would be "inconsistent with law," and also because the effecting of such a change is not a regulation of the "proceedings in the patent-office."

5. SAME—ATTORNEY AND CLIENT.

A party cannot excuse non-compliance with a *subpœna duces tecum* commanding him to produce documents, unprivileged in his own hands, by showing that he has delivered them into the hands of his counsel.

Application for an order to compel production of papers on a *subpœna duces tecum*.

Samuel A. Duncan and Edmund Wetmore, for the motion.

C. A. Seward and Grovenor Lowrey, *contra*.

LACOMBE, Circuit Judge. Complainant is prosecuting a suit for alleged infringement of a patent for incandescent electric lamps, (No. 223,898, application November 4, 1879,) issued January 27, 1880, to Thomas A. Edison, and by him assigned to the complainant. On December 11, 1879, said Edison filed an application in the patent-office for improvements in electric lamps, and subsequently, namely, on December 15, 1880, divided such application into two parts, and embodied one division of the same in a new or divisional application of that date. No patent has been issued upon such divisional application. The defendant is endeavoring to prove the contents of such divisional application. In connection with such application, the patent-office has, it is claimed, sent various letters to the applicant, Edison, and to the complainant, and the said applicant and complainant have also sent letters relating thereto to the patent-office. The originals of the application and of the letters to the patent-office are with the commissioner of patents, who also presumably has copies of the letters sent by his office. The complainant has possession of the original letters from the patent-office, and has copies of the letters to that office and of the application. These papers are in the hands of one of its counsel, who claims that they are privileged communications, and refuses to produce them. The proper officer of the complainant corporation has been duly subpœnaed *duces tecum* to produce the papers, and declines to do so, refusing to recall them from its counsel so as to obey the subpœna. Application has been made by the defendant to the supreme court of the District of Columbia for a *mandamus* to compel the commissioner of patents to furnish copies in accordance with the provisions of section 892, Rev. St. U. S. That application has been refused.

Complainants concede that the application for a *mandamus* and its refusal by the court puts the defendant in the same situation as if it had duly subpœnaed the commissioner to appear before an examiner, and, upon his refusal to produce the papers in obedience to such subpœna,

had applied to the court in the District of Columbia to punish him for contempt, without success.

It was further conceded on the argument that the defendant has done all that is necessary to put it in a position to give secondary evidence of the contents of any of those documents, the originals of which, if present, would be admitted in evidence. Both of these applications were filed by Edison in pursuance of a contract made with the complainant corporation November 15, 1878. By this he not only transferred to the complainant the inventions which he had already patented, but also expressly covenanted to prosecute, with his utmost skill and diligence, further necessary investigations and experiments, and to promptly apply for patents for any further inventions and improvements in the field of electric light. He also agreed to prepare, or cause to be prepared, specifications, etc., of such inventions and improvements "as may be required by the company," to deliver the same to the company at its request, and to request, upon application for letters patent, that the same be issued to the company as sole owner. By this contract he conveyed to the complainant all such inventions and improvements which he might make for the space of five years after its date. The attorney who prepared, under Mr. Edison's directions, the particular application with which this motion is concerned, was the complainant's lawyer; and all the expenses of the application were borne by it. The theory on which defendant seeks to make proof of the divisional application and of the declarations made by Edison and by the complainant in their letters to the patent-office, concerning such application, is briefly this: That there is in the patent sued upon an ambiguity, its language being open to either of two constructions, one a very broad one, the other much more restricted; that, inasmuch as the language of the patent is the language of the applicant, his admissions are admissible for the purpose of removing the doubt with which his choice of words has surrounded the document; that for the purpose of making applications for patents covering inventions and discoveries of the kind conveyed absolutely to the complainant by the contract of 1878, Edison and the complainant are practically the same; that in the particular divisional application above referred to Edison uses language which is inconsistent with the claim that in the earlier application (the one for the patent in suit) he used the ambiguous words or phrases in their broad meaning; and, finally, that when the letters to the patent-office are read in connection with the letters to which they are replies, this fact will still more plainly appear.

This argument deals, of course, with the materiality of the proposed evidence when produced, and to this motion, which is practically directed to securing its presence in court, the complainant objects that the evidence, if produced, would be immaterial. That question, however, should not be determined upon application to produce the papers. The court should pass upon it with the proposed evidence before it, so that it may act intelligently, and that an exception to its refusal to admit the testimony, should it so refuse, may be of avail to the exceptant upon appeal. If the only objection to admitting these documents in evidence be that

they are immaterial, that objection is of no avail in opposition to an application which calls for their production. Without therefore finally determining the question as to the materiality of these documents, it is sufficient to say that, in view of the contract relations between Edison and the company, and of the rule of law as to the admissibility of a party's admissions, and in view of the effect accorded to such admissions in the case cited by defendant, (*Giant-Powder Co. v. California, etc., Co.*, 4 Fed. Rep. 720,) and, finally, in view of the contents of the documents as disclosed by the moving papers, there is not found in the objection as to the materiality of the evidence sufficient to warrant the refusal of the officers of the corporation to obey the *subpœna duces tecum*, and to produce the documents, which are concededly in the hands of its counsel, subject to its orders and under its control.

It is, however, further objected that the documents are privileged; that the application and the letters patent are the result of consultations between the applicant and his counsel; that their phraseology must necessarily reflect both the information given by the client to the counsel and the advice given by the counsel to the client; and that they have been placed in the hands of counsel under the protection of the confidential relation. Of the various cases cited upon the argument, many deal with the question as to the duty of the counsel. *Coveney v. Tannahill*, 1 Hill, 33; *Wright v. Mayer*, 6 Ves. 280a; *Dale v. Denison*, 4 Wend. 558; *Kellogg v. Kellogg*, 6 Barb. 116; *Chirac v. Reinicker*, 11 Wheat. 280; *Insurance Co. v. Schaefer*, 94 U. S. 457; *Hibberd v. Knight*, 2 Exch. 11; *Rex v. Dixon*, 3 Burrows, 1687. In the case last cited, Lord MANSFIELD said that, instead of producing the papers, the attorney ought immediately upon receiving the *subpœna* to have delivered them up to his client. The defendant, however, is not contending upon this motion that Mr. Dyer, the counsel who received these documents, is under any obligation to produce them in response to the *subpœna*, or to testify as to their contents. The only question now presented is whether the complainant's officers, under whose control the documents now are, who have the power to call them back from the possession of counsel, even if he has not, in accordance with the suggestion of Lord MANSFIELD, above quoted, already returned them, can excuse themselves from producing these documents in response to the *subpœna*, upon the theory that they are privileged as being the subject or the result of confidential communications between client and counsel. If documents are not privileged while in the hands of a party, he does not make them privileged by merely handing them to his counsel. The latter may perhaps properly refuse to produce them, but the former cannot do so merely because he is prepared to say that he has shown or has delivered them to his counsel. The converse of this proposition was contended for by the complainant upon the argument, but the authorities cited do not sustain such contention. In *Water Co. v. Quick*, 3 Q. B. Div. 315, transcripts of short-hand notes of interviews between officers and employees of the company, which interviews were had with the object of obtaining statements of fact to be furnished to counsel for the company for the purpose

of securing his legal advice touching an intended action, were held privileged. In *Wheeler v. Le Marchant*, 17 Ch. Div. 683, the questions as to whether certain written communications which had passed between the solicitor of the defendants and their surveyor, and between the surveyor and the solicitor, were privileged. The court held that they were not, except such as were prepared after dispute had arisen between plaintiffs and defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties. Certainly nothing of these cases supports the proposition that a party may secure for a document not otherwise privileged the protection of the rule by handing it to his counsel. It is urged, however, that these papers are privileged because they are the result or product of confidential consultations between client and counsel. This argument applies, of course, only to the application and to the letters to the patent-office.

The principles deducible from the authorities cited, and from others which have been examined, seem to be these: Neither client nor counsel may be asked as to mutual communications induced by their confidential relation, nor can either be required to produce any document emanating from one and transmitted to the other in the course of such confidential relation. The client cannot be required to produce letters written by him to his counsel, stating the facts as to which he wished advice, nor letters from his counsel embodying that advice, or even asking for further facts. If, as the result of the consultation between client and counsel, there is prepared some document, such as a form of contract or a notice or a letter, and that document is given by one to the other, and by him kept, it is probably privileged; its contents being confidential between client and counsel, and the document itself effectual only as an expression of the statement of the client as to the facts, and of the opinion of the counsel as to what kind of document it is desirable to prepare in view of the facts. *Genet v. Ketchum*, 62 N. Y. 626. But if the document thus confidentially prepared is not so kept, if the contract is by the client executed with some third person, or the notice is given or the letter sent to some outsider, its contents are no longer confined to the knowledge of client and counsel, and the party can no longer, as to a document which he has thus made public, claim that it is privileged because it is confidential. Such seems to be the rule fairly deducible from the decisions. *Minet v. Morgan*, L. R. 8 Ch. 361; *Pearse v. Pearse*, 11 Jur. 52; *Insurance Co. v. Schaefer*, 94 U. S. 457; *Coveney v. Tannahill*, 1 Hill, 33; *Whiting v. Barney*, 30 N. Y. 330; *Randolph v. Quidnick Co.*, 23 Fed. Rep. 278; *Foakes v. Webb*, 28 Ch. Div. 287; *Ford v. Tennant*, 9 Jur. (N. S.) 292; *In re Whitlock*, 15 Civil Proc. R. 204, 2 N. Y. Supp. 683; *In re Mitchell*, 12 Abb. Pr. 249.

The complainant, however, contends that the documents are privileged, because they are communications passing between the applicant and the patent-office, touching an unissued patent. The existence of no such general privilege is recognized in any of the authorities cited. See, also, the exhaustive enumeration of authorities given in *Whiting v. Barney* and *In*

re *Mitchell*, *supra*; and also the cases cited in 1 Greenl. Ev. §§ 250-252, and in Whart. Ev. §§ 604, 604a, 604b. Nor has any express legislation created it. By section 4902, Rev. St. U. S., congress has provided that *caveats* and descriptions, specifications, etc., interfering with such *caveats*, shall be filed in the confidential archives of the patent-office, and preserved in secrecy; but there has been no such legislation as to pending applications.

The complainant relies upon a rule or regulation of the patent-office, as follows:

"(15) *Caveats* and pending applications are preserved in secrecy. No information will be given without authority respecting the filing by any particular person of a *caveat* or of an application for a patent, or for the reissue of a patent, the pendency of any particular case before the office, or the subject-matter of any particular application, unless it shall be necessary to the proper conduct of business before the office, as provided by rules 97, 103, and 108."

That rule has been established under authority of section 483, Rev. St. U. S., which provides that "the commissioner of patents, subject to the approval of the secretary of the interior, may from time to time establish regulations not inconsistent with law for the conduct of proceedings in the patent-office."

This rule, so far as it regulates the conduct of proceedings in the patent-office, is binding upon all the subordinates in that office; possibly, also, upon the commissioner of patents himself, unless he obtains the assent of the secretary of the interior to its total or partial abrogation; but it is inoperative to change the rules of evidence in courts of justice, both because to that extent it would be inconsistent with law, and also because the effecting of such a change is in no sense the regulation of proceedings in the patent-office. Under a somewhat similar section (section 252) the secretary of the treasury, under direction of the president, is authorized to establish regulations, not inconsistent with law, to secure a just appraisal of imported goods. If, under such authority, he should make a rule that no examiner or assistant appraiser should give information to any one as to the methods by which he ascertained the composition or quality of such imported goods as he examined, such rule might be binding upon the subordinate as to any voluntary disclosures, but would certainly not excuse him from testifying in court if the sufficiency of his examination of the goods were made the subject of judicial inquiry.

The refusal of the company's officers to produce the documents in question under *subpoena duces tecum* cannot therefore be excused upon the theory that they are privileged communications. The specific relief prayed for on this application is for an order—

"That the complainant consent that the commissioner of patents furnish to the defendant's solicitors, at their expense, a certified copy of the file wrapper and contents of the pending application for letters patent filed in the patent-office of the United States by Thomas A. Edison on the 15th day of December, 1880, the same being a division of an earlier application known as the 'paper carbon application,' filed by the said Edison on or about December 11, 1879; or, in lieu thereof, at complainant's option, that complainant produce,

for the examination of defendant's counsel, and for use as evidence herein, if defendant be so advised, the full text, either original papers or copies, of said application, and of all correspondence in relation thereto which has passed between the patent-office and the said Edison, or the complainant herein, or his or its attorneys."

Sufficient ground for the making of such an order, if it be within the power of the court to make it, is not shown. It does not appear that the commands of the *subpoena duces tecum* will not be ample to obtain such evidence as that described in the motion. *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 202; *Bischoffsheim v. Brown*, 29 Fed. Rep. 341. Certainly as to the letters from the patent-office, the originals of which are in the possession of the complainant, the writ of subpoena should produce the best evidence; and as to the copies of the application and of the letters to the patent-office, sufficient foundation having been laid for the admission of secondary evidence, they may be offered, when produced and identified, with the same effect as if they were originals. The notice of motion, however, also contains a prayer for general relief, and under that prayer the defendant may take an order committing the officers of the corporation for contempt in failing to obey the *subpoena duces tecum*.

HATCH *et al.* v. THE NEWPORT.

(Circuit Court, S. D. New York. November 18, 1890.)

1. ADMIRALTY—REHEARING—NEWLY-DISCOVERED EVIDENCE.

After a libel for collision had been determined against libelants and a stipulation entered into by both parties to dismiss the action, libelants asked a rehearing, on the ground of the newly-discovered evidence of passengers of the libeled steamship. Libelants had a list of these passengers at the trial, but did not know their residences. Their affidavit alleged that they had afterwards learned the residences of these passengers through the Spanish consul. *Held*, that a rehearing would not be granted, as no excuse was given for failure to find the passengers' residences by the same means before the trial.

2. SAME.

Nor is it ground for such rehearing that new evidence has become available through some of the steamer's crew, where libelants, before the trial, had a full list of such crew, and knew which of them claimants would not examine as witnesses, but did not call any of them.

3. SAME.

Nor is it ground for such rehearing that libelants have discovered a witness who was in sight of the steamer the morning after the collision, where information of the whereabouts of such witness was obtained from the diary of a passenger, so that, if the passenger had been found before the trial, the witness might have been found too.

4. SAME—EXPERT EVIDENCE.

Newly-discovered expert evidence as to the distance at which shore lights can be seen, and as to the effect of a change of helm in giving a list to a vessel, is no ground for such rehearing, as such evidence might have been obtained at the trial.

In Admiralty.

George A. Black, for Hatch.

Goodrich, Deady & Goodrich, for the Newport.

LACOMBE, Circuit Judge. After the final decision of this court upon motion for a rehearing, rendered April 9, 1889, (38 Fed. Rep. 669,) a stipulation to discontinue the action was on June 4, 1889, entered into by both parties. This was done at the request of the libelant, ostensibly to save the expense of entering and satisfying the decree of the circuit court, and the costs of district and circuit courts were thereupon paid by him. Had this stipulation not been made, it must be assumed that the claimant would have entered the final decree in regular course. Had such final decree been entered, this court would be precluded by its rule from granting a rehearing. Dist. Ct. Rule 155; Cir. Ct. Rule 136; *Hogg v. The Annex No. 3*, 27 Fed. Rep. 516, 35 Fed. Rep. 560, (E. D. N. Y.) Without passing upon the question whether, when the decree has been entered, the court may relieve a party from the operation of such a stipulation at any time, it would be sufficient for the disposition of the present motion to hold that the libelant, having, by means of the stipulation, induced the claimant to refrain from entering a final decree, should be held to the strictest application of the ordinary rules by which motions for rehearing are tested. Such motions are not granted where the new evidence which a party seeks to introduce could by the exercise of proper diligence have been produced on the trial. All the new witnesses named by the libelant may be divided into five groups:

1. *Passengers.* Before the trial the libelant had obtained a list of the passengers from the Spanish consul. This list gave no residences, and the detectives employed by him were able to discover very few of them, and one only was called as a witness and examined in this court. Several passengers are now offered as new witnesses. The affidavit, however, gives no satisfactory excuse for the failure to discover their whereabouts before. It states that, after the trial and decision, (and after a period of ill-health,) libelant's counsel "set about investigating whether there could not be some new evidence discovered," and "following out the traces obtained, (from the Spanish consul's list and the efforts of the detectives before the trial,) he ascertained the whereabouts of additional passengers." How this was done the affidavit does not set forth, but on the argument it was stated that information as to their addresses was obtained from the state department, through the bureau having charge of the issue of passports. It is no ground for reopening the case that this method of investigation did not occur to the detectives or to counsel till the winter succeeding its final disposition. It was available from the very inception of the case in the district court, and probably if it had been put in practice then would have resulted in discovering the proffered witnesses with much less trouble than when undertaken nearly five years later.

2. *The Crew.* It appears that several months before the trial in this court, and while additional testimony was being taken, the libelant was furnished by the claimant with a full list of the crew of the Newport. At that time the trial in the district court had advised him which of these witnesses his adversary did not intend to call. He did not call any

of them himself, (other than those examined in the district court,) nor did he apply for a continuance of the case to enable him to discover their whereabouts, apparently relying upon the inferences which he insisted should be drawn from their non-production by his adversary. As to these witnesses the affidavit merely states—

"That, through sources of information which became known to deponent only after his recovery to health, in the winter of 1889-90, deponent got on the track of persons who were members of the crew of the Newport, besides those examined herein."

There is nothing to show that the same methods of investigation as energetically applied would not have enabled him to get on the track of those witnesses before the trial of the case in the circuit court.

3. *A witness from a coastwise steamer that was in sight of the Newport the morning after the collision.* Information as to the presence of such steamer was obtained from the diary of a passenger. Had the passenger been found before, this witness could also have been found.

4. *Experts as to the distance at which shore lights can be seen; as to the effects of collision; and as to the effect of a change of helm upon the list of a vessel.* Such evidence could of course have been obtained on the trials both in the district and circuit courts.

5. *The chief officer of the schooner Parker M. Hooper, which, on February 23, 1884, (the night of the collision,) came in contact with a mast sticking out of the water, near the place of collision.* No particular explanation is given in the affidavit as to the discovery of this witness, but, assuming that it was wholly fortuitous, there is not enough in his testimony to warrant the reopening of the case after this lapse of time. The motion is denied.

DUNCAN v. THE GOV. FRANCIS T. NICHOLLS.

(Circuit Court, E. D. Louisiana. October 18, 1890.)

ADMIRALTY--REVIEW ON APPEAL.

In cases involving questions of fact only depending on conflicting evidence, and the credibility of witnesses, the circuit court in admiralty will not disturb the decrees of the district court, where there is no preponderance of evidence, and no additional evidence offered on appeal.

In Admiralty.

The following are the findings of the district court referred to in the opinion:

"This cause came on to be heard and was argued by proctors. On consideration thereof, the court is satisfied and finds that in law the steam-tug was in fault for the collision, which happened between her and libellant's lugger on the 28th of February, 1889, and therefore the libellant is entitled to recover the damages sustained by him in the premises, and amounting under the proof to one hundred and fifty dollars."

T. M. Gill, for claimant.

H. Delesdernier, for libellant.

PARDEE, J. The case presented to this court, growing out of the collision of the tug Nicholls and the libellant's lugger, presents only questions of fact. The correct decision of these questions of fact depends upon the credibility to be given the witnesses on both sides. The important fact in the case is whether the libellant's lugger unnecessarily and improperly changed its course when in front of the defendant tug. After a careful and painstaking examination of the whole case, comparing and weighing the evidence given, I am unable to reach an opinion contrary to the findings of the district judge, and therefore affirm the decree given by the district court. In cases involving only facts, and the proof of these facts resting upon conflicting evidence and the credibility of witnesses, where there is no preponderance of evidence, nor additional evidence offered on appeal, the circuit courts in admiralty do not on appeal disturb the decrees of the district court. For both reason and authority, see *The Thomas Melville*, 37 Fed. Rep. 271, 36 Fed. Rep. 708; *The Suratoga*, 40 Fed. Rep. 509. The following decree will be entered in this case: This cause came on to be heard upon the transcript of appeal, and was argued. On consideration whereof it is ordered, adjudged, and decreed that the libellant, H. Duncan, do have and recover from James Sweeney, owner of the tug-boat Gov. Francis T. Nicholls, claimant in this cause, and from Charles A. Miltenberger, surety of said Sweeney on the bond of release *in solido*, the sum of \$150 damages, with 5 per cent. interest from judicial demand, to-wit, from March 9 1889, until paid; and all costs of the district and circuit courts.

THE TRANSFER NO. 4.¹

BROOKLYN & N. Y. FERRY CO. v. THE TRANSFER NO. 4.

(District Court, E. D. New York. December 8, 1890.)

COLLISION—STEAM VESSELS CROSSING—DUTY TO HOLD COURSE.

Where a tug, having the right of way over a ferry-boat on a crossing course, whistled to indicate that she would cross the bow of the ferry-boat, but immediately changed her wheel to swing away from the ferry-boat, and continued swinging until the vessels collided, it was *held* that the collision was the fault of the tug in not holding her course.

In Admiralty. Suit for damage by collision.

Wilcox, Adams & Macklin, for libellant.

Page & Taft and *R. D. Benedict*, for claimant.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

BENEDICT, J. This action is brought by the Brooklyn & New York Ferry Company, owners of the ferry-boat Alaska, to recover damages for injuries done to that ferry-boat by the tug Transfer No. 4, on the 10th of August, 1889. The collision occurred about 10:40 P. M. The night was clear moonlight, and the tide was strong ebb. The ferry-boat moved out from her bridge on the New York side blowing a long whistle as she moved. As soon as she reached the mouth of her slip, the Transfer No. 4 was disclosed moving up the river with a car-float on her starboard side. The ferry-boat blew two whistles, and kept her speed under a starboard helm. The tug put her helm a-port and reversed her engines. The result was that the tug came in contact with the starboard side of the ferry-boat 30 or 40 feet from her stern, doing the damage sued for. The testimony of the pilot of the tug makes a clear case of fault on the part of the tug. The vessels were on crossing courses involving risk of collision, and the ferry-boat had the tug upon her own starboard side. Under these circumstances, according to the contention of the tug, it was the duty of the ferry-boat to avoid the tug. But if this be so, it was also the duty of the tug to hold her course and permit the ferry-boat to choose whether to go astern or ahead of the tug. Instead of doing this the tug undertook to dictate to the ferry-boat. Her pilot testifies that when he saw the ferry-boat coming out he blew one whistle because, as he says, "I wanted to go ahead of him. I wanted him to stop," and instantly ported his helm; and although he received a signal of two whistles from the ferry-boat in reply to his one, he answered with a second signal of one whistle and kept porting, so that at the collision both vessels were heading towards Brooklyn. This evidence from the tug makes a case of fault on the part of the tug. I cannot find fault in the navigation of the ferry-boat. She, according to the contention of the tug, had the right to elect whether to go ahead of or astern of the tug. She determined to pass ahead of the tug, and the fact that the blow was made within 30 or 40 feet of her stern shows that if the tug had not changed her course the ferry-boat would have passed ahead of her in safety. The pilot of the ferry-boat says that he determined to go ahead of the tug, because he knew that any other course would result in collision, and I am not able to find upon the evidence that his conclusion was wrong. It is not, therefore, a case of choosing the most dangerous of two courses, but rather of choosing the least dangerous course, and one which, as the result proved, would have averted collision if the tug had not altered her course in the manner above stated. There must be a decree for libellant.

CURNOW v. PHOENIX INS. CO.

(Circuit Court, D. South Carolina. December 11, 1890.)

REMOVAL OF CAUSES—MOTION TO REMAND.

Where a cause has been removed from a state to a federal court upon defendant's petition, alleging diverse citizenship, plaintiff's petition to remand, denying the allegation of diverse citizenship, will be treated as a traverse of the petition to remove, and the motion to remand will be decided upon the trial of the issue thus made.

At Law. Motion to remand.

J. N. Nathans, for plaintiff.

J. P. K. Bryan, for defendant.

SIMONTON, J. This action was commenced in the state court. It has been removed into this court upon the petition of the defendant solely upon the allegation of diverse citizenship. The plaintiff thereupon filed in this court her petition, in which she denies diverse citizenship, and alleges that she is a citizen of the state of Connecticut, under whose laws the defendant was incorporated. She now moves to remand the cause to the state court. The defendant excepts to this mode of proceeding, and insists that the motion to remand admits the facts set out in the petition for removal. Counsel relies on the cases of *Buttner v. Miller*, 1 Woods, 620, and *Texas v. Railroad Co.*, 3 Woods, 308; that the only mode of obtaining the relief sought is by plea in abatement, (*Coal Co. v. Blatchford*, 11 Wall. 178,) or a traverse of the allegation of citizenship. Whatever may be the result of a motion to remand unsupported by petition or affidavit, the present is not that case. The plaintiff has filed her petition, denying the statement of the defendant as to the citizenship of the parties, and, alleging that both the plaintiff and defendant are citizens of the same state, bases her motion on these facts. She challenges the jurisdiction of this court, and gives the ground for the exception. Under these circumstances it is the duty of the court to examine into the question. *King Bridge Co. v. Otoe Co.*, 120 U. S. 225, 7 Sup. Ct. Rep. 552; *Morris v. Gilmer*, 129 U. S. 316, 9 Sup. Ct. Rep. 289; 18 U. S. St. at Large, 472; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 373, 10 Sup. Ct. Rep. 1004. The issue is made up from contradictory statements made by the parties. Let the petition to remand be filed, and be treated as a traverse of the petition to remove, and let a day be set for the trial of the issue made.

v.44f.no.5—20

NIBLOCK *et al.* v. ALEXANDER *et al.*

(Circuit Court, D. Indiana. December 10, 1890.)

1. REMOVAL OF CAUSES—LOCAL INFLUENCE—AFFIDAVIT.

The affidavit of defendant's attorney for the removal of a cause from a state to a federal circuit court, couched in the general terms of the statute, with the additional averment "that affiant knows the facts of such prejudice and local influence, and makes this affidavit from such knowledge," is insufficient under Act Cong. March 8, 1887, requiring that "it shall be made to appear" to the circuit court that such prejudice or local influence exists.

2. SAME—DIVERSE CITIZENSHIP.

Under that act, permitting the removal, when there is a "controversy between a citizen of the state in which the suit is brought and a citizen of another state," a removal cannot be had when the suit is brought in Indiana by two plaintiffs, one a citizen of Illinois, and the other of Indiana, against a citizen of Texas.

At Law. On motion to remand.

Claypool & Ketcham, for plaintiffs.

L. B. Swift, for defendants.

WOODS, J. This cause was removed from the state court upon the petition of the defendant John S. Alexander, who is a citizen of Texas, his co-defendants being one of them a citizen of Pennsylvania and the other a citizen of Indiana. Of the plaintiffs, Niblock is a citizen of Illinois and Zimmerman of Indiana. The suit is to enforce an arbitration bond executed by the defendants to the plaintiffs, and the plaintiffs are jointly and equally interested in the relief sought. The removal was obtained upon the ground of prejudice and local influence. Aside from the citizenship of the parties, the proof of prejudice or local influence can hardly be deemed sufficient. There is conflict in the decisions on the subject, but the opinion of Justice HARLAN, as declared in *Malone v. Railroad Co.*, 35 Fed. Rep. 625, is controlling in this circuit. After reviewing the statutes, he says:

"I am of opinion that congress did not intend to vest the circuit courts of the United States with authority to take cognizance of a case pending in a state court upon the ground of prejudice or local influence against the defendant, a citizen of another state, unless the circuit court, in some proper way, found as a fact that such prejudice or local influence existed. And the simple affidavit by an officer of a defendant corporation, stating in general terms that it cannot, from prejudice or local influence, obtain justice in the state courts,—no opportunity having been given to the plaintiff, by notice, to controvert such statement,—ought not to be accepted as sufficient evidence of that fact."

For cases touching the question, see *Cooper v. Railroad Co.*, 42 Fed. Rep. 697. The affidavit in support of the petition for removal of this cause was made by the petitioner's attorney, and is in the general terms of the statute, except that it contains the statement "that affiant knows the facts of such prejudice and local influence, and makes this affidavit from such knowledge." But this necessarily is only an expression of opinion, and, without a statement of facts to justify it, means no more than if the affidavit had conformed to the language of the act of March 3,

1875, "that he has reason to believe and does believe," etc. The present act says: "When it shall be made to appear to said circuit court," etc., and the change of phraseology seems to me to require the interpretation which Justice HARLAN has adopted. In *Rike v. Floyd*, 42 Fed. Rep. 247, an affidavit was held insufficient on grounds quite applicable here. See, also, recent decision of the supreme court in *Ex parte Pennsylvania Co.*, 11 Sup. Ct. Rep. 141, (decided December 22, 1890.) Whether or not, if the showing of prejudice were *prima facie* good, the court ought to consider the counter-affidavits, which have been filed, or should sustain the motion made to reject them, need not be considered.

There is another and more conclusive reason why the court cannot take jurisdiction of this cause. There is in it no "controversy between a citizen of the state in which the suit is brought and a citizen of another state." It is perhaps not material that the defendant who sought a removal was joined as co-defendant with a citizen of the state where the suit was brought, but it is fatal to the right of removal that one of the plaintiffs was a citizen of another state. It was so decided, after careful consideration, in the case of *Thouren v. Railway Co.*, 38 Fed. Rep. 673. Motion to remand sustained.

BAIN *et al.* v. PETERS.

(Circuit Court, E. D. Virginia. December 10, 1890.)

NATIONAL BANK—INSOLVENCY—PAYMENT OF PREFERRED DEBT—INTEREST.

Insolvent debtors of an insolvent national bank assign, giving preferences in favor of the bank. *Quære*, whether the debt preferred shall carry interest. *Held* that, where there is nothing in the language of the assignment, or in the circumstances under which the debt was created, to negative the presumption that the debt should bear interest, and nothing in the conduct of the receiver of the national bank to estop him from claiming interest, in such a case interest must be paid.

(Syllabus by the Court.)

In Equity. On petition of receiver to be allowed interest upon a preferred debt, the principal of which has been paid.

T. S. Garnett and W. J. Robertson, for receiver.

Walke & Old, James Alfred Jones, and Legh R. Page, for trustees.

HUGHES, J. There are cases in which sums of money made payable by instruments defining them do not carry interest after the date when they become payable, if payment is deferred. They are cases in which the circumstances and language under and by which the sums are made payable forbid the implication that interest is to accrue. A case of this class was that of *Murphy's Appeal*, 6 Watts & S. 223, cited at bar, in which there was an assignment in trust, which provided, among other things, that the trustee should "pay and satisfy in full the sum of \$5,178.32 to Placette Caze, a minor, to be paid to her, or whomsoever

may be legally entitled to receive it for her." The court refused to allow interest, on the ground that there was no recognition in the language of the grantor, or indication from the circumstances of the case, that the amount designated was a debt or claim. In the case of *Insurance Co. v. Delawnie*, 3 Bin. 295, there was a disputed account between plaintiff and defendant; the former claiming too much, the latter offering too little, and a suit became necessary. The court said that interest depended on the conduct of the parties, and allowed interest on the sum recovered. A strong ruling in respect to interest was that of the United States supreme court in *Early v. Rogers*, 16 How. 599. There a controverted case was, by agreement of parties, entered settled, and the terms of settlement were that the debtor should pay by a limited day, and the creditor agreed to receive, a less sum than that for which he had obtained judgment; and, the debtor having failed to pay on the day limited, the original judgment became revived in full force. This original judgment having omitted to name interest, and the supreme court having affirmed the judgment as it stood, the supreme court held, on the case again coming before it, that it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest. Numerous other cases might be cited in which interest has been disallowed on varying grounds, not easily classified; but I do not think it will be found that interest has been often, if it has ever been, disallowed, where debts have been due and demanded, and where no circumstances have existed to negative the idea that interest was to follow the principal. A number of cases may be found in which trustees under deeds of assignment have been required to pay interest on preferred debts, and to this rule depositors in national banks are not exceptions. In *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, it was specifically held that a depositor in a national bank, when it suspends payment and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit, and that such deposits, when regularly proved, stand on the same footing as judgments. Generally, as to interest, the supreme court held in *Young v. Godbe*, 15 Wall. 565, that, "if a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment." The court went so far in that case as to hold that, there being no law in the place where the contract arose (Utah) prescribing a rate of interest on such transactions as the one under consideration, nevertheless, reasonable interest must be paid by way of damages for withholding the payment of the debt.

The principle that where a debt is due and remains unpaid, the creditor has a right to claim interest upon it from the time it is due, is as firmly established by the statute law and by decisions of the court of appeals of Virginia, as it is by the decisions of the supreme court of the United States; and the question in the case at bar is resolved into the inquiry—*First*, whether the amount claimed by the receiver of the Exchange National Bank of Norfolk against the trustees under the deed of the Bains is a debt due; and, *second*, whether the receiver has, by any act

of his own, estopped himself from claiming interest upon the debt. The receiver holds notes which are thus described in that clause of the deed which gives them, with a few others, a first preference over other debts of the grantors: "Three notes of George M. Bain, Jr., as maker alone, held by the Exchange National Bank; the overdraft of the said George M. Bain, Jr., at said bank; and the overdraft of Mrs. Annie S. Hall at said bank," etc. Of the notes, one for \$13,000 and another for \$9,000 were past due, and one for \$9,000 was to mature on the 3d of July following. The two overdrafts amounted to an aggregate sum of \$11,288.49. The principal of these sums, \$42,291.65, was paid in July last. The interest which is now claimed is what accrued on the respective notes from their maturity, and on the overdrafts from April 2, 1885, when the bank failed, until the date of the payment of the principal.

There is certainly nothing in the character of this debt, or in the circumstances of its creation, or in the terms of the deed securing it, to negative the presumption of its being an interest-bearing debt; and therefore we have only to inquire whether the receiver has done anything to estop him from claiming interest upon it. It appears from the affidavit of Mr. Old, one of the trustees in the Bains deed, that affiant, shortly after the execution of that instrument, went to the receiver, and informed him that the trustees were "in part ready to pay the whole indebtedness of Bain & Bro. to the Exchange National Bank as a preferred claim, and would pay the overdrafts as soon as those accounts were audited and presented, and any note of G. M. Bain then due, and would be ready to pay the other of said notes when due." Affiant further avers that the receiver positively refused to receive said money from deponent, or to recognize him or his co-trustees in any manner whatever. The receiver, in a counter-affidavit, denies that any tender of payment of any part of any of the said indebtedness was ever made to him in any form, or that the receiver refused to receive any money from the trustee; but the receiver says that he did then refuse to recognize the said Old and his co-trustees as the lawful holders of the estate conveyed under the said deed of trust of April 6, 1885; and the receiver further says that, even if a tender had been made of the money to pay the said preferred claims, he would not have received the same, for the reason that he was then intending to bring, or had actually brought, his suit, claiming that the said deed of trust was fraudulent and void, and he was advised to do nothing; that could be construed into a recognition of its validity. The suit alluded to was brought in this court on the 2d May, 1885, and, in the month of July following, the trustees in the deed of trust of the Bains filed a cross-bill, praying that their trust might be administered under the direction of the court, in which cross-bill they say that they are advised that the amounts named in the deed as preferred debts due to the Exchange National Bank should not be paid by them, because the receiver, in attacking the said deed, had estopped himself from claiming the said indebtedness, or any benefit under the said deed.

In this attitude of the issue between the receiver and the trustees the suits went on. Large funds were collected from time to time until July, 1890. The funds have been held under the direction of the court dur-

ing this whole period. For about 13 months of this time they were on deposit in a national depository, not bearing interest. For the rest of the time they have been on deposit in several banks of Norfolk, bearing interest at the rate of 3 per cent. per annum. This disposition of the funds has been made in accordance with orders of the court, and now the question is whether the preferred debt held against those trust funds by the receiver shall be decreed to have borne interest from the date at which the component parts of it severally became payable, to the date of the payment of the principal to the receiver, in July last. This court has decreed that the receiver did not become estopped from claiming this preferred debt by bringing his suit to set aside the deed. It was a debt due, and there was nothing in the circumstances under which it arose to divest it of the incident of interest which attaches presumptively to every debt. If bringing his suit did not estop the receiver from claiming his debt, with interest, I do not see that his previous refusal to recognize the right of the trustees to dispose of any part of the property conveyed by the trust-deed which he was about to assail could estop him. I think the receiver is entitled to interest at 6 per cent. on the preferred debt which he held, and will so decree.

PACIFIC EXP. CO. v. SEIBERT, State Auditor, et al.

HOEY v. SAME.

(Circuit Court, W. D. Missouri, W. D. October 22, 1890.)

1. EQUITY JURISDICTION—INJUNCTION—TAXATION.

Where a suit is not essential to the collection of a tax, and a penalty is imposed for delay in paying the tax, and no action lies to recover back the tax if paid, equity has jurisdiction to determine the legality of the tax, and enjoin its collection if illegal.

2. SAME—MULTIPLICITY OF ACTIONS.

The fact that a penalty is imposed for each day's delay in the payment of a tax, and that the state might bring a separate action for each day's penalty, is no ground for the interference of a court of equity in order to prevent a multiplicity of actions, since it will not be presumed that the state would institute vexatious litigation.

3. TAXATION—INTERSTATE COMMERCE.

Act Mo. May 16, 1889, which imposes on companies carrying goods "by express, on contract with any railroad or steam-boat company," a tax on their "receipts for business done within this state," is not an interference with interstate commerce.

4. SAME—CONSTITUTIONAL LAW.

Said act does not deprive the express companies of the equal protection of the laws, or constitute inequality of taxation, since the state has a right to tax different kinds of property in different ways.

5. EXPRESS COMPANIES—COMMON CARRIERS.

An express company is a common carrier which, at regular periods, over fixed routes, carries money and articles of value in the charge of its own messenger, on passenger steamers and railway trains which it does not own, but with the owners of which it contracts for the carriage of its messengers and freights.

In Equity. Bill for injunction.

This case arises under the following act of the legislature of the state of Missouri:

"An act to define express companies, and to prescribe the mode of taxing the same, and to fix the rate of taxation thereon. Be it enacted by the general assembly of the state of Missouri, as follows: Section 1. Any person, persons, joint-stock association, company, or corporation incorporated under the laws of any state, territory, or country, conveying to, from, or through this state, or any part thereof, money, packages, gold, silver, plate, articles, goods, merchandise, or effects of any kind, by express, on contract with any railroad or steam-boat company, or the managers, lessees, agents, or receiver thereof, (not including railroad companies or steam-boats engaged in the ordinary transportation of merchandise and property in this state,) shall be deemed to be an express company. Sec. 2. Every such express company shall annually, between the 1st day of April and the 1st day of May, make and deliver to the state auditor a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this state of each agent of such company doing business in this state for the year then next preceding the 1st day of April, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies: provided, that the amount which any express company actually pays to the railroads or steam-boats within this state for the transportation of their freight within this state may be deducted from the gross receipts of such company, as above ascertained: and provided, further, that said amount paid to the various railroad or steam-boat companies for transportation shall be itemized, showing the amount paid to each railroad or steam-boat company: and provided, further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or charged for the business done within this state for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county and the total amount received for all the counties. In case of the failure or refusal of such express company to make such statement before the 1st day of May it shall then be the duty of each local agent of such express company within this state annually, between the 1st day of May and the 1st day of June, to make out and forward to the state auditor a similar verified statement of the gross receipts of his agency for the year then next preceding the 1st day of April. When such statement is made, such express company shall, at the time of making the same, pay into the treasury of the state the sum of two dollars on each one hundred dollars of such receipts. And any such express company failing or refusing for more than thirty days after the 1st day of June in each year to render an accurate account of its receipts in the manner above provided, and to pay the required tax thereon, shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the state of Missouri, on the relation of the state auditor, in any court of competent jurisdiction, and the attorney general shall conduct such prosecution; and such company, corporation, or association so failing or refusing shall be prohibited from carrying on said business in this state until such payment is made. Sec. 3. There being no law in this state by which such express companies are taxed, creates an emergency within the meaning of the constitution. Therefore this act shall take effect and be in force from and after its passage. Approved May 16, 1889."

The bill alleges in substance that the plaintiff is a corporation organized under the laws of the state of Nebraska, and is conducting business as an express company in Missouri and many other states, "conveying money, packages, gold, silver, plate, articles, goods, and merchandise to,

from, and through the state of Missouri and various parts of said state, by express," that in the prosecution of said business it does not provide its own transportation, but carries all its express matter "on contract with the Missouri Pacific Railroad Company and various other railroad companies;" that in the prosecution of its business it receives express freight in many states, and carries the same, for hire, to points in the state of Missouri, and receives such freights within the state of Missouri, and conveys the same to points within other states, and that it receives such express matter at points within the state of Missouri, and conveys the same to other points within said state; that there are "other persons, copartnerships, associations, and corporations residing and doing business within the state of Missouri, who were engaged in conveying to, from, and through the said state, and various parts of the same, goods and property of the descriptions aforesaid, for hire, by freight and by express, but not on contract with any railroad or steam-boat company, or the managers, lessees, agents, or receiver thereof, within said state, such persons, copartnerships, associations, and corporations being either provided with their own transportation facilities, or procuring the same, by hire, from other persons, not a railroad or steam-boat company, or the manager, lessees, agent, or receiver thereof." The bill then refers to the act of the legislature hereinbefore set out, and alleges that it is not a valid law, because it lays a tax on interstate commerce, and discriminates in favor of all express companies that do not hire their transportation by "contract with any railroad or steam-boat company" and against those who do, by imposing the tax on the latter only, thus denying to the plaintiff the equal protection of the laws, in violation of the constitution of the United States, and violating the rule of equality and uniformity of taxation required by the constitution of the state of Missouri. The bill prays that the act of the legislature may be decreed to be unconstitutional, and the defendants enjoined from enforcing said act, or attempting to collect any tax or penalty therein provided for. A temporary injunction was granted on filing the bill. The case is now before the court on demurrer to the bill.

The case of *Hoey v. The Same Defendants*, and similar in all respects, was submitted at the same time.

W. W. Morsman, for Pacific Express Co.

Edward S. Robert, for plaintiff *Hoey*.

John M. Wood, Atty. Gen., for defendants.

Before CALDWELL and PHILIPS, JJ.

CALDWELL, J., (*after stating the facts as above.*) Does the bill present a case of equitable jurisdiction? A very clear case must be made out before a federal court will enjoin the collection of a state tax. A case for the exercise of such jurisdiction is not made out by showing that the tax is illegal, irregular, or unjust. It must also appear that its collection will be attended with a multiplicity of suits, or the destruction of a franchise, or cast a cloud upon the title to real estate, or some other recognized head of equity jurisdiction must be shown. This being a personal tax, no cloud can be cast on the title to real estate. The supreme

court of the United States, speaking by Mr. Justice MILLER, states the rule in these terms:

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax." *State Railroad Tax Cases*, 92 U. S. 614.

The case last cited, and the case of *Dows v. Chicago*, 11 Wall. 108, are leading cases on this subject. These cases have been cited, and their doctrine approved, applied, and illustrated in many other cases in that court, and they furnish rules of decision obligatory on all federal courts. It is needless to repeat here the reasoning in support of these rules. It is set forth with convincing power in the two cases cited and in many others. *Hannevinkle v. Georgetown*, 15 Wall. 548; *Tennessee v. Sneed*, 96 U. S. 69. The plaintiff contends that in addition to the alleged illegality of the tax there are, in this case, special grounds of equitable jurisdiction. It is said if the tax is not paid the plaintiff incurs a penalty of \$100 per day, and is prohibited from doing business in the state during the period that it refuses to pay the tax, and that it is competent for the state to bring a separate suit for the penalty that accrues each day. All this is undoubtedly true. But the plaintiff has in its power to avert all these penalties and disasters by paying the tax. The tax is a personal one, touching which Judge Cooley says:

"When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult, in most cases, to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal, and the party makes payment, he is entitled to recover back the amount." Cooley, *Tax'n*, 772.

In *Brewer v. Springfield*, 97 Mass. 152, it is said:

"Until the plaintiffs have been compelled to pay the tax which they allege to have been illegally assessed upon them, they have suffered no wrong. When they have paid it they can recover it back by an action at law, which would furnish them an adequate and complete remedy."

The sound rule is that it is better the citizen should pay an alleged illegal tax, and test its legality in a suit at law to recover the money back, than that the state should be deprived of the revenues essential to its existence during the life of a chancery suit, which is usually protracted. In *Dows v. Chicago*, *supra*, the court say:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax, and the threatened sale of the shares for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. * * * And except where the special circumstances which we have mentioned exist, the party of whom an illegal

tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff, protesting against its enforcement, might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

The government of the United States has made this rule statutory. An act of congress declares that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Rev. St. U. S. § 3224. Appeals are given to the executive departments, and if the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid by suit against the collecting officer. Referring to this statute, the supreme court say:

"And though this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. See *Cheatham v. Norvell*, (decided at this term;) *Nichols v. U. S.*, 7 Wall. 122; *Dows v. Chicago*, 11 Wall. 108." *State Railroad Tax Cases*, *supra*.

Similar statutes are in force in some of the states. *Tennessee v. Sneed*, *supra*. These statutes are legislative recognitions of the principle that no government can permit its claims for public taxes on the citizen to become the subject of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others. *Murray's Lessee v. Improvement Co.*, 18 How. 272, 282. Speaking of the rule which requires the citizen to pay the tax, and test its validity, in a suit for its recovery, the supreme court say:

"There is nothing illegal, or even harsh, in this. It is a wise and reasonable precaution for the security of the government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man, or every embarrassed man, to whom delay was more important than the payment of costs." *Tennessee v. Sneed*, *supra*.

The citizen cannot appeal to equity for an injunction to stay the collection of a personal tax if he has an adequate remedy at law; and he has an adequate remedy at law if, after paying the tax, he can sue the state or the officers who collected the tax to recover it back. And his remedy at law is also adequate in the case of a personal tax, if the state can only collect the tax by suit or other proceeding that will afford to the citizen an opportunity to contest its validity without incurring penalties or forfeitures in the mean time.

We have not been cited to any statute or decision of the supreme court of the state showing that if the plaintiff paid the tax a suit would lie against the state or her officer to recover it back. In the view taken by the court of the other points in the case, the decision of this question, one way or the other, would not change the result, and the court will therefore assume, for the purposes of this case, that by the laws of Missouri an action could not be maintained to recover back a tax like this. The act we are now considering does not contemplate a suit to collect the tax. The amount of the tax cannot be known until the company makes a return of its earnings; and the making of this return, and the payment of the tax, are by the provisions of the act enforced by the imposition of a penalty of \$100 per day, and the denial of the right to do business in the state so long as the company is delinquent. While it is true that the plaintiff might contest the validity of the act in any suit brought by the state to collect the penalty imposed for the non-payment of the tax, that would not be an adequate remedy, for the reason that during the pendency of such a suit the penalty of \$100 would be accruing each day, and the plaintiff be denied the right to carry on its business in the state. It would take months, and possibly years, to reach a final decision of the case, and, if that decision should be favorable to the state, the penalty visited on the company would be very heavy indeed, including, as it would, the penalty of \$100 per day for the whole period, and the destruction of its business in the state, and probably great injury to its business in other states. Equity abhors penalties, and holds the remedy at law inadequate when the assertion of the alleged right at law will be, or may be, attended by the imposition of heavy penalties and forfeitures. And upon this ground, and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case.

Multiplicity of suits having also been earnestly urged upon the court as a ground of jurisdiction in the case, it is proper to consider that question. It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the state might bring a separate suit for each day's penalty, the court would hardly be justified in acting on the assumption that it would do so. The state is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting for and in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with lawsuits. Whatever the rule may be in the case of natural persons, the court will presume that a state is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a state will not bring any more suits than are fairly necessary to establish and maintain its rights.

The disposition of the case on its merits depends on the construction of the statute imposing the tax. The first question is, does the tax imposed by the act, upon the express company's receipts, amount to a regulation of or an interference with interstate commerce? The tax is im-

posed on the receipts for "all sums earned or charged for the business done within this state." These words qualify the whole act. They are plain and unambiguous. The words "for the business done within the state" *ex vi termini* import business begun and ended in the state, and include only intrastate, and not interstate, commerce. The interjection of the intensifying words "wholly" or "entirely" would not alter their meaning or change their legal effect. Interstate commerce is not "business done within" the state of Missouri. It is business done between two or more states. A package carried by the plaintiff from Omaha to St. Louis is not business done within the state of Nebraska, or the state of Missouri, but is business done between those two states. A contract for the carriage of goods from one state to another is an entire contract, and is an interstate contract, and the carriage of the goods under such a contract is interstate commerce, and is not "business done within" any of the states from, through, and to which they are carried on such contract. Before the passage of this act the supreme court of the United States had decided, in several cases, that it was not competent for a state to levy a tax upon earnings derived from interstate commerce. *Telegraph Co. v. State Board*, 132 U. S. 472, 10 Sup. Ct. Rep. 161; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, and cases there cited; *Ratterman v. Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. Rep. 1127; *Lyng v. State*, 135 U. S. 161, 10 Sup. Ct. Rep. 725. The law as contained in these decisions was common knowledge before the passage of this act, and it is obvious that the general assembly had these decisions in view in drafting the act. The limitation of the tax to the receipts on business done within the state is explicit, and is three times repeated. The legislative intent, not to impinge on interstate commerce, is manifest. But if the meaning of the act was doubtful, the doubt must be resolved in favor of its validity. It is a canon of construction that when an act of the legislature admits of two interpretations, one of which brings it within, and the other presses it beyond, their constitutional authority, the courts will adopt the former construction. But if the act could be construed to embrace the earnings derived from interstate commerce, that would not render the whole act invalid. It would still be valid as to the earnings derived from intrastate commerce, and the plaintiff would have to pay the tax on the receipts of its business done within the state. *Ratterman v. Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. Rep. 1127; *Telegraph Co. v. State Board*, 132 U. S. 472, 10 Sup. Ct. Rep. 161.

The next contention is that the act deprives the plaintiff of the equal protection of the laws secured to it by the fourteenth amendment to the constitution of the United States, and violates the rule of uniformity and equality of taxation required by that article and the constitution of the state of Missouri. This contention is rested on the words of the act that limit its operation to express companies that carry "by express, on contract with any railroad or steam-boat company." Neither the constitution of the United States, nor of the state of Missouri, requires taxes to be levied by a uniform rule upon all descriptions of property, or that all taxes on franchises, licenses, and privileges should be equal, or im-

posed by a uniform rule. For purposes of taxation, property and franchises, licenses and privileges, may be classified, and the different classes valued or taxed by different methods. The pursuits of mankind have become so varied, and property has assumed so many forms, many of them artificial and complicated, that different classifications of property, for purposes of taxation, and the valuation of different classes by different methods, are rendered imperatively necessary. And franchises, licenses, and privileges may be classified according to their several natures, and each class taxed a different rate and by a different method, or some may be taxed and others not. There is no evasion of the requirement of equality or uniformity so long as all in the same class are subject to the same tax under the same conditions. These principles have been repeatedly affirmed by the supreme court of the United States. In the latest utterances of that court on this subject it is said:

"The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions; it may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. * * * We think that we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation." *Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. Rep. 533. "But the amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind of property to a different rate, distinguishing between franchises, licenses, and privileges and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies it is not open to objection if all such bodies are treated alike, under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint-stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See *Barbier v. Connolly*, 113 U. S. 29, 32, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 5 Sup. Ct. Rep. 730; *Railway Co. v. Humes*, 115 U. S. 512, 523, 6 Sup. Ct. Rep. 110; *Railway Co. v. Mackey*, 127 U. S. 205, 209, 8 Sup. Ct. Rep. 1161; *Railway Co. v. Beckwith*, 129 U. S. 26, 32, 9 Sup. Ct. Rep. 207." *Insurance Co. v. State*, 134 U. S. 594, 606, 607, 10 Sup. Ct. Rep. 593.

In the light of the doctrine of these cases it is plain the act we are considering is not in contravention of the fourteenth amendment. The act imposes the same tax on all express companies, in the same circumstances and conditions. It is not averred in the bill, and was not contended in argument, that any person, company, or corporation engaged

exclusively in the express business owns and operates its own railroads and steam-boats for the exclusive purpose of carrying its express messengers and freights. There are no such express companies. In *Re Express Cos.*, 1 Int. St. Com. R. 349, 367, the question was presented to the commission whether express companies were within the provisions of the interstate commerce act. In enumerating the reasons set up by the express companies against the claim that they were within the act, the commission say: "The words 'its railroad,' the express companies say, exclude the idea that they are intended by the law, for they have no railroads; they neither own nor operate any railroad lines;" and the commission concurred in this view. The act of the legislature of Missouri applies to express companies proper, and contains a brief, and, as far as it goes, accurate definition of them. From the origin of express companies down to the present time a distinguishing and uniform feature of their method of conducting business has been the hiring of railroad and water transportation for their messengers and freights. It is a common carrier that does not own any means of transportation, but hires other common carriers (railroad and steam-boat companies) to carry its freight and messengers. It may be defined to be, a common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight, and also other articles, and packages of any description, which the shipper desires, or the nature of the article requires, should have safe and rapid transit and quick delivery, transporting the same in the immediate charge and custody of its own messenger, on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights, and within cities and towns or other defined limits it collects from the consignors and delivers to the consignees at their places of business the goods that it carries. *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542; *Retzer v. Wood*, 109 U. S. 185, 3 Sup. Ct. Rep. 164; 1 Int. St. Com. R. 273; *In re Express Cos.*, 1 Int. St. Com. R. 349. The court is bound to take judicial notice of a matter of public history and facts notorious to persons of ordinary intelligence. It would be discrediting to the court to affect to believe that there was any person in Missouri conducting an express business without the use of railroad or steam-boat transportation. The freighting business of this country was once carried on in wagons, propelled by animal power, on dirt roads, but that method of transporting common freights has been rendered obsolete by the railroads and steam-boats. Such a thing as an express company dissociated from transportation by rail or steamer is unknown. In the case of *Hoey*, suing as a shareholder in the Adams Express Company against these same defendants, submitted for decision with this case, and depending on the same questions, the bill alleges that the Adams Express Company, in conducting its express business, "utilizes over nineteen thousand miles of interstate railway communication." It is true, there are in cities and towns persons and corporations that carry goods and parcels in wagons or carts

from one place in a city or town and its vicinity to another, as chance may offer. But that is not an express business. A statute of the United States provided "that any person, firm, company, or corporation carrying on or doing an express business shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business." Under this statute the collector of internal revenue required one Retzer to pay a tax for carrying on an "express business." Retzer's business was the carrying of goods, freights, and baggage, in wagons, between New York and Brooklyn, and from one place in Brooklyn to another place in the same city. He did not run regular trips, nor over regular routes, but when and where he had orders. Upon these facts the supreme court of the United States held that Retzer was not carrying on an "express business." The court said:

"We are of the opinion that the plaintiff was not liable to this tax, because he did not carry on or do an 'express business,' within the meaning of the statute. Although he carried goods between New York and Brooklyn, and from one place to another in either city, he did so solely on call and at special request. He did not run regular trips, or over regular routes or ferries. He was no more than a drayman or truckman, doing a job when ordered. The fact that he had a place in Brooklyn where orders could be left on a slate made no difference. The words 'express business,' in the statute, must have the meaning given them in the common acceptance. An 'express business' involves the idea of regularity as to route or time, or both. Such is the definition in the lexicons." *Retzer v. Wood*, 109 U. S. 185, 187, 3 Sup. Ct. Rep. 164.

But suppose a business like Retzer's could be called an "express business." It differs so essentially in methods and conditions from the business defined by the act we are considering that it is obvious that they may be differently classed for taxation, and that the rule of equality and uniformity would not be violated by varying either the rate or the method of taxing them. The legislature might well consider a tax on the teams and wagons sufficient in the one case, and a tax on the earnings necessary in the other, or it might exempt the one and tax the other, without impinging on the fourteenth amendment. See *Gibson Co. v. Car Co.*, 42 Fed. Rep. 572, 574. The express business taxed by this act differs so materially from that conducted by other common carriers, and is so clearly defined and understood to be a distinct and separate branch of business, that it was eminently proper, if not imperatively necessary, if it was to be taxed at all, for the legislature to class it by itself, and, having so classed it, it was competent for the legislature to impose such a tax on its earnings for business done within the state as its wisdom dictated, not in excess of any limit prescribed by the constitution of the state. In the first annual report of the Interstate Commerce Commission (1887, p. 13) it is said:

"Some of the railroad companies, however, have undertaken to do the express business on their own lines, through their own agencies. The Baltimore & Ohio Railroad Company did this for a time, and then sold the business to one of the existing express companies. Some of the western railroads combine for the purpose, and for convenience create a nominal corporation to do the business over their several lines, and divide the net proceeds. * * *

There is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation."

When a railroad company, by the addition of a new bureau or department, and the adoption of new methods in the conduct of its business, qualifies itself to do the business commonly done by an express company, it does not thereby itself become an express company. Such an expansion or extension of its business as a common carrier works no change in its corporate character. Nor does it escape taxation on such new business. All schemes for the taxation of railroads, however much they may vary in details, are intended to include, and do include, in one way or another, a tax on all their property, income, and franchises. If the tax is not in terms laid upon their business and income, due regard to these is had in imposing the tax on their property and franchises. It may be conceded that there are no means of ascertaining whether a railroad company pays more or less tax on the earnings derived from its express business than is paid by an express company; but if it is admitted to be less, that is not the want of equality that falls under the ban of the constitution; but it results from the difference in the constitution, methods, and business pursuits of the two corporations which justifies the legislature in classifying them differently for purposes of taxation and taxing them by different methods. What is true of one railroad company is true of any association of railroad companies. All business they do as railroad companies is taxed in the general scheme for the taxation of railroads. It is not alleged in the bill in this case that the persons and corporations, which, it is averred, are carrying goods "by freight and by express," are not taxed. The complaint is that they are taxed at a different rate, and by a different method, from that applied to the plaintiff and all others who carry freight "by express on contract with any railroad or steam-boat company." The plaintiff's contention is that those carriers who own their transportation, and are common carriers of all manner of freights, shall be taxed at the same rate and by the same method as those carriers who hire their transportation, and whose business is limited to the carriage of express matter; in a word, that, for purposes of taxation, railroad companies shall be classed with express companies, and taxed at the same rate and by the same rule. There are inherent and fundamental differences in the corporate franchises, rights, and duties, property and methods of business, of a railroad company and an express company. These differences forbid their being classed together for purposes of taxation. Such a classification would be extremely incongruous. Because of this difference between the railroad companies and the express companies the latter could not be brought within the purview of the interstate commerce act. *Case of the Express Companies*, 1 Int. St. Com. R. 349; *U. S. v. Morsman*, 42 Fed. Rep. 448. Except as to their visible and tangible property, there seems to have been no law for taxing express companies until the passage of this act; for the legislature, in the third section of the act, assigns as a reason for putting the act in force from its passage the fact of "there be-

ing no law in this state by which such companies are taxed." Will any one seriously contend that before the passage of this act railroad companies could have successfully resisted the payment of taxes because express companies were not taxed, or that they can now do so because the method of taxation is different? If the rule contended for by the plaintiff is sound, it must be reciprocal, and, if express companies are not liable for the tax because they are not classified for taxation with railroad companies, and taxed in the same manner, then the railroad companies can object to paying taxes because they are not classified with express companies and taxed by the same method. For purposes of taxation they have no relation to each other, and the method of taxing them may be as widely different as the legislature in its wisdom chooses to make it. The demurrer to the bill is sustained, the temporary injunction dissolved, and the bill dismissed for want of equity.

CORPORATION OF THE CATHOLIC BISHOP OF NESQUALLY v. GIBBON *et al.*,
(UNITED STATES, Intervenor.)

(Circuit Court, D. Washington, W. D. November 3, 1890.)

1. PUBLIC LANDS—ORGANIC ACT OF OREGON—MISSIONARY STATIONS.

The proviso in the organic act of Oregon territory, confirming titles to the land not exceeding 640 acres then occupied as missionary stations among the Indian tribes, in the religious societies to which said missionary stations respectively belonged, must be construed as a grant of only the specific lands which were at the date of the act so occupied, exclusively, and not in subserviency to another's right.

2. SAME—GRANT CONSTRUED—POSSESSION.

The land in possession of the Hudson's Bay Company at the date of said act, and to which said company had a legal possessory right for a definite period, was not granted by said act, although priests of the Roman Catholic Church, by permission of said company, then had and maintained a missionary station thereon.

(*Syllabus by the Court.*)

In Equity.

Whalley, Bronaugh & Northrup, for plaintiff.

P. H. Winston, U. S. Atty., P. C. Sullivan, Asst. U. S. Atty., and W. H. White, for defendants and intervenor.

HANFORD, J. The plaintiff, in behalf of the Roman Catholic Church, which he represents, seeks, by this suit, primarily, to try the title to a tract of 430 acres of land in possession of the United States government, and occupied as a military reservation at Vancouver, in this state, and to obtain a declaratory judgment in his favor as the equitable owner, in trust for the church, of said property; and, incidentally, to obtain an injunction to prevent the commission of waste upon the premises. I wish to have it understood that in considering the merits of the plaintiff's claim I have not overlooked the very important question as to the power of the court in this suit to grant any part of the relief prayed for.

In the case of *U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. Rep. 669, decided since this case was commenced, the supreme court held, in effect, that a person having an unquestionable right to a conveyance of title to land from the government, and wrongfully deprived of it, cannot maintain a suit to compel such a conveyance. I think that, under existing laws, a disputed claim of a mere right to have a conveyance of title from the United States cannot, consistently with that decision, be litigated in the courts in any form of proceeding. And, as this case does not come within any known exception to the general rule that an injunction to restrain waste by a party in possession, and claiming title adversely to the plaintiff, will not be granted, if it had been submitted to me on a demurrer to the complaint, I should probably have held that the plaintiff could not obtain either form of relief. A preliminary question as to the legal capacity of the plaintiff to maintain the suit has also been raised by counsel; but, as much time and labor has been spent in taking testimony, and in the argument on the merits, I have determined to pass by these questions and rest my decision on the facts and the law affecting the validity of the claims of the Catholic Church to this land. I do so in order that on appeal the whole case can be at once taken to the supreme court.

The land claimed by plaintiff was, with other land adjoining and surrounding it, occupied by the Hudson's Bay Company as a site for a fort, trading post, and farm, and was the metropolitan establishment of that company on the Pacific coast from about the year 1825 until it was occupied by United States troops in May, 1849. In so occupying the land, and in carrying on its trading business, the company was operating under a charter and license from the sovereign of England. The license to trade with the Indians west of the Rocky mountains, including the right to occupy said premises, was granted to the company in 1838, and was for a definite period of 21 years, and expired May 30, 1859. In the year 1838, two priests of the Roman Catholic Church came to Vancouver, under commission from the bishop of Quebec, to perform the duties of priests generally, and to serve as missionaries among the Indian inhabitants of the region. Their superior, the bishop of Quebec, instructed them to establish their principal residence at some point on the Cowlitz river, and they did so, taking possession of land for the purpose which was theretofore unoccupied, except by the Indians. They also established a missionary station upon unoccupied land at a place now known as "St. Paul," in the Willamette valley. At Vancouver they also established a missionary station, with the consent of the Hudson's Bay Company, upon the land now claimed, which, as before stated, was then occupied by that company, and maintained a station there continuously until and subsequent to August 14, 1848. During these years the first two who came were reinforced by other priests, and, except during one or two short intervals, one of the priests resided at Vancouver, and there held religious services, and administered the sacraments, according to the rites of his church, among such of the officers and servants of the company as were of the Catholic faith, and their families, and such

Indians as were sojourning there or came for religious instruction. In consideration of the services of the priests among its servants and their families, the Hudson's Bay Company contributed a regular stipend of \$500 per annum for support of the mission, and furnished the resident priest a house to live in, and board or rations, and also provided a building for use as a chapel. In the treaty of 1846 between the United States and Great Britain, the Hudson's Bay Company's possessory right to the land for the unexpired part of said period of 21 years was recognized and guarantied by the following clause in the third article:

"In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of the land, or other property lawfully acquired within the said territory, shall be respected."

The law upon which the plaintiff's claim to the land is founded is contained in a proviso to the first section of the organic act of Oregon territory, entitled "An act to establish the territorial government of Oregon," approved August 14, 1848, (9 U. S. St. 323,) and reads as follows:

"That the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes in said territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

In May, 1849, Maj. Hathaway, of the United States army, with a company of soldiers, arrived at Vancouver, and he at once rented buildings for quarters from the Hudson's Bay Company, including part of the building used as the Catholic church, and, with the consent of said company, established a military camp upon the land now in dispute. A camp and garrison for the United States troops has been continuously, from that time to the present, maintained there, and, except a small portion thereof, all of said land has been occupied and used for that purpose. In October, 1850, Col. Loring, U. S. A., the commanding officer of the United States troops at Vancouver, issued a proclamation creating a military reservation for use of the government of the United States, four miles square, with defined boundaries, including this land now claimed by the Catholic Church, and declaring said reservation to be subject only to the temporary possessory rights of the Hudson's Bay Company, guarantied by treaty; and also giving public notice that all improvements within the limits of the reservation would be appraised, and payment therefor recommended. May 16, 1853, the Catholic Church, for the first time, asserted its claim to this land by filing a notice thereof with the surveyor general of Oregon territory, in which notice the boundaries of the 640 acres claimed were attempted to be defined. On the 28th day of the same month, and again on December 31, 1853, amended notices were filed for the purpose of changing the boundaries. December 8, 1854, the commanding officer at Vancouver, Col. Bonneville, pursuant to instructions from the secretary of war, and in conformity to an act of congress, approved February 14, 1853, limiting the extent of military reservations to 640 acres, by a general order reduced the

reservation to that extent, and caused the same to be surveyed and the new boundaries to be marked; and about the same time caused the buildings, and the improvements on the reservation, including the Catholic church, to be appraised by a board of military officers. After the extinguishment of the Hudson's Bay Company's possessory right to the land, by limitation of time, in 1859, upon application made in behalf of the Catholic Church, the commissioner of the general land-office directed the surveyor general of Washington territory to survey the land claimed as a missionary station. Thereupon protests against the allowance of the mission claim, and divers adverse claims to the same land, were filed, and the commissioner of the general land-office then ordered the surveyor general to investigate the matter fully, and make a special report, which was done, that officer assuming the power to adjudicate and determine the questions, both of fact and law, involved; and he decided in favor of the validity of the mission claim. This decision was reversed by the commissioner of the general land-office. An appeal was then taken to the secretary of the interior, and the final decision of the matter in the department of the interior was rendered by the secretary, March 11, 1872, allowing the claim, and authorizing the issuance of a patent for a small piece of land, less than half an acre in extent, upon which the building used as a church was situated, and rejecting it as to every other part of the land claimed. On the 15th of January, 1878, the president approved a final survey and plat of the military reservation, and confirmed the previous action of the war department, and declared said reservation to be duly set apart for military purposes. The government has purchased from the Hudson's Bay Company, and paid it for all the buildings and improvements of a permanent character which said company erected or made upon the land, including the Catholic church. And, prior to the commencement of this suit, everything necessary to constitute this land a government reserve for military purposes was formally and completely done.

In the argument counsel for the plaintiff has insisted that the decision of the secretary of the interior is conclusive as to the facts in the case. I think, however, that, as congress has not conferred any authority upon the department to take proofs or decide any question concerning the grants made for missionary stations by the statute above cited, the court is not bound by said decision, and it must find the facts, in an independent way, from the testimony given upon the trial and the exhibits introduced.

It is assumed in the brief and argument of counsel for the plaintiff that the question of chief importance in the case is whether there was a missionary station upon this land on the 14th day of August, 1848. And the contention is that if a missionary station existed there on that day, then, by the said act of congress, a right to the full quantity of 640 acres passed to and became vested in the religious society which the plaintiff represents, subject only to the incumbrance of the Hudson's Bay Company's temporary right of possession. This assumption is based upon the supposition that congress intended by this act to make

a grant of part of the public domain as a mere gift or contribution from the nation to the cause of religion; or, if not as a gift purely, then, as a grant in consideration of the good done by missionaries among the Indian tribes of Oregon. I am convinced, however, that the purpose of the act was not to make a gift, nor to reward meritorious efforts in the missionary service, but rather to recognize the just claims of a few people, who had incidentally, in connection with missionary labor, by their toil created property, whereby the material interests of the nation were affected and greatly benefited, and to protect their natural rights to the property so created by confirming to them the legal title thereto. It is to be presumed that in legislating for Oregon, congress was influenced by existing facts which were then generally well known. It was a fact well known, at the time of the passage of this statute, that missionary stations had been established and were then maintained among the Indian tribes at several places in Oregon territory by different denominations of Christians; that said missionary stations occupied land upon which they had erected dwelling-houses, school-houses, churches, barns, and mills, and, in connection therewith, gardens and fields were cultivated, all of which were necessary to the success of the missions, and for the support and comfort of the missionaries and their families. The missionaries were mostly loyal citizens of the United States; they were the pioneers of immigration; they aided in establishing the provisional government of Oregon; and they were helpers in securing this country for this nation. Failure or neglect on the part of the government to make good the titles of the first American inhabitants of the country to the land, made valuable by their labor, would have been base ingratitude. To do what congress did—that is, confirm to the several societies the titles to the land occupied by their respective missionary stations, with the improvements thereon made by their servants, the missionaries—was simply justice. In this view of the matter the appropriateness of the somewhat peculiar phraseology of the statute becomes apparent. The form of conveying title by confirming instead of granting the same harmonizes with the idea of a pre-existing equitable right, and an already acquired possession; the word “occupied”—a synonym for possessed, covered, filled—is an appropriate word to use for the purpose of identifying land in actual possession and use. The seemingly vague and loose expression, “religious societies,” applicable as well to Jewish, Mormon, or Buddhist as to Christian organizations, which in the act serves to designate the grantees, can be very well understood, and becomes definite, when it is considered that at that time the missionary stations were prominent points in Oregon territory. Their existence and occupancy of land was so well known that the taking of proof to establish these facts must have been regarded by congress as a work of supererogation. The entire frame of the act clearly indicates that congress intended to grant specific lands to certain well-known institutions. These considerations make it necessary to give the word “occupied” its full force and meaning, and excludes the idea that the occupancy of a tenant or guest, or any occupancy in subserviency to the right of another, could suffice to support a claim

to a grant under this statute. As the Catholic missionaries did not improve the land claimed in this suit, nor occupy it, except by permission from and in subordination to the Hudson's Bay Company, it is impossible for me to conclude that congress intended to or did give the valuable buildings and improvements on this land which that company owned to the church, a conclusion not to be escaped from if the land covered by those improvements was granted. The supreme court of the United States, in the case of *Society v. Dalles*, 107 U. S. 336, 2 Sup. Ct. Rep. 672, construed this act as a grant of only the land actually occupied as a missionary station among the Indian tribes. Another view that may be taken of the case is this: If the act is not to be regarded as a grant of specific land, capable of being identified by the description given in the act, then it must be a floating grant, and a grantee under it could acquire no vested right to any particular tract until a selection had been made, and the boundaries of the granted premises ascertained and established. No steps tending towards this end were taken until after the land now claimed had been appropriated and duly set apart for governmental use. It was then too late. The rights of the United States to this land as a military reservation are older, and for that reason, if for no other, superior in equity to the claim of the plaintiff. Findings may be prepared in accordance with this opinion, and a decree will be entered in favor of the defendants.

SIPES v. SEYMOUR *et al.*

(Circuit Court, D. Colorado. December 20, 1890.)

ACTIONS ON CONTRACT—PLEADING—COMPLAINT.

A written contract provided that in consideration of \$800, as well as for the services rendered, S. agreed to pay plaintiff a commission of 10 per centum of the cash that might be received for a certain mine, on a sale thereof, and also to deliver to plaintiff "all certificates of shares of stock that may be received in payment for the said * * * mine, over and above the amount of such shares at the price at which I may accept the same as will make the net price received by me for the said mine \$225,000." In an action against S. and other persons, the complaint alleged that the mine had been sold by S. for \$200,000 in cash, and \$800,000 in stock, and averred that plaintiff was entitled to recover from defendants his proportion of both cash and stocks. The complaint showed that the consideration from plaintiff for the contract was about \$1,300, but did not set forth any of the negotiations or the understanding of the parties as to the agreement. *Held*, that a demurrer to the complaint would be sustained, as the meaning of the agreement did not sufficiently appear.

At Law. Ruling on demurrer.

T. A. Green, for plaintiff.

Willard Teller, for defendants.

HALLETT, J., (*orally.*) William B. Sipes brought suit against J. Fenton Seymour, Ellen R. Seymour, and William G. Pell, on a contract which I will read:

"For, and in consideration of, the sum of eight hundred (800) dollars to me in hand paid, as well as for services rendered, I hereby agree to pay, or cause to be paid, to William B. Sipes, of the city of New York, or to his legal representatives, a commission of ten (10) per centum on the cash that may be received for the Slide mine, located in Gold Hill mining district, Boulder county, Colorado, on a sale of the same being effected in London or in Europe, and also to allow and cause to be delivered to the said Sipes, or to his legal representatives, all certificates of shares of stock that may be received in payment for the said Slide mine over and above the amount of such shares at the price at which I may accept the same as will make the net price received by me for the said mine two hundred and twenty-five thousand (225,000) dollars.

"New York, Dec. 19, 1881.

[Signed]

"J. F. SEYMOUR."

Plaintiff avers that the mine was sold by Seymour to one Halderman for \$200,000 cash, and \$800,000 in stock, and thereupon he became entitled to have from defendants \$25,000 in money on account of the cash received, and \$575,000 on account of the stock. A demurrer was presented to the complaint on several grounds, as that it is ambiguous and unintelligible; that there is a misjoinder of defendants, and some other matters. The contract upon which the suit is founded is not easily understood. If it stopped with the first clause,—that which relates to the payment of 10 per cent. of the cash which might be received from the Slide mine,—it would be plain enough; but the second clause, which provides for delivering all certificates of shares of stock over and above what would make the net price of the mine \$225,000, seems to put the whole instrument into some doubt. Whether it was intended that the mine should be sold for cash only, or for stock only, or for both cash and stock, is not stated in the complaint, and does not appear in the agreement itself. Looking to the agreement only, it may mean one thing or another, according to the understanding of the parties at the time it was drawn. If it was intended that the mine should be sold for cash only, if that was the expectation of the parties, then the first part of the agreement only will be operative, which provides for the payment of 10 per centum of the cash so received. If it was intended that the mine should be sold for stock in a company to be organized, and that the entire payment should be made in stock, then it would seem that it was the understanding of the parties that Seymour should have a price fixed upon the stock, something different and aside from its face value probably; and, looking to that price, which would be fixed by the parties purchasing the mine and himself, he would take enough of the stock to amount to \$225,000, according to the price so fixed, and all of the stock in excess of that number of shares would go to Sipes under this agreement. If it was the expectation of the parties that the property would be sold partly for cash, and partly for stock, as, according to the averment in the complaint, the fact was,—that is to say, if the mine was so sold partly for cash and partly for stock,—then it is difficult to understand the agreement at all, because apparently under the first clause of the agreement Sipes was 'to have 10 per cent. of the cash, and if the cash was less than \$225,000, then Seymour was to take enough of the stock

to make up \$225,000 at some price or another, and Sipes was to have all of the excess over that number of shares. It is quite clear that the negotiations of the parties, or at least what their understanding was in respect to this matter, must be ascertained before we can come to any correct construction of the agreement; and nothing of that kind is set forth in the complaint. This instrument was drawn and executed in New York, and, according to the complaint, the consideration proceeding from Sipes to Seymour was \$800 cash, and about \$500 more paid out for maps and plans to be used in making sale of the mine. That was something like \$1,300. Upon that payment, Sipes, if his own statements in this complaint are to be regarded, is to recover from the defendants here over \$500,000. Such an agreement as that would require very close scrutiny to see whether it is not within the usury law of the state of New York, where the paper was drawn. In any event, before we can reach a conclusion as to what the agreement may be, and before we can allow any action to stand upon it, we must know what the understanding of the parties was at the time this agreement was drawn, what they were trying to express in writing, not for the purpose of varying the terms of the writing, or contradicting it, not for the purpose of avoiding it in any way, but merely to understand it, to know its meaning. The plaintiff has not in his complaint set forth any of the negotiations. He has not told us with what understanding the parties made this agreement. Therefore we cannot reach any conclusion upon it. I think the demurrer ought to be sustained. The plaintiff ought to be required to give more of the circumstances of the agreement between the parties at the time this instrument was drawn, so that we may know what theory they were proceeding upon when they made this paper. It may be true, as is contended by the plaintiff, that if this was drawn by J. F. Seymour, with the authority and under the direction of the other defendants in the suit, Mrs. Seymour and Pell, they are bound equally with J. F. Seymour. I think probably that is true; but the more important matter for us in the outset is to get some understanding about what the agreement means; what the purpose of the parties was when they framed it; how it is to be construed in order to determine the rights of the parties in respect to it.

ÆTNA LIFE INS. CO. v. LYON COUNTY.

(Circuit Court, N. D. Iowa, W. D. December 15, 1890.)

1. COUNTIES—INDEBTEDNESS—REFUNDING BONDS.

Refunding bonds issued by a county for the purpose of taking up a prior valid indebtedness of the county are not rendered invalid by the fact that they exceed the constitutional limitation on the indebtedness of counties and other municipalities.

2. SAME—ACTION ON BONDS—ESTOPPEL.

Representations made by an agent appointed by a county board "for the purpose of funding and refunding the county indebtedness" that all the indebtedness proposed to be refunded by means of such bonds has been reduced to judgment, and then bonded, thus rendering the new bonds valid, though they exceed the constitutional limitation, do not estop the county to show the contrary, and that the bonds are invalid as against a purchaser thereof from such agent, as the county records are the best evidence of the purpose in issuing the bonds, and purchasers are bound to take notice thereof.

3. SAME.

Where a county, having power to fund its indebtedness, issues bonds in payment of judgments standing in full force against it, it cannot attack the validity of the bonds, in an action thereon, by showing that the judgments against it are invalid because in excess of the constitutional limitation of its indebtedness.

4. SAME—JUDGMENT WITHOUT PREJUDICE.

In an action at law on county refunding bonds which are part of a particular series, where a portion only of the amount for which such series of bonds was issued constitutes a valid and enforceable indebtedness of the county by reason of the constitutional limitation on its indebtedness, the court cannot determine the order in which the bonds were sold or the rights of the respective owners thereof, and judgment must be rendered for defendant without prejudice to plaintiff's right to establish its claim in some other proceeding.

At Law. Action on interest coupons.

By consent of parties, this case was tried to the court, and, from the evidence submitted, the court makes the following finding of facts:

(1) This action is brought upon 410 interest coupons, for \$30 each, originally attached to certain negotiable bonds, duly executed by the defendant, the county of Lyon, on the 1st day of May, 1885, and thereafter negotiated and delivered to the purchasers thereof, under the circumstances hereinafter stated, the said bonds being numbered as follows: 028 to 047, inclusive; 056 to 090, inclusive; 096 to 0120, inclusive.

(2) The defendant, the county of Lyon, is a municipal corporation, organized under the laws of the state of Iowa, within the meaning of section 3, art. 11, of the constitution of the state of Iowa, and was so organized early in the year 1872.

(3) The first state and county lists of the county were those for the year 1872, and the amount of taxable property within the defendant county, as shown by the state and county tax-lists for the various years since the organization of the county, is as follows:

For the year 1872.....	\$ 499,099 96	For the year 1879.....	\$ 915,133 28
" " " 1873.....	1,009,444 56	" " " 1880.....	1,066,707 00
" " " 1874.....	997,822 62	" " " 1881.....	978,259 00
" " " 1875.....	1,061,806 63	" " " 1882.....	989,550 00
" " " 1876.....	1,081,356 09	" " " 1883.....	1,384,289 00
" " " 1877.....	885,262 80	" " " 1884.....	1,437,527 00
" " " 1878.....	889,757 85	" " " 1885.....	1,558,043 00

(4) The first bonds issued by the county were issued July 29, 1872. During the year commencing July 29, 1872, and ending July 28, 1873, the sum of \$55,000 in bonds was issued by the defendant county, under chapter 174 of

the Acts of the 14th General Assembly of Iowa, upon the following judgments, in the following amounts, at the date given below:

On Wilson & Joy judgment, dated July 18, 1872, for \$6,018.00, 8 bonds, dated July 29, 1872, amounting to.....	\$ 6,000
" Jas. H. Wagner judgment, dated July 18, 1872, for \$1,269.96, 3 bonds, dated July 29, 1872, amounting to.....	1,200
" John A. Schmidt judgment, dated Oct. 11, 1872, for \$6,001.50, 10 bonds, dated Oct. 14, 1872, amounting to.....	6,000
" J. P. Gilman judgment, dated Oct. 11, 1872, for \$402.28, 4 bonds, dated Oct. 14, 1872, amounting to.....	400
" E. W. Lewis judgment, dated Oct. 11, 1872, for \$1,528.40, 3 bonds, dated Oct. 14, 1872, amounting to.....	1,500
" A. G. Case.....	
" Wm. Larrabee judgment, dated Oct. 11, 1872, for \$1,840.34, 5 bonds, dated Nov. 12, amounting to.....	1,800
" Joy & Wright judgment, dated Oct. 11, 1872, for \$743.10, 3 bonds, dated Jan. 6, 1873, amounting to.....	700
" Wm. Larrabee judgment, dated Apr. 18, 1873, for \$2,266.74, 4 bonds, dated Apr. 19, 1873, amounting to.....	2,200
" C. E. Gortz.....	
" Thos. Thorson judgment, dated Apr. 18, 1873, for \$809.94.....	
" J. P. Gilman judgment, dated Apr. 18, 1873, for \$499.20, 1 bond, dated Apr. 21, 1873, amounting to.....	500
" C. A. Greeley judgment, dated Apr. 18, 1873, for \$5,411.30, 7 bonds, dated Apr. 22, 1873, amounting to.....	5,400
" Clark & Grant judgment, dated Apr. 18, 1873, for \$8,197.70, 14 bonds, dated Apr. 23, 1873, amounting to.....	8,200
" Van Sickle & Bro. judgment, dated Apr. 18, 1873, for \$1,268.70, 2 bonds, dated Apr. 22, 1873, amounting to.....	1,200
" Jas. H. Wagner judgment, dated Apr. 18, 1873, for \$392.55, 4 bonds, dated May 5, 1873, amounting to.....	900
" J. C. Buchanan judgment, dated Apr. 18, 1873, for \$1,210.24, 4 bonds, dated May 5, 1873, amounting to.....	1,200
" E. W. Lewis judgment, dated July 23, 1873, for \$2,414.30, 7 bonds, dated July 28, 1873, amounting to.....	2,400
" P. H. Parsons judgment, dated July 23, 1873, for \$2,897.59, 4 bonds, dated July 28, 1873, amounting to.....	3,000
" Geo. W. McQueen judgment, dated July 23, 1873, for \$4,326.95, 7 bonds, dated July 28, 1873, amounting to.....	4,300
" C. L. Wright judgment, dated July 23, 1873, for \$505.37, 1 bond, dated July 28, 1873, amounting to.....	500
" C. A. Greeley judgment, dated July 24, 1873, for \$6,754.66, 13 bonds, dated July 28, 1873, amounting to.....	6,800
Total.....	\$55,000

The last above judgment, being against the defendant and in favor of C. A. Greeley for the sum of \$6,754.66, rendered on July 24, 1873, was rendered, bonded, and reversed under the following circumstances: C. A. Greeley brought a suit against the defendant county, in the district court of Plymouth county, Iowa, for the sum of \$6,754.66. In this suit one F. W. Allen, a citizen and tax-payer of Lyon county, appeared and filed his petition of intervention prior to the rendition of judgment against the county, claiming and alleging that he was a citizen and tax-payer in the defendant county; that a great portion of the warrants sued on in the suit in which the petition of intervention was filed were fraudulent, and without consideration; that at the time they were issued the indebtedness of Lyon county exceeded the amount of 5 per centum of the taxable property of said county; and that the warrants upon which the suit was based were in excess of such limitation of indebtedness, and void. The petition of intervention further alleges that the board of supervisors of the county well knew that there was a good and valid defense to said warrants, and that the defendant county was not liable thereon, and that the warrants were fraudulent; and that, knowing these facts, they corruptly and fraudulently entered into an arrangement assisting the plaintiff in procuring a judgment against the said county upon the said warrants, and entered into conspiracy with the plaintiff to have a judgment taken upon the

same, and to prevent a full and impartial defense being made by the defendant county. The plaintiff and defendant county each moved to strike this petition of intervention from the files, on the ground that the tax-payer had no right of intervention, or to defend for the county. The court in Plymouth county sustained these motions to strike, and at the same time entered judgment against the defendant county, in favor of the plaintiff, for the full amount claimed. From this judgment and these orders the intervenor appealed, and the supreme court of the state of Iowa, on December 9, 1874, reversed the judgment of the court below, rendered against the county, and remanded the same for further proceedings. Thereafter, and on the 5th day of February, 1875, the case was transferred to Lyon county, on motion of the intervenor, where it was continued from term to term, and not disposed of, and no other judgment was entered therein. The judgment above referred to, and which was reversed by the supreme court, was entered against the county on the 24th of July, 1873. On the 28th day of that month, a transcript of the judgment was filed in Lyon county, and on the same day bonds were issued thereon in the sum of \$6,800. The total amount of bonds issued upon judgments, not including the last judgment above referred to, was \$48,200, and, including the judgment above referred to, there were issued an aggregate of \$55,000.

(4½) I further find that the board of supervisors of Lyon county, on the 16th day of April, 1873, passed a resolution in the following form, to-wit:

"Whereas, there is now considerable outstanding indebtedness of the county of Lyon, in the shape of county warrants; and

"Whereas, the time for putting into judgment, and bonding the same, as provided by law, will expire on the 1st day of Sept. 1873; and

"Whereas, it is the opinion of the board of supervisors of Lyon county, Iowa, that the best interest of said county will be subserved by said indebtedness being bonded, in accordance with law:

"Now, therefore, be it resolved, and it is hereby moved and carried, by a majority of said board, convened as by law provided, that the holders thereof be, and hereby are, authorized and empowered to bring suit upon the same in any court in this judicial district, and obtain judgment on the same for the purpose of bonding: provided, however, that J. F. Eccleson and H. B. Wilson are hereby employed as sole attorneys, to appear in any court of this judicial district, and defend said county against all such warrants wherein the consideration thereof had failed, or wherein there is no consideration."

(5) From July 28, 1873, date of the issuance of the last of the \$55,000 of bonds heretofore referred to, up to July 1, 1879, funding bonds were issued by the defendant county, under the provisions of chapter 1, tit. 4, of the Code of Iowa for 1873, as amended by chapter 9 of the Acts of the 15th General Assembly, and chapter 154 of the Acts of the 17th General Assembly, at various dates, and in various amounts, as follows:

October 19, 1874.....	\$10,000 00
December 1, 1874.....	6,000 00
February 16, 1875.....	1,000 00
September 18, 1875.....	5,100 00
October 18, 1875.....	200 00
November 9, 1875.....	400 00
September 6, 1876.....	20,000 00
July 7, 1877.....	3,600 00
February 7, 1878.....	1,000 00
June 4, 1878.....	5,200 00
February 19, 1879.....	1,400 00
June 4, 1879.....	1,400 00
Total.....	\$55,800 00

All of the bonds were issued under resolutions of the board of supervisors, introduced in evidence, and which showed the purpose for which the bonds were issued; such purpose being to fund outstanding warrants and floating indebtedness against the county.

(6) I further find that on July 1, 1879, the defendant county issued \$100,000 of 8 per cent. refunding bonds, under the provisions of chapter 58 of the Acts of the 17th General Assembly of the state of Iowa, and upon the following resolution of the board of supervisors of said county, of date April 3, 1878:

"Whereas, in accordance with an act of the seventeenth general assembly of the state of Iowa, authorizing counties, cities, and towns to refund outstanding bonded indebtedness at a lower rate of interest, and to provide for the payment thereof, the board of supervisors of Lyon county, Iowa, in regular session assembled, deem it for the public interest to refund all indebtedness of said county, evidenced by bonds thereof, heretofore issued and outstanding at the time of the passage of this act.

"Therefore, be it resolved by said board of supervisors, that the chairman of said board and the auditor of said county are hereby authorized and empowered to issue the coupon bonds of said county in sums not less than one hundred dollars, (\$100.00,) nor more than one thousand dollars, (\$1,000.00,) having not more than fifteen years to run, redeemable in lawful money of the United States of America, at the pleasure of said county of Lyon, after five years from date of issue, and bearing interest, payable semi-annually, at the rate of eight per centum (8 per cent.) per annum, which bonds shall be substantially in the form set forth in said bill, to-wit, from lines eleven (11) to twenty-nine, (29,) inclusive, and deliver the same to J. Shade, the treasurer of said Lyon county, Iowa, who is hereby authorized to sell and dispose of said bonds so issued, in accordance with said act of the seventeenth general assembly of the state of Iowa, and for no other purpose, whatever.

"It is further resolved by the board of supervisors of said Lyon county that two per centum (2 per cent.) be, and the same is hereby, appropriated of the bonds herein authorized to be issued, to pay the costs or expense of preparing, issuing, advertising, and disposing of the same, and that J. Shade is hereby employed as financial agent therefor, with power to employ an assistant, if he so desire, and that all matters herein set forth shall be done in strict conformity with this resolution, and the provisions of said act.

"The foregoing was approved by all the members of the board of supervisors of Lyon county."

(7) The foregoing resolution was spread upon the records, and is upon page 337 of Book A of the records of the proceedings of the board of supervisors of said county; and the proceeds of this issue of Shade refunding bonds, amounting to \$100,000, were used to pay the principal and interest of bonds issued prior thereto, as follows: The amount of \$53,500 thereof was used to pay in full all of the \$55,000 of judgment bonds heretofore referred to, and which were issued in 1872 and 1873, and which were outstanding and unpaid, being in amount \$53,000 of principal and \$500 of interest, including the whole of the \$6,800 issued upon the judgment in favor of C. A. Greeley, and which was reversed in the supreme court of Iowa, as hereinbefore found. The remainder of the proceeds arising from the sale of the issue of Shade refunding bonds of \$100,000, issued July 1, 1879, was used to pay said above-mentioned \$47,300 of funding bonds, not issued upon, or to pay judgments with accrued interest thereon, amounting to \$1,085, hereinbefore referred to as being issued between October 19, 1874, and February 7, 1878, both dates inclusive.

(8) I further find that the following additional judgments were entered against the defendant Lyon county at the dates and in the amounts named, to-wit:

E. T. Kirk, July 24, 1873.....	\$2,204 23
James H. Wagner, April 21, 1874.....	672 06
A. J. Harmon, April 21, 1874.....	381 42
Perkins Bros., August 22, 1874.....	815 05
Wilson & Van Saun & Co., May 5, 1875.....	3,850 34
Lyman J. Gage, Oct. 16, 1875.....	4,400 56
C. H. Smith, Nov. 15, 1876.....	233 00
E. T. Drake, May 14, 1878.....	462 67
Swan & Fawcett, May 14, 1878.....	603 00
A. H. Andrews & Co., May 14, 1878.....	107 45
T. C. Thompson, May 14, 1878.....	304 00
Chase & Taylor, May 14, 1878.....	479 10

(9) I further find that bonds had been issued to discharge these last-named judgments, which bonds in turn have been merged in or paid from the proceeds of later issues of bonds.

(10) I find that there were no judgments rendered against the defendant county after the 1st day of Jan., 1879, and that all judgments against the defendant county prior to that date, had been satisfied prior to that date, either by bonds as hereinbefore found, warrants, or cash.

(11) I find that the next bonds issued by the defendant county were issued on January 8, 1880, and that on said date, and at various dates subsequent thereto, up to and including July 1, 1885, there were issued \$60,600 of funding bonds, under the provisions of chapter 1, tit. 4, of the Code of 1873; chapter 9 of the Acts of the 15th General Assembly; chapter 125 of the Acts of the 16th General Assembly; chapter 154 of the Acts of the 17th General Assembly; chapter 183 of the Acts of the 18th General Assembly; chapter 147 of the Acts of the 19th General Assembly; chapter 80 of the Acts of the 20th General Assembly,—at dates and in amounts as follows:

January 8, 1880.....	\$ 600 00
May 12, 1880.....	11,600 00
June 14, 1880.....	6,800 00
November 12, 1880.....	2,400 00
September 6, 1881.....	4,000 00
January 13, 1882.....	9,000 00
September 1, 1884.....	3,100 00
March 1, 1885.....	3,100 00
July 1, 1885.....	20,000 00
Total.....	\$60,600 00

(12) I find that the whole amount of said bonds was issued for the purpose of taking up outstanding floating warrants against said county, and, on the date of the issuance of the last \$20,000 thereof, to-wit, July 1, 1885, there was over \$20,000 of warrants outstanding against said county, which had been outstanding and unpaid more than six months prior to July 1, 1885, said bonds being issued to take up said warrants under a resolution of the board of supervisors of said county, of date April 10, 1884, as follows:

"Whereas, the county of Lyon, state of Iowa, has a floating indebtedness in warrants of the different funds of said county, and whereas, the board of supervisors of said county deem it for the best interest of the county to bond the same, be it therefore resolved by the board of supervisors of Lyon county, Iowa, that the chairman, with the auditor, be authorized to issue bonds in amounts sufficient to cover said indebtedness, and deliver the same to the county treasurer, and take his receipt therefor.

"Adopted by a full vote of the board."

(13) On May 1, 1885, an issue of \$120,000 of refunding bonds was made by the defendant county under the provisions of chapter 58 of the Acts of the 17th General Assembly, and chapter 175 of the Acts of the 20th General Assembly of the state of Iowa, and under a resolution of the board of supervisors of said county, of date April 11, 1884, as follows:

"Whereas, it is deemed to be for the public interest to refund the indebtedness of the county of Lyon, state of Iowa, evidenced by the bonds thereof, heretofore issued and outstanding on the 1st day of Jan., 1884, and to issue the coupon bonds of county.

"It is therefore resolved by the board of supervisors of said county in session assembled, to issue coupon bonds of this county, in sums not less than one hundred nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States of America, at the pleasure of the county, after five years from the date thereof, and bearing interest, payable semi-annually, at 6 per cent. per annum, which bonds shall be substantially in the form given in section 1, ch. 58, 17th General Assembly, and shall bear the date of July 1, 1884, or on the first day of any month called for by Miller & Thompson, and the chairman of the board, and the auditor of this board, and auditor of the county are hereby directed to issue same in accordance with said statute and this resolution.

"In testimony whereof the said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board, and attested by the auditor, with the county seal attached, this 1st day of May, 1885.

[Seal.]

"J. G. ANDERSON,

"Chairman of the Board of Supervisors.

"L. C. THOMPSON,

"County Auditor."

The foregoing preamble and resolution was passed the 11th day of April, 1884, by the vote of all the members of this board present, which was 4-5 of all the members thereof.

(14) That on the 9th day of January, 1885, the board of supervisors of the defendant, Lyon county, duly adopted the following resolutions:

"On motion, the resolution appointing Miller & Thompson as financial agents for funding and refunding county indebtedness, and the contract entered into in such resolutions, is hereby rescinded.

"On motion, it is hereby resolved by the board of supervisors that B. L. Richards is hereby appointed financial agent for Lyon county, for the purpose of funding and refunding county indebtedness, and that said B. L. Richards is required to give bond covering amount called for at any time by said agent. This resolution is passed in accordance with the Laws of 1873, and the amendment thereto."

That under these resolutions the defendant county, on the first day of May, 1885, duly executed one hundred and twenty refunding bonds in the sum of one thousand dollars each, numbered 01 to 0120 inclusive. That said bonds were identical in form, and are as follows:

"UNITED STATES OF AMERICA.

"Number

"0106

State of Iowa, Lyon County.

Dollars

1000

"The county of Lyon, in the state of Iowa, For value received, promises to pay to Connecticut General Life Insurance Co., or order, at the office of the treasurer of said county of Rock Rapids, on the 1st day of May, 1905, or at any time before that day after the expiration of five years, at the pleasure of the county, the sum of one thousand dollars, with interest at the rate of six per cent. per annum, payable at the

office of the said treasurer semi-annually, on the 1st days of May and November in each year, on presentation and surrender of the interest coupons hereto attached. This bond is issued by the board of supervisors of said county, under the provisions of chapter 58 of the Session Laws of the 17th General Assembly, chapter 175 of Public Laws of the 20th General Assembly of the state of Iowa, and in conformity with a resolution of said board dated 10 day April, 1884."

Indorsed on the back of the bond:

"CHAPTER LVIII.

"An act to authorize counties, cities, or towns to refund outstanding bonded debt at a lower rate of interest, and to provide for the payment of the same.

"Section 1. Be it enacted by the general assembly of the state of Iowa that counties, cities, and towns are hereby authorized and empowered, if by a vote of two-thirds ($\frac{2}{3}$) of the board of supervisors or city or town council, as the case may be, it be deemed for the public interest to refund the indebtedness of such corporation, evidenced by the bonds thereof, heretofore issued and outstanding, at the time of the passage of this act; and to issue the coupon bonds of such corporation in sums not less than one hundred dollars, (\$100.00,) nor more than one thousand dollars, (\$1,000.00,) having not more than twenty years to run, redeemable in lawful money of the United States of America, at the pleasure of such corporation, after five years from the date of their issue, and bearing interest payable semi-annually, at a rate not exceeding eight per cent. (8%) per annum, which bonds shall be substantially in the following form:

"No. _____.

"The _____ of _____, in the state of Iowa, for value received, promises to pay _____, or order, at the office of the treasurer of said _____, in _____, on the first day of _____, or at _____ time before that date, after the expiration of five years, at the pleasure of said _____, the sum of _____ dollars, with the interest at the rate of _____ per cent, per annum, payable at the office of said treasurer semi-annually, on the first days of _____, and in each year, on presentation and surrender of the interest coupons hereto attached.

"This bond is issued by the _____ of said _____, under the provisions of chapter _____ of the Session Laws of the Seventeenth General Assembly of Iowa, and in conformity with a resolution of said _____, dated _____ day of _____, 18—.

"In testimony whereof the said _____ has caused this bond to be [L. S.] signed by the _____, and attested by the _____, seal attached, this _____ of _____, 18—."

"And the interest coupons shall be in the following form:

"\$ _____.

"The treasurer of _____, Iowa, will pay to the holder hereof on the _____ day of _____, 18—, at his office in _____, _____ dollars, for interest on bond No. _____, issued under the provisions of chapter _____ of the Session Laws of the Seventeenth General Assembly."

"Sec. 2. The treasurer of any such corporation is hereby authorized to sell and dispose of the bonds issued under this act at not less than their par value, and to apply the proceeds thereof to the redemption of the outstanding bonded debt, or he may exchange said bonds for outstanding bonds, par for par; but the bonds hereby authorized shall be issued for no other purpose whatever: provided, however, such corporation may appropriate, not to exceed two per centum (2%) of the bonds herein authorized, to pay the expenses of prepar-

ing, issuing, advertising, and disposition of the same, and may employ a financial agent therefor.

"Sec. 3. The board of supervisors or common council of any city or town, as the case may be, shall cause to be assessed and levied each year, upon the taxable property of the county, city, or town, as the case may be, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds, issued in conformity with the provisions of this act, accruing before the next annual levy, and such proportion of the principal that at the end of eight years the sum raised from such levies shall at least equal fifteen per cent. (15%) of the amount of bonds issued, at the end of ten years, at least thirty per cent. (30%) of the amount, and at and before the date of maturity of the bonds shall be equal to the whole amount of the principal and interest; and the money arising from such levies shall be known as the 'bond fund,' and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer of such county, city, or town shall open and keep in his books a separate and special account thereof, which shall at all times show the exact condition of said bond fund.

"Sec. 4. Whenever the amount in the hands of the treasurer of any such county, city, or town, belonging to the bond fund, after setting aside the sum required to pay the interest coupons maturing before the next levy, is sufficient to redeem one or more bonds, he may notify the owner of such bond or bonds that he is prepared to pay the same, with all the interest accrued thereon; and, if said bond or bonds are not presented for payment or redemption within thirty (30) days after the date of such notice, the interest on such bonds shall cease, and the amount due thereon shall be set aside for its payment whenever presented: provided, however, that nothing herein shall be construed to mean that any such bond or bonds issued in accordance with this act shall be due or payable before the expiration of five years after its date of issue. All redemption shall be made in the exact order of their issuance, beginning at the lowest or first number, and the notice herein required shall be directed to the post-office address of the owner, as shown by the record kept in the treasurer's office.

"Sec. 5. If the board of supervisors of any county, or the common council of any city or town, which has issued bonds under the provisions of this act, shall fail to make the levy necessary to pay such bonds or interest coupons at maturity, and the same shall be presented to the treasurer of any such county, city, or town, and payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the auditor of the state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council shall, at their next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county, city, or town a sufficient rate to realize the amount of principal or interest past due, and to become due prior to the next levy; and the same shall be levied and collected as a part of the state tax, and paid into the state treasury, and passed to the credit of such county, city, or town, as bond tax, and shall be paid by warrants, as the payments mature, to the holder of such obligations, as shown by the register in the office of the state auditor, until the same shall be fully satisfied and discharged: provided, that nothing in this act shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have.

"Sec. 6. This act, being deemed by the general assembly of immediate importance, shall take effect from and after its publication in the Iowa State Register and Iowa State Leader, newspapers published at Des Moines, Iowa.

"Approved March 20, 1878.

"CHAPTER CLXXV.

"Acts Twentieth General Assembly. An act to amend chapter 58, Acts of the Seventeenth General Assembly.

"Be it enacted by the General Assembly of the State of Iowa:

"Section 1. That section one (1) of chapter 58, Acts of the Seventeenth General Assembly of Iowa, be amended by striking out of the fifth and sixth lines the words 'heretofore issued and outstanding at the time of the passage of this act,' and insert in lieu thereof the words 'now outstanding,' and strike out the word 'eight,' in the twelfth line, and insert in lieu thereof the word 'six.'

"Sec. 2. This act, being deemed of immediate importance, shall take effect and be in force from the date of its publication in the Iowa State Register and Iowa State Leader, newspapers published in Des Moines."

(15) I find the proceeds arising from the sale of the \$120,000 of "Richards" refunding bonds, issued May 1, 1885, were used to take up the \$100,000 of "Shade" refunding bonds, issued July 1, 1879, and \$16,900 of funding bonds, issued June 4, 1878, and subsequent thereto, as follows:

Of issue of June 4, 1878.....	\$ 1,700 00
" " " Feb. 19, 1879.....	1,000 00
" " " June 4, 1879.....	100 00
" " " May 12, 1880.....	11,600 00
All of issue of June 12, 1880.....	2,500 00

Total.....\$16,900 00

—and also to pay the commission and expense of placing said bonds, amounting to \$2,438.59; and the balance of the amount realized from the sale of said bonds, amounting to \$661.41, was applied on the payment of accrued interest on the bonds taken up.

(16) I find that five per cent. (5 per cent.) of the value of the taxable property within the county of Lyon, defendant, as ascertained by the state and county tax-lists for the several years since the organization of the county up to 1885, is as follows:

1872.....	\$24,954 99	1879.....	\$45,756 66
1873.....	50,472 22	1880.....	53,335 35
1874.....	49,591 13	1881.....	48,912 95
1875.....	53,090 33	1882.....	49,477 50
1876.....	54,067 80	1883.....	69,214 45
1877.....	44,263 14	1884.....	71,876 35
1878.....	44,487 89	1885.....	77,902 15

(17) Of the issue of \$100,000, bearing date July 1, 1879, there is no testimony as to the order in which the bonds were sold upon the market. Of the issue of \$120,000, of date May 1, 1885, the testimony tends to show that they were sold at the date, and in the amounts, and of the numbers, and to the persons or corporations, as follows, to-wit:

June 1, 1885, Nos.	01 to 027	to G. B. Provost.
" 4, " "	048 " 052	" C. H. Eighmey.
" 6, " "	053 " 055	" Dubuque National Bank.
Aug. 28, " "	056 " 090	" Ætna Life Ins. Co.
Sept. 1, " "	091 " 095	" U. S. National Bank.
" 1, " "	096 " 0105	" Orient Fire Ins. Co.
" 2, " "	0106 " 0110	" Conn. Gen. Life Ins. Co.
" 8, " "	028 " 047	" Saving & Trust Co. of Cleveland, O.
" 20, " "	0111 " 0120	" Hartford Steam Boiler Inspection and Insurance Company.

(18) I find further that the \$20,000 of bonds issued July 1, 1885, were sold on September 3, 1885.

(19) I further find that said B. L. Richards, as refunding and financial agent of the defendant county, at the time he sold said bonds numbered 028 to 047, inclusive, 056 to 090, inclusive, and 096 to 0120, inclusive, submitted to the purchasers the following statements, certificates, and affidavits as evidence of the validity of the bonds offered for sale. The statements contained in the affidavit of B. L. Richards, sworn to under date of September 1, 1885, were made orally in the first instance by him, when seeking to make sale of the bonds, and subsequently reduced to the form of an affidavit, and sworn to under date of September 1, 1885:

"EXHIBIT J.

"Certified copy of the proceedings of Board of Supervisors of Lyon County, Iowa, April 10, 1884.

"Bonding.

"Whereas the county of Lyons, state of Iowa, has a floating indebtedness in warrants on the different funds of said county; and whereas, the board of supervisors of said county deem it for the best interest of the county to bond the same:

"Be it therefore resolved by this board of supervisors of Lyon county, Iowa, that the chairman, with the auditor, be authorized to issue bonds in amounts sufficient to cover said indebtedness, and deliver the same to the county treasurer, and take his receipt therefor.

"Adopted by full vote of the board."

"(Under our state law, the bonds authorized to be issued by above resolution are optional 6 per cents., running ten years, with interest, payable semi-annually, at office of county treasurer.

[Signed]

"T. C. THOMPSON, Auditor.)"

"Refunding, April 10, 1884.

"Whereas, the county of Lyon, state of Iowa, has a bonded indebtedness, consisting of 8 per cents., and whereas, the board of supervisors of said county deem it for the best interest of the county to refund the said indebtedness, be it therefore resolved that said board of supervisors receive and consider bids for that purpose, and accept the best offer made for accomplishing said refunding.

"Adopted.

"On motion, the bid for bonding of Miller & Thompson and refunding the county indebtedness was accepted."

"January, 1885, Session, (January 9, 1885.)

"On motion, the resolution appointing Miller & Thompson financial agents for funding and refunding the county indebtedness, and the contract entered under such resolution, is hereby rescinded.

"On motion, it is hereby resolved by the board of supervisors that B. L. Richards is hereby appointed as the financial agent for Lyon county, for the purpose of funding and refunding the county indebtedness, and that said B. L. Richards is required to give a bond covering the amount called for at any time by said agent.

"This resolution is passed in accordance with the laws of [Code] 1873, and amendment thereto.

"I hereby certify that the above and foregoing is a complete record of the proceedings of said board of supervisors of Lyon county, Iowa, and that said B. L. Richards is duly authorized financial agent of the county, with full authority to negotiate the bonds of the county.

[Seal.]

[Signed]

"T. C. THOMPSON, County Auditor.

"I, T. C. Thompson, auditor of Lyon county, Iowa, hereby certify that the total bonded debt of Lyon county now outstanding is \$140,000, represented by bonds of following dates, amounts, and rates of interest:

"Refunding bonds, July 10, 1879, optional after July 1, 1884, 8 per cent.....	100,000
"Funding June 4, 1878 optional 10 years, 8 per cent.....	2,400
Feb. 19, 1879, 8 per cent.....	1,000
June 4, 1878, 8 per cent.....	100
May 12, 1880, 7 per cent.....	11,600
June 1, 1880, 7 per cent.....	6,800
Nov. 12, 1880, 7 per cent.....	2,400
Sept. 6, 1881, 7 per cent.....	4,000
June 13, 1882, 6 per cent.....	9,000
Sept. 1, 1884, 6 per cent.....	8,100
	140,400

—"That there never has been default made in payment of any interest coupons on any of above bonds since they were issued, and provision by levy for payment of interest has been made for 1885. That the total amount of floating debt now outstanding is about \$25,000, and does not exceed that amount. That of the floating debt represented by county warrants there are—

"Contingent fund warrants.....	15,692
"Bridge " ".....	8,191
"Poor " ".....	1,016

	24,899
"Adding bonded debt.....	140,400

"Making total debt..... \$165,299

—"That the assessed valuation of the property of Lyon county, as taken from the assessment rolls of 1884, is as follows:

"357,021 acres, at \$4.00	1,428,084
"Town lots.....	23,079
"Personalty.....	72,330
"Railroad.....	57,242
	1,580,735

—"That the land is assessed not to exceed one-third of its value. That town lots, with the buildings thereon, are worth, at a moderate valuation, \$500,000. That the personal property is valued at not more than one-tenth of its value. The real value of the property would be listed as follows:

"357,021 acres, at \$12 per A.....	4,284,252
"Town lots.....	500,000
"Personalty.....	723,300
"Railroad.....	57,242
	5,564,794

"Total real value..... 5,564,794

"Rock Rapids, Iowa, March 9, 1885.

[Signed]

"T. C. THOMPSON, Auditor. [Seal.]

"I, John G. Watkins, treasurer of Lyon county, Iowa, hereby certify that the bonds as listed by the county auditor, amounting to \$140,400, are correct, and that the county is not in default in payment of interest on any of said bonds, and that provision for the year 1885 for payment of coupons has been made.

"Signed at Rock Rapids, March 9, 1885.

[Signed]

"JOHN G. WATKINS,

"County Treasurer of Lyon County, Iowa.

"I, C. H. Smith, clerk of the district and circuit courts of Lyon county, Iowa, hereby certify that I am acquainted with T. C. Thompson, county auditor, and John G. Watkins, county treasurer, and know their signatures; that they are the present officers of Lyon county, in auditor's and treasurer's

offices, and that their signatures are attached to the foregoing certificates touching the debt of Lyon county, Iowa.

[Seal.] "*Dated Rock Rapids, Iowa, March 9, 1885.*

[Signed]

"CHAN. H. SMITH,

"Clerk of the District and Circuit Courts in and for Lyon Co., Iowa."

Also Exhibit L, which is as follows, to-wit:

"EXHIBIT L.

"*McCeney & O'Donnell, Attorneys at Law.*

"DUBUQUE, IOWA, August 26, 1885.

"We are asked our legal opinion as to the validity of the issue of \$140,400 of refunding bonds by the county of Lyon in this state. The certified copy of the record of the proceedings of the board of supervisors is not sufficient for us to determine several questions necessarily involved, viz.: *First.* Whether the refunding resolution of April 10, 1884, was adopted by the required two-thirds vote of the board of supervisors. *Second.* Whether these bonds evidence an indebtedness which was passed in judgment against the county. Assuming, however, from what Mr. Richards states, that the above-named resolution was adopted by the same vote as the bonding resolution, and that the indebtedness of the county for which it is proposed to issue these bonds was merged in, and is now evidenced by, a judgment against Lyon county, then we say that, notwithstanding the fact that said amount of \$140,400 was evidently in excess of the constitutional limitation upon counties not to contract an indebtedness in excess of 5 per centum of the assessed valuation of their property as shown by the last previous assessment, still the amount of the judgment or judgments, no matter if in excess of such 5 per centum, would be a valid obligation against the county, and the judgment would forever bar the county from pleading the constitutional defense. The county having had its day in court, and full opportunity to plead the overissue of warrants, or whatever may have been on the evidence of its debt, cannot again, whether it did before or not, be heard to make that defense again on any bond or other security given to pay such judgment. This is fully determined in the case of *Railroad Co. v. Osceola Co.*, 45 Iowa, 168. In order to issue the bonds of a county to refund its bonded indebtedness under the authority of law, all the action required is a vote by resolution, or otherwise, of the board of supervisors, by a two-thirds majority, declaring their intention so to do, as they deem it for the best interest of the county. Chapter 58, Acts 17th General Assembly. The two points above mentioned being conceded, viz., that the resolution authorizing the refunding was adopted by the required vote, (and the legal presumption is that it was,) and that the bonds are to refund judgment bonds, we give it as our opinion that the \$140,400 of bonds are legal and binding upon the county of Lyon, no matter who may be the purchaser.

[Signed]

"McCENEY & O'DONNELL.

"We mean to be understood by the above that the last issue of bonds by Lyon county to refund the refunding bonds which were issued to take up the judgment bonds are legal and binding upon the county.

[Signed]

"McCENEY & O'DONNELL."

Also Exhibit M, which is as follows:

"EXHIBIT M.

"AUGUST 29, 1885.

"*To McCeney & O'Donnell, Dubuque, Iowa:* Judgments were obtained against Lyon county, Iowa, and judgment bonds were issued to satisfy same.

Refunding bonds were issued to take up the judgment bonds. Refunding bonds upon which your opinion was given were issued to take up first-mentioned refunding bonds. Are last issue refunding bonds legal and binding obligations against the county?

[Signed]

"B. L. RICHARDS."

Also Exhibit N, which is as follows:

"Dated DUBUQUE, IOWA, August 30, 1885.

"To B. L. Richards: Yes. Last issue being authorized by law, and to pay judgments, is legal and binding.

[Signed]

"McCENEY & O'DONNELL."

Also Exhibit O, which is as follows:

"*State of Connecticut, Hartford County*—ss: I, B. L. Richards, of Lyon county, Iowa, being duly sworn, on oath depose and say that I was present at the meeting of the board of supervisors of Lyon county, Iowa, held April 10, 1884, and that the said meeting was a regular one; that at said meeting the resolution set forth in copy of proceedings of said board on file with Ætna Life Insurance Company at Hartford was offered, and adopted by the full vote of the board. No negative vote was cast.

"I further depose that the refunding bonds of Lyon county, Iowa, were issued July 1, 1879, for the purpose of taking up the outstanding judgment bonded indebtedness of said county, and the proceeds of said refunding issue were used for that purpose, and that the refunding issue of May 1, 1885, \$20,000, bonds Nos. 01 to 0120, inclusive, are issued to take up the refunding bonds dated July 1, '79.

[Signed]

"B. L. RICHARDS.

"Subscribed and sworn to by B. L. Richards before me this 1st day of Sept., 1885.

"CHARLES J. COLE, Justice of the Peace.

(20) I further find that the purchasers of the bonds, from which the coupons sued on were attached, at the time the sale thereof was negotiated, knew that the issue of which the bonds offered for sale formed part was in an amount greater in the aggregate than 5 per cent. upon the total valuation of the taxable property of the county of Lyon, as shown by the state and county tax-lists of that and all preceding years, but that the purchasers bought them in the belief that, being refunding bonds, they were valid and binding, and were so induced to believe by reason of the statements made to them by said B. L. Richards, and the written documents submitted to them as set forth in the last preceding finding.

(21) I further find that the amount due upon the coupons in suit is \$12,300, with interest at 6 per cent. from the maturity of each coupon.

(22) I find that the plaintiff is now, and has since the date of the sale of the bonds to it been, the full and beneficial owner of the coupons in suit which were detached from bonds Nos. 056 to 090, inclusive, and as to the remaining coupons in suit plaintiff is the holder thereof, the legal title thereto being vested in it, although plaintiff is liable to account, as agent or trustee, for the proceeds realized therefrom to the parties who originally bought the bonds, and who retain a beneficial interest in the proceeds realized.

Cummins & Wright and Henderson, Hurd, Daniels & Kiesel, for plaintiff.
Kauffman & Guernsey and Van Wagenen & McMillan, for defendant.

SHIRAS, J., (after stating the facts as above.) The questions of law arising on the foregoing facts have been very fully and ably presented by the counsel for the respective parties, and it is perhaps needless to say that there is a wide divergence in the views advanced touching the judgment that should be rendered by the court. It clearly appears from the evidence that the plaintiff and other purchasers of the bonds issued by the defendant county in pursuance of the resolution adopted by the board of supervisors in April, 1884, bought the same in good faith, and paid therefor the full face value and accrued interest; and the amount thus received was applied by the county, through its refunding agent, to the payment of bonds then outstanding against the county. It no less clearly appears that the issue of bonds negotiated by B. L. Richards on behalf of the county, being in amount \$120,000, exceeded largely the constitutional limitation of 5 per cent. upon the valuation of the taxable property in the county, as shown by the last preceding state and county tax-lists. If this issue of bonds had been negotiated in the purchase of property then acquired, or for the erection of county buildings or other like purpose, so that thereby a new or original indebtedness had been thereby created against the county, there could then be no question that the bonds themselves would be void by reason of the provision of the constitution of the state of Iowa, limiting the indebtedness of all municipal and political corporations within the state to 5 per cent. upon the taxable valuation of the property within the limits of the particular corporation, and a recovery thereon could not be had, even in favor of parties who had paid full value therefor in the belief that the bonds were valid. *Buchanan v. Litchfield*, 102 U. S. 278; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Lake Co. v. Rollins*, 130 U. S. 662; 9 Sup. Ct. Rep. 651; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654. The bonds in question were not issued for any such purpose, but were issued for the purpose of refunding other outstanding bonds of the county; and the issuance thereof did not in fact increase the indebtedness of the county, but only changed the form or evidence of indebtedness. Under these circumstances, it is broadly claimed on behalf of plaintiff that the bonds, being issued to refund or pay other bonds, are not affected by the constitutional limitation.

To the extent of holding that, as applied to a series of refunding bonds, the mere fact that the amount thereof might exceed 5 per cent. of the then taxable valuation of the property within the county, as shown by the tax-lists, would not necessarily show that the bonds so issued were invalid, I can agree in the views of counsel for plaintiff. If a county owes a valid and enforceable indebtedness, refunding bonds, issued under authority of an act of the legislature for the purpose of taking up such enforceable indebtedness, are not invalid because they may exceed the 5 per cent. limitation. In such case, the refunding bonds are valid, because they represent a valid indebtedness. *Railroad Co. v. County of Osceola*, 45 Iowa, 168; *Austin v. District Tp. of Colony*, 51 Iowa, 102. In suits, therefore, upon refunding bonds representing prior indebtedness, it is necessary, in order to sustain the defense of invalidity, to show that

the indebtedness merged in and represented by the refunding bonds was itself invalid and non-enforceable, either in whole or in part, and, in the present case, both parties have introduced evidence on this issue.

On behalf of plaintiff, it is claimed that the representations made by B. L. Richards, the accredited agent of the county, to the effect that all the indebtedness proposed to be refunded by means of the issuance of the series of bonds which were negotiated by him to plaintiff and others had been reduced to judgment, and then bonded, estops the county from showing the contrary. I do not think the statements made by Richards come within the principle contended for. When these bonds were offered to the plaintiff, it was known to the parties acting for the plaintiff that the series of bonds proposed to be negotiated exceeded in amount 5 per cent. of the taxable property in the county, and therefore, to authorize the issuance thereof, there must be then in existence a valid indebtedness to the amount of \$120,000, which it was proposed to refund by the issuance of the bonds in question. The validity of the bonds was asserted upon the claim that the bonds to be refunded represented claims that had been reduced to judgment, and therefore were enforceable against the county. The purchasers knew, and were bound to know, that, unless this assertion was true, the bonds would be invalid, because in excess of the constitutional limitation, and the purchasers were bound to ascertain what the fact in this particular was. The bonds themselves contain no recital on the subject. The certified copy of the proceedings taken by the board of supervisors in regard to the issuance of the bonds, and which copy was submitted to the purchasers, does not contain any statement showing that the bonds proposed to be refunded were based wholly upon prior judgments. The statement relied upon as an estoppel was made by Richards first orally, and then in the form of an affidavit; but he was not then acting on behalf of the county in ascertaining or certifying to a fact which the law required to be then ascertained and determined as the basis for further action. He was the refunding agent of the county, but he did not have the power to determine any question or matter pertaining to the right to issue the bonds. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Davless Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897. The resolution of the board of supervisors appointing Richards declares the object of the appointment to be "for the purpose of funding and refunding the county indebtedness," and the resolutions adopted by the board under date of April 10, 1884, show upon their face that it was the purpose of the board to undertake the bonding of the floating indebtedness, as well as the refunding the then outstanding bonded indebtedness.

Upon the question of what the bonds proposed to be refunded were the representative, and whether the same were based upon judgments previously rendered against the county, the records of the county constituted the primary and best evidence. Richards had no charge over or connection with these records, nor was he the one to whom application would naturally be made by one seeking to know the origin and purpose of the outstanding bonded indebtedness of the county. If the effect

of an estoppel is given to statements of this character, the protection intended to be secured by the constitutional provision limiting the amount of indebtedness of counties and other municipal corporations would be wholly destroyed. In every instance it could be evaded by the simple device of appointing a refunding agent, and by his statements create an estoppel against the county or city, and thus validate any amount of bonds that might be issued. I hold, therefore, that the representations made by Richards do not operate as an estoppel against the county, but that it is open to the county to show that the bonds merged into the refunding bonds sold by Richards were in whole or in part invalid and non-enforceable.

On behalf of the defendant, it is argued that, upon this issue of unconstitutionality, it is open in this proceeding to question the validity of judgments against the county, or of bonds issued to fund or pay judgments against the county. In this claim I cannot concur. The constitutional limitation is not self-acting. The protection of its provisions must be invoked at the proper time, and in the proper mode. If judgments are obtained against a county, and the same are not reversed, but remain in full force, they are evidence of the highest nature that the county owes the amounts adjudged to be due; and if the county, having the power to fund its outstanding indebtedness, issues bonds in payment of such judgments, the validity of the bonds cannot be successfully attacked, when suit is brought thereon, by showing that, if the defense had been interposed in the original case, the claim might have been defeated, and that the judgment actually rendered might have been prevented. As is said by the supreme court in *Cromwell v. Sac County*, 94 U. S. 351:

"Thus for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument, and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

The argument of counsel would have weight if the constitutional provision was to the effect that no judgment could be rendered against a county under any circumstances. In such case, even though a court should enter up a judgment, its unconstitutionality and invalidity would be self-apparent, and could always be availed of when its enforcement might be attempted, and this for the reason that upon its face the judgment would show that the court was without jurisdiction. A defense based upon the clause limiting the amount of municipal indebtedness to 5 per cent. upon the amount of taxable property is of a wholly different nature. It requires a proper pleading of the facts, and upon the trial proper evidence must be introduced, or else the defense fails. It makes no difference in the validity of the judgment whether the defendant failed to plead the defense based upon the constitutional limitation, or

failed to sustain the defense, if pleaded, by sufficient evidence. In either case the rendition of the judgment established the validity of the claim against the county, and the judgment, so long as it remains unreversed, cannot be questioned on the ground that the amount thereof exceeds 5 per cent. of the taxable property in the county.

The evidence shows that, when the bonds owned by plaintiff were issued and sold, there was outstanding against the county bonds representing judgments, and possibly other enforceable debts, to an amount exceeding 5 per cent. of the taxable property in the county. It follows that, to the extent of this enforceable indebtedness, the county could have issued valid refunding bonds. The amount of bonds issued and sold exceeds the amount of this enforceable indebtedness, and it may be said, therefore, that part of the indebtedness represented by this series of bonds is valid and enforceable and part not. That the holders of these bonds have equities against the county, will not be questioned. The question is, whether effect can be given thereto in this action.

It is argued that the bonds would be valid until the amount needed to refund the enforceable debt had been reached, and that it will be presumed that the bonds were sold in the order of their number. Such a presumption cannot be indulged in under the facts of this case. To settle the equities and rights of the bondholders against the county, and their rights as between themselves, would seem to require the institution of a suit in equity. In this action at law between one owner of part of the bonds and the county, it is beyond the power of the court to hear and determine the question of the order in which the series of bonds was sold, or the application of the proceeds realized from the sales thereof, and whether the facts are such that a certain number of the bonds can be held valid at law, or whether it should not be held that each owner of a bond is equitably entitled to demand his share of the total sum which may be adjudged to be collectible from the county.

It seems to me that the only means of solving the difficulties of the situation is for the plaintiff and the other non-resident bondholders to unite in a proper proceeding in equity against the county and such other bondholders as may refuse to act as complainants, and in such suit it can finally be determined for what amount the county can be held liable, and the rights of the respective bondholders in and to this sum can be decreed. As the case now stands, I hold that the facts show that the series of bonds issued by the county, and negotiated by B. L. Richards, as agent of the county, represent, in part, bonds previously issued, and which were enforceable against the county, and, in part, bonds which were invalid and non-enforceable; but that in the present case at law, and in the absence of interested parties, it is impossible to determine what part or proportion of the coupons sued on belong to bonds that represent the valid indebtedness refunded therein. While the plaintiff has shown a right of recovery against the county for some amount, it has failed to show a legal right to recover on all the coupons sued on, or any particular number thereof, and hence there is no basis for rendering a judgment at law in the present cause. For this reason, judgment

herein must be in favor of defendant; such judgment, however, to be without prejudice to the right of plaintiff to establish, in any other proper proceeding, its rights against the county growing out of the purchase by plaintiff of the bonds of the county.

MACK v. SPENCER *et al.*

(Circuit Court, S. D. New York. December 11, 1890.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not issue in a suit for infringement, where upon the issue of privity of invention the evidence is merely oath against oath.

In Equity. Motion for preliminary injunction.

H. A. West, for complainant.

Chas. C. Gill, for defendants.

LACOMBE, Circuit Judge. Patent No. 268,112 was upheld by Judge SHIPMAN, (43 Fed. Rep. 69,) but not as a pioneer invention, the invention of the complainant being found to consist in the combination with a detachable opera-glass handle made in telescopic sections, of the fastening device, consisting of a piston, hook, and slot, or their equivalent. I am not satisfied that the fastening devices used by the defendant in the exhibits put in evidence are such an equivalent for that of the patent as will warrant the claim that they infringe. They seem to be a pretty plain infringement of the devices described in the other patent sued upon, No. 399,543. Conceding that this latter patent was sustained by Judge SHIPMAN as showing patentable invention, (and that is by no means clear,) the fact remains that his decision was rendered in a case where there was not before him the question of priority of invention as between complainant and this defendant. Here it is a distinct issue; and, as upon that issue there is merely oath against oath, a preliminary injunction should not issue.

MYERS *et al.* v. CUNNINGHAM *et al.*

(Circuit Court, N. D. Ohio, W. D. June Term, 1890.)

PATENTS FOR INVENTIONS—ACTIONS FOR INFRINGEMENT—PLEADINGS.

Rev. St. U. S. § 4919, provides that damages for infringement of a patent may be recovered by an action on the case. Section 4920 prescribes the nature of pleadings to be used in the action, and was passed in 1874. Section 914, which provides that the practice, pleadings, etc., in the federal courts shall conform as near as may be to those "in like causes" in the state courts of the state where such federal courts are held, was passed in 1872. *Held* that, as actions for infringements of patents

are within the exclusive jurisdiction of the federal courts, the pleadings therein are governed by section 4920, and a declaration in such an action, conforming to a common-law declaration in an action on the case, is sufficient, though a different form is prescribed by the statutes of the state where the court is held, and that the answer in such an action should comply with the common-law pleadings in actions on the case in form covering one or more of the defenses permitted in section 4920.

At Law. On demurrer to answer.

Lee & Brown, for complainant.

Doyle, Scott & Lewis, for respondent.

RICKS, J. A common-law declaration was filed in this case under section 4919 of the Revised Statutes of the United States, which provides that damages for the infringement of any patent may be recovered by an action on the case in the name of the party interested, either as patentee, assignee, or grantee. An answer was filed on the 17th of May, 1890, which was, in substance, an answer such as is permitted in actions at law in the state courts of this state. The plaintiff filed exceptions to that answer, because it was not in the form required by the statute of the United States. Those exceptions were sustained, and the defendant then filed a plea, containing the general issue, with seven other special pleas. The first plea of the general issue concludes "to the country," in the manner usual in pleas at common law. The other pleas do not in form conclude "to the country," nor aver that the pleader is ready to verify, as provided in the forms in such cases. The plaintiff demurred to this answer, claiming that it was not in conformity to the answer required in a patent case in response to a declaration in an action on the case. The defendant on the argument claimed that the demurrer filed searched the record, and thereupon contended that the declaration filed in this case was not such as is provided in actions at law in this court. This presents the question as to the proper form of pleadings in this court in an action of this character for damages for an infringement.

It is undoubtedly true, as contended by the defendant in this case, that in actions at law in the circuit court in this district the pleadings conform as near as may be to the pleadings prescribed by the statute of Ohio in its courts of common pleas in similar cases. But where a statute of the United States prescribes a special form of pleading, such statute should undoubtedly control. It should be remembered that in this action, the validity of a patent being involved, the jurisdiction is exclusively vested in the circuit court of the United States. If congress has provided any form for pleading in such an action, that should prevail. The first act passed by congress on this subject was that of April 10, 1790, another passed on the 21st of February, 1793, and still another on July 4, 1836. In this last act we find the first provision definitely prescribing the pleading in an infringement case at law.

Looking first to the sufficiency of the pleading filed by plaintiff in this case, it may be remarked that no matter what it is called,—whether a declaration, or a petition, or a complaint,—it will still be a good pleading in this suit if it be properly entitled, and contains the essential averments necessary to constitute plaintiff's statement of his ground for re-

covery in an action on the case. This is what the court decided in the case of *May v. Mercer Co.*, 30 Fed. Rep. 246. On examination of the pleading filed by the plaintiff in that case, the court found that "it contained all the allegations material to make an action on the case," and therefore held it sufficient. That may fairly be said of the pleading in the case now under consideration. It is, in substance, a declaration according to the forms prescribed under the old common-law pleading in an action on the case. The act of 1836, which, as before stated, has defined what sort of a plea the defendant should file in an action of this character, was repealed by the act of July 8, 1870. This last act provided a substitute for the provision in the act of July 4, 1836, by which the defendant was authorized to plead the general issue, and, having given notice, might prove on the trial any one or more of five special matters therein specified, viz.: (1) That the specification contained less than the whole truth as to the invention or discovery; (2) that the plaintiff had surreptitiously or unjustly obtained his patent; (3) that it had been patented or described prior thereto; (4) that he was not the original inventor, etc.; (5) that it had been in public use for more than two years, or that it had been abandoned to the public. This act continued in force until the 22d of June, 1874, when it was repealed by the act of that date. That act is found in the Revised Statutes as section 4920, and substantially re-enacts the provisions as to pleadings to be used by the defendant, as prescribed by the act of July 4, 1836. Now it will be well to note that section 914 of the Revised Statutes, which provides that the practice, pleadings, forms and modes of proceeding in civil cases other than equity and admiralty in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held, was passed and took effect June 1, 1872; so that when the act of June 22, 1874, more particularly defining the nature of pleadings to be used in suits of this character, was passed, congress evidently had before it the provisions of section 914 of the Revised Statutes, and section 4920 must therefore be construed with this fact in view. Now upon every principle of construction of statutory provisions, the latter act of June 22, 1874, must prevail, as against the provisions of the prior act of June 1, 1872. It is evident, therefore, upon this principle of construction of statutes, that full force and effect must be given section 4920, even though seemingly in conflict with the provisions of section 914. But in view of the fact that this act of 1874 defines the pleadings in an action at law in a case exclusively within the jurisdiction of the circuit court of the United States, the provisions of that act, so far as they define the nature of pleadings required to set forth the issue between the parties in such a case, are to prevail. It seems plain that, while a Code answer in the practice in Ohio might be sufficient to clearly define the defenses upon which the defendant relied in all actions provided for by the state statutes, it is nevertheless true that congress legislated with a view to the character of defenses usual in actions of this kind, and intended to pro-

vide a special form of pleading, which would more fully meet the requirements of such a case than the varied forms of answers in the different states in which the circuit courts might sit to try such cases. There is no great hardship in adopting and following this form of pleading. It is simple, clear, and meets all the requirement of the defenses usually set up in such suits.

The cases to which counsel have cited the court do not, we think, fully meet this question. The opinion of Judge LACOMBE, in the circuit court of the southern district of New York, does not fully disclose the nature of the pleading upon which the defendant in that case relied. In that opinion, he says that an answer which would be good in the courts of the state of New York in a "like case" ought to be good in the circuit court of the United States. But, as before stated, suits of this character are not brought in the courts of any state. A suit at law which involves the validity of a patent could not be brought in any court other than the courts of the United States. There can be, therefore, no pleading prescribed by state laws in a "like case." Mr. Walker, in his work on Patents, takes this view of the subject. In section 442, in discussing the question of rules of common-law pleading that are applicable to cases of this kind, he says:

"Where an authoritative precedent can be found for a particular relaxation, that particular relaxation must be regarded. In the absence of such a precedent, the safe and proper course is to conform to the ancient common-law rules, unless the pleader is willing to risk his defenses upon the theory that state statutes relevant to pleadings are binding on federal courts when trying patent actions of trespass on the case. The text-writer believes that they are not binding under such circumstances, because actions of trespass on the case were first prescribed by congress for patent suits in 1790, and because the law has never since been changed in that particular, and because, therefore, there seems to be no good cause for holding that such an action under the Revised Statutes is a different proceeding from what it was under the earliest of the Statutes at Large."

In none of the cases cited by counsel has this question of the proper form of pleading in this kind of a case been fully considered. The court, for the reasons above stated, is therefore of opinion that the plaintiffs' pleading in this case contains all the essential averments that are prescribed for a declaration in an action on the case under the common-law form of pleading, and is therefore sufficient. The court is further of opinion that an answer in an action of this kind should be substantially in compliance with the forms of pleading heretofore used in actions on the case, but of course should cover one or more of the specific defenses permitted under section 4920 of the Revised Statutes. Whether the defense relied on is based on one or all of these five defenses, it should be pleaded substantially as in the form heretofore used in pleas in actions on the case. The court therefore sustains the demurrer in this case, and holds that the several pleas made in the answer should conclude in the form usual to pleas in actions on the case at common law.

INTERNATIONAL TOOTH-CROWN CO. v. CARMICHAEL.

(Circuit Court, E. D. Wisconsin. December 1, 1890.)

PATENTS FOR INVENTIONS—INFRINGEMENT—CROSS-BILL—PLEADING.

Letters patent No. 238,490, issued March 15, 1881, to James E. Low, for an improvement in the dental art "whereby artificial dental surfaces may be permanently fixed in the mouth in place of lost teeth, without the use of plates, or other means of deriving support from the gum beneath the artificial dentition," were sustained in *International Tooth-Crown Co. v. Richmond*, 30 Fed. Rep. 775; but in a suit to restrain infringement defendant answered that full proofs were not presented in that case, and now asks leave to file a cross-bill charging anticipation, that the patent, if valid, does not cover all practical forms of artificial dentures known as "crown" and "bridge" work, and that complainant, with a view to harass him in his dental business, has caused to be published, in newspapers and circular letters, warnings that its patent is construed to cover all practical forms of crown or bridge work, and threats that all persons procuring such artificial dentures from defendant will be prosecuted, and offering rewards for information of the performance of bridge and crown work by any dentist not licensed by it. *Held*, that all matters attacking the validity of the patent could be presented under the answer to the original bill, and that the alleged unlawful attack upon defendant's business was not the proper subject of a cross-bill.

In Equity.

Mr. Banning, for complainant.

Mr. Offield, for defendant.

JENKINS, J. The original bill in this cause was filed to restrain the alleged infringement of letters patent No. 238,490, issued March 15, 1881, to James E. Low for an improvement in the dental art "whereby artificial dental surfaces may be permanently fixed in the mouth in place of lost teeth, without the use of plates, or other means of deriving support from the gum beneath the artificial dentition." This patent was passed upon and sustained in the case of *International Tooth-Crown Co. v. Richmond*, 30 Fed. Rep. 775; but the answer here asserts that full proofs were not presented upon the hearing of that case. The defendant now moves for leave to file a cross-bill charging anticipation of the alleged invention; that the patent, if valid, cannot be construed to cover all practical forms of artificial dentures, commonly known as "crown" and "bridge" work, and that, with a view to hinder and harass the complainant in the cross-bill in his dental business, and to divert patronage from his business to dentists licensed under the Low patent, the International Tooth-Crown Company has heretofore, and presumably since the filing of the original bill, caused to be published in newspapers and circular letters, and caused to be circulated throughout the United States, and within this district, certain threats and warnings embodied in a notice, specifying certain dentists as the only licensees of the company in the city of Milwaukee; that the patents of the company are construed to cover all practical forms of artificial dentures now commonly known as "crown" or "bridge" work; warning all persons against obtaining such artificial dentures from the complainant in the cross-bill; and that the full legal penalty will be exacted of all infringers,—patients, as well as dentists,—and offering a reward for information of the performance of any

bridge work of one, two, or more crowns or bridges prepared by any dentist not licensed by the company. This notice and threat is charged to divert patronage, and to seriously interfere with the business of the cross-complainant. An injunction is prayed restraining the publication and circulation of such notices and threats, and a decree is sought for the damages sustained for such alleged wrongful publications. All matters contained in the cross-bill attacking the validity of the patent, or limiting its scope, can be presented by answer to the original bill. No cross-bill is necessary for that purpose. The interference with the business of the cross-complainant, by reason of the publication of the notice and threats charged, is the only matter not pertinent as a defense to the original bill. If the publication be construed as a mere notification of the rights claimed by the company under the Low patent, it would not be unwarranted, unless the patent was invalid, and possibly not in that event. If, as is claimed, it is a malicious and unwarranted threat, even if the Low patent be held valid, the act done would not avail as a defense for infringement of the letters patent. It would, in such case, be an unwarranted attack on the business of the cross-complainant, independently of the validity or non-validity of the Low patent, for which he has appropriate remedy. Such matter, as I conceive, is not proper subject-matter of a cross-bill. The purpose of such a bill is to obtain discovery of facts in aid of the defense to the original bill, or to obtain full relief to all parties touching the matter of the original bill. The matter sought to be charged does not respond by way of defense to the original bill. Every matter in dispute touching the validity or infringement of the patent can be contested under the original bill, full proofs made, and complete decree rendered, touching its validity and scope upon the pleadings thereto, without the aid of the cross-bill. The facts charged by the proposed pleading would neither throw light upon the subject, nor avail to defeat the patent, or justify an infringement of it, if valid. The cross-bill merely charges an independent unlawful act by the owner of the patent. It is more than doubtful if an original bill in equity would lie upon the matter charged in the proposed cross-bill; and this, upon the ground that complete remedy at law is at the command of the injured party, for the injury done. The cases of *Ide v. Engine Co.*, 31 Fed. Rep. 901, and *Emack v. Kane*, 34 Fed. Rep. 46, uphold the right to maintain such an action. The latter case certainly presents a strong assertion by Judge BLODGETT of the right of a court of equity to interfere in such a case as here presented, and is sought to be distinguished from the cases of *Kidd v. Horry*, 28 Fed. Rep. 773, and *Wheel Co. v. Bemis*, 29 Fed. Rep. 95, opposed. The contention seems, however, to be authoritatively settled by the case of *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. Rep. 1148. I am unable to distinguish the latter case from that here presented. The motion to file the cross-bill is denied.

WRIGHT v. POSTEL.¹

(Circuit Court, E. D. Pennsylvania. October 13, 1890.)

1. PATENTS FOR INVENTIONS—PERFECTING INVENTION—DILIGENCE.

A patentee who had in 1833-34 described his invention in general terms, and in 1836 described it more fully, but with the addition only of mechanical details, such as would suggest themselves to any mechanic who could have made the device from the first description, and made application for a patent in February, 1887, has not exercised sufficient diligence in reducing his invention to practice, and a re-deduction to practice by another before the filing of his application renders his patent invalid.

2. SAME—EXTENT OF CLAIM.

When a patentee, in order to obtain a patent for an improvement on a device formerly patented by himself, swears that his former patent does not cover his last device, this oath is persuasive evidence against him in an attempt to construe his former patent broadly enough to cover a device substantially the same as that embraced in his second application.

3. SAME—SCOPE OF INVENTION.

Complainant's patented device consisted of a wheel loosely supported in a stationary bearing, and having its periphery provided with a series of clamps in which the cards are clamped. The defendant used a device in which the clamps were attached to an endless chain. *Held*, although the complainant may have been the first to apply card clamps to an endless conveyer, yet as endless chains had been used, time out of mind, to carry various objects to hand, his patent could not be construed sufficiently broadly to cover defendant's device.

Bill in Equity by Charles A. Wright, to Restrain A. H. Postel from Infringing Complainant's Patents. In the earlier patent (No. 290,303) the invention was stated to consist in a wheel, loosely supported on a stationary bearing, and having its periphery provided with a series of clamps, by which the cards are clamped, and in many details of construction. The patent described a wheel loosely supported so as to be capable of being turned by hand, and on the periphery of this wheel are placed a number of clamps, containing cards to be gilded, and in which clamps they were held firmly during the process of gilding. The operator stood in front of the wheel, and turned it, bringing one clamp after another in front of him. The operator himself put the gold leaf on the article to be gilded. The claims sued on were:

"(2) A gilding wheel, formed of a wheel provided on its periphery or circumference with a series of clamps formed of pivoted jaws, and one or more of their clamping edges being exposed to allow of manipulation of the object clamped, having independent clamping devices, by which each clamp may be opened separately, substantially as and for the purpose specified." "(18) The combination of wheel, B, with rigid jaw, H, hinged jaw, K, of shorter length than jaw, H, and screw, N, having wheel, O, substantially as and for the purpose specified. (19) The combination of wheel, B, with rigid jaw, H, having prongs, h, hinged jaw, K, of shorter length than jaw, H, and having clamping edge, k, and screw, N, having wheel, O, substantially as and for the purpose specified." "(22) The combination of wheel, B, with rigid jaw, H, hinged jaw, K, screw, N, having wheel, O, and wooden blocks, R.R, substantially as and for the purpose specified."

The plaintiff's second patent was for a device which had in place of the wheel an endless chain.

¹Reported by Mark Wilkes Collett, Esq., of the Philadelphia bar.

"The Postel machine consisted essentially of two endless parallel chains engaging with the sprockets of four sprocket wheels, arranged in pairs on parallel shafts at a distance apart, so that each chain engages with the sprockets of two of the wheels. One of these shafts was connected with the motor which runs the machines. By a lever the wheels on the motor shaft could be thrown in or out of gear, and the chains caused to stop or move at the pleasure of the operator. Capable of being attached to the chains by projecting side wings, and attached to them while the machine was in operation, were clamps for holding the cards to be gilded and burnished, each consisting of a rectangular frame, with a projecting piece, to which was pivoted a clamping piece, one end of which passed within the frame, and was held under its top by a spring attached to it and to the top of the frame. Through this top passed a screw with a hand wheel, by which the bearing point of the screw could be pressed down on the clamping piece and the cards clamped. When the screw was reversed, the spring raised and held the clamping piece, and the cards might be removed or inserted. Near the operator there was a supporting piece under each chain, so that during the operation of burnishing the cards the operator might press, with the considerable force required in this operation, against the supporting pieces, and the clamp which contains the cards being burnished could rest against the supporting pieces. The clamps were not locked during the operations of gilding or burnishing, and the sprockets of the wheels near which these operations took place prevent any lateral movement of the chain or clamps."

*Earnest Howard Hunter and S. S. Hollingsworth, for complainant.
George J. Harding and George Harding, for defendant.*

BUTLER, J. No more need be said in this case than is necessary to indicate our reasons for dismissing the bill. The younger of the two patents sued upon (No. 363,936) is invalid. The application was filed January, 1887. Some months previous the defendant had devised and constructed the machine complained of as an infringement. The plaintiff, however, asserts that his invention relates back to a still earlier period. The proofs show that in the winter of 1883-84 he described it in general terms to his solicitor, and that in 1886 he repeated the description more fully. It seems, however, that he did not intend at either date to reduce the invention to practice. His only concern, apparently, was to protect himself in the construction and sale of the machine made under the earlier patent. His monopoly in this served his interests as well as the other would, if competition could be avoided. His solicitude was for the avoidance of such competition. Being advised that the former patent covered the endless-chain device, and would consequently keep others off, he rested content until a short time before the date of his application. Then becoming alarmed at something heard or observed of the defendant's movements, he resolved to apply for a patent, and thus shut him out, if the former patent did not do so. He had not then embodied his invention in a machine for practical use. This conduct, and the purpose which inspired it, are not commendable. One who desires a patent must be vigilant in reducing his invention to practical form, and applying for letters. The patent laws are intended for the benefit of the public, as well as of patentees. They are designed to stimulate invention, for the common advantage. It is, therefore, the

v.44F.no.5—23

duty of inventors to use reasonable diligence in reducing their conceptions to practice and applying for patents, when desired. They cannot neglect it without danger to their rights. Here the plaintiff not only failed in diligence, but it appears that he did not even intend to apply for a patent at all, unless it should seem necessary as a means to prevent others making these machines. At the time of his first conversation with the solicitor he was as well prepared to reduce his invention to practice and apply for a patent as he was at the date of the second. Any competent mechanic, accustomed to such work, could have constructed the machine from the first description almost, if not quite, as readily as from the second. The details added in the latter embrace no invention, and were such substantially as would present themselves to the mind of such a workman. They are simple mechanical details, in common use for similar purposes.

The validity of the earlier patent (No. 290,303) was not questioned on the argument. If, however, its claims are strictly construed, and thus confined to the particular character of machine described, and manufactured under it, the defendant does not infringe. The plaintiff contends that the claims should be liberally construed, so as to embrace the substitution of an endless chain for the wheel, substantially as shown in the defendant's machine. Whether the plaintiff's sworn declaration when applying for the later patent—in effect that the use of such a chain in his combination is not covered by the earlier patent—upon which others may have acted, and a favorable decision of the office was obtained, should stop him from asserting otherwise now, need not be considered. It is certainly persuasive evidence against him. Aside, however, from this it seems clear that the claims cannot be so construed. The history of the art shows that the use of such chains for analogous uses is old. Time out of mind they have been employed to carry various objects to hand, for use at particular places. Applying them to the carriage of clamps, in the operation of gilding cards, shows nothing new. If the clamps were novel and patentable, the combination might doubtless be made the subject of a claim. They are not, however, as the plaintiff virtually acknowledges by the omission to base any claim upon them except in combination with his wheel. Nor is there anything patentable in the method of their attachment, or the means employed for keeping them in position. A decree must, therefore, be entered dismissing the bill with costs.

HATFIELD v. SMITH *et al.*

(Circuit Court, S. D. Ohio, W. D. November 7, 1890.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—LICENSE.

An instrument which is in terms a transfer by complainant to defendant of the exclusive right "to manufacture and sell and vend" certain patented articles, the purchasers to have the right to use the articles, which expresses that it is intended for the purpose of vesting in defendants all the rights of complainant in the manufacture and sale of such articles, but which expressly provides that complainant shall retain the ownership of the patent, and in which defendants stipulate for payment of royalties and to do all reasonable things for the successful manufacture and sale of the patented articles, is a mere license.

2. SAME—ESTOPPEL.

Where defendants admit that they have manufactured and sold under such license, and that they have assigned whatever rights they had thereunder, they will not be permitted to plead that they were led to make the contract by complainant's false and fraudulent representations, nor that the patent was invalid, as complainant knew.

In Equity.

Parkinson & Parkinson, for complainant.

Peck & Rector and *E. W. Kittredge*, for respondents.

SAGE, J. 1. The contention of the defendants that the contract forming the basis of the bill is not a mere license, but is a grant of the entire equitable title in and to the patent, with the right to the grantees to assign at pleasure, subject to the conditions of the contract, is not, in my opinion, well founded. The contract is nothing more than a license. It is in terms a transfer of the sole and exclusive right "to manufacture and sell and vend" the patented improvements throughout the United States, the purchasers to have the right to use. It expresses that this grant is intended for the purpose of vesting in the defendants all the rights of the complainant in the manufacture and sale of said improvements throughout the United States under said inventions, but it is expressly provided that the complainant shall retain the ownership of the patent. Now, while it is true that the transfer of an exclusive right to make and use and sell may be an assignment, and not a mere license, it is also true that the "right to manufacture, the right to sell, and the right to use, are substantive rights, and may be granted or conferred separately by the patentee," (*Adams v. Burke*, 17 Wall. 456,) and that the conveyance of all these rights is necessary to make the transfer an assignment, and not a license. The right to use is not, under the contract, conveyed to the defendants, only the right to manufacture and sell. Moreover, the express provision of the contract retaining the ownership of the patent in the complainant, is not to be overlooked, nor is its significance to be disregarded, nor are the stipulations of the defendants to do all reasonable things for the successful manufacture or sale of the patented articles and for the payment of royalty.

2. The defendants admitting, as they do, that they manufactured and sold under the license, and that they have assigned whatever rights they had thereunder to the parties named in the bill and in the answer,

they will not be permitted to plead that they were led to make the contract by false and fraudulent representations of the complainant, nor that the patent was invalid, as the complainant well knew. It has been held that if the licensee, under the assumed protection of the patent, has enjoyed advantages of which, without the license, he would have been deprived, he is subject to the obligations of the license, and continues so to be until he is disturbed in his enjoyment by a superior patent, or until the patent under which he acts has been declared invalid or annulled. 3 Rob. Pat. § 1251, and cases there cited. The amended answer differs from the answer, to which exceptions were sustained, only in that it avers that the complainant falsely and fraudulently represented that he was the inventor of the patented article described in the license. The amendment does not, in my opinion, add anything to the legal effect of the answer. Leave to file the amended answer is therefore refused.

SUTRO BROS. BRAID CO. v. SCHLOSS *et al.*

(Circuit Court, S. D. New York. November 18, 1890.)

PATENTS FOR INVENTION—DESIGN FOR BRAID—INFRINGEMENT.

Letters patent No. 18,589, granted to Valentine Schuck, September 4, 1888, for a design for braid covers, a design having when seen in cross-section, two extended flattened elliptical curves diverging at an obtuse angle from each other, with a third rib projecting from the center in the form of a convex curve, and smaller than the others, presenting the appearance of a trefoil. *Held*, not infringed by a braid made in two colors, and having four ribs, the two lower ones being smaller than the others.

In Equity.

David A. Burr, for complainant.

Alfred Ely, for defendants.

COXE, J. This is an equity suit for the infringement of letters patent No. 18,589, granted September 4, 1888, to Valentine Schuck, assignor to complainant, for a design for braid used in trimming ladies' garments and for similar purposes. The design shows a deep, central groove indenting one face of the braid, the opposite face being rounded and crowned with a slight, central, longitudinally projecting rib. In cross-section the design has the appearance of a trefoil or three-leaved clover, with the lower leaf smaller than the other two. The claim is as follows:

"The design for a piece of braid herein shown and described, which consists in the form imparted thereto, which is defined in cross-section by two extended flattened elliptical curves diverging at an obtuse angle from each other to form a central re-entrant angle or cusp at their intersection on one side, and which terminate on the opposite side in the intersecting lines of a central outwardly projecting convex curve of small diameter."

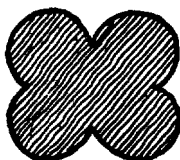
The defenses are lack of patentable novelty, non-infringement and that the patent is invalid because the claim is indefinite and functional. The

claim covers a design having, when seen in cross-section, the following characteristics:

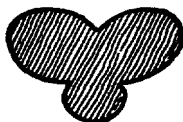
First. Two extended, flattened, elliptical curves diverging at an obtuse angle from each other to form a central cusp at their intersection on one side. *Second.* On the side opposite the cusp, a central rib, projecting outwardly in the form of a convex curve. *Third.* This convex curve must be of small diameter when compared with the other curves. That is, it must be of smaller diameter than the oblate curves.

Prior to the patent, braids had been made in various forms. The old *soutache* braid resembled the design of the patent minus the longitudinally projecting rib upon the lower side. Braid had also been made with four ribs of equal size. The defendants' braid is made of two colors—black and bronze—and presents the appearance of having four ribs, the two lower ribs being smaller than the two upper ones. The situation can be better illustrated by placing enlarged cross-sections of these various designs in juxtaposition:

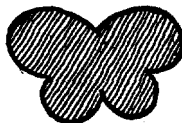
PRIOR DESIGNS.



PATENTED DESIGN.



DEFENDANTS' DESIGN.



It will be seen that in view of the prior art a broad construction of the claim is out of the question. A braid which does not present to the eye the characteristics so distinctly enumerated in the claim, namely, a three-ribbed design, in conformation like a trefoil, does not infringe. The test of infringement where design patents are under consideration is the substantial identity in effect produced by the two designs in question upon the eye of a general observer interested in such matters or an ordinary purchaser of articles embodying similar designs. If he be not deceived, if it be entirely plain that he could not be induced to take the defendants' goods for the complainant's, there is no infringement. Walk. Pat. § 375. Tested by this rule the court is constrained to hold that the defendants do not infringe. If a purchaser should start out with the express intention of buying braid made after the design of the patent, it is not conceivable that he would buy the defendants' braid, and there is absolutely no proof that any one was ever so deceived. In appearance it is entirely different from the complainant's. The use of two colors conveys to the eye the impression of four ribs—instead of the three ribs

of the patent. The defendants' braid certainly looks as if it had four ribs, and, if the testimony of the patentee can be relied upon, it, in fact, has four ribs. Mr. Schuck was asked on cross-examination the following questions:

"Question. Will you take this exhibit [defendants' braid] and say how many ribs there are on that? Answer. There are four."

On his redirect examination he emphasized his former answer as follows:

"Q. In your answer to cross-question 99 you were asked to take defendants' braid and see how many ribs there are in it, and answered 'There are four,' what do you understand the question to refer to? A. I understood it referred to ribs. Q. What are ribs as you understand in the defendants' braid? A. Those corners of the braid I called ribs; there are four ribs on that, two small and two large ones."

After all this, the theory that the defendants' braid has but three ribs cannot be maintained. As the defendants do not infringe it is unnecessary to examine the other questions presented. The bill is dismissed.

PEARSON v. THE ALSALFA.

(District Court, D. South Carolina. December 14, 1890.)

WARRANT OF ARREST—ISSUANCE ON SUNDAY.

A warrant of arrest may issue in admiralty on Sunday, where a vessel has changed her day for sailing, and proposes to sail on that day, and a libellant for seaman's wages did not learn that his wages would not be paid in time to begin his case before that day.

In Admiralty.

C. B. Northrop, for libellant.

SIMONTON, J. The libel is for seaman's wages. Libellant moves for a warrant of arrest, as the vessel is about to proceed to sea. The only question is, can such a warrant be issued on Sunday? The law of South Carolina forbids the service of civil process on Sunday. This regulation is purely municipal, and can control only the process in the state courts. If it can be construed to apply to process on the law side of the courts of the United States, under section 914, Rev. St., it cannot be made to apply to process out of the court of admiralty, which is expressly excepted from this section. The question now made is entirely new. There are no authorities in point, and very few bear on the question. Mr. Desty, in his little book on Shipping & Admiralty, § 181, says that Sunday is not recognized by the maritime law. Although the authorities he quotes do not bear him out in this broad statement, (*The Richard Matt*, 1 Biss. 440; *Johnson v. The Cyane*, 1 Sawy. 150,) it seems to have support. Sailors can be made to work on Sunday notwithstanding that a law of the port may forbid it. *Ulary v. The Washington*,

Crabbe, 208. A vessel can leave a port on Sunday, although the law of the port may forbid travel on that day. *GRIER, J., in Philadelphia, W. & B. R. Co. v. Philadelphia, etc., Tow-Boat Co., 23 How. 209.*

This court is always open for the redress of wrongs. Seamen specially are under its protection. In the present case the vessel has unexpectedly changed her day for sailing, and has anticipated it by proposing to sail to-day. The libellant did not learn that his wages would not be paid in time to begin his case before to-day. In this view of the case, and in the absence of authority to the contrary, let the warrant of arrest issue.

THE SAPPHO.¹

BROOKLYN WATER FRONT WAREHOUSE & DRY-DOCK CO. v. THE SAPPHO.

KNUDSEN v. BROOKLYN WATER FRONT WAREHOUSE & DRY-DOCK CO.

(District Court, E. D. New York. December 23, 1890.)

NEGLIGENCE—DRY-DOCKS—IMPROPER DOCKING.

A dry-dock company applied an hydraulic jack under the keel of a vessel in its dry-dock, whereby the keel was split and the vessel injured. It appearing that the keel was sound and strong, and that the cause of the accident was the failure of the dry-dock company to take the ordinary precaution of placing a plank between the keel and the head of the jack, *held*, that the dry-dock company was liable for the damage.

In Admiralty. Suit to recover for services in dry-docking vessel. Cross-suit for damages received by vessel while in dry-dock.

Peter S. Carter, for the Brooklyn Water Front Warehouse & Dry-Dock Company.

North, Ward & Wagstaff, for the Sappho.

BENEDICT, J. These are cross-libels. The action against the bark is to recover the sum of \$415.50 for hauling the bark out on the libellant's dock, shifting the blocks, etc. The cross-libel is filed by the owner of the bark to recover for injuries alleged to have been done to the vessel while on the dock by the negligence and want of skill on the part of the dry-dock company. The dry-dock was made in sections of about 25 feet in length into which the water was allowed to flow to depress them, and when depressed the vessel was floated over them and raised by them by pumping the water out of the sections. Upon these sections blocks were placed at intervals upon which the keel of the vessel rested. When a vessel is to be coppered—as this bark was—while on the dock, the portion of the bottom where the vessel rests upon a block is covered with copper either by placing a sheet of copper on top of the block before the vessel is raised, or by shifting the block under the vessel after she is raised. The block is shifted by placing an hydraulic jack under the keel of the vessel and resting on the edge of one of the sections of the dock, so that by

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

pumping the jack the edge of that section is forced down into the water, the whole section being depressed enough to remove the pressure on the block, and then the block can be shifted. In this case when it came time to shift the block at the bow of the bark the hydraulic jack was placed under the keel a few inches from its end. The keel was pitch pine 14 or 15 inches in width. The head of the cap of the hydraulic jack was about 6 inches in diameter. When the power was applied by the jack to depress the section the keel split, the bolts through the dovetail plates pulled out, and the vessel was injured to an extent that made it necessary to remove 16 feet of the keel and replace it with new, involving a detention of some three days longer upon the dock, and other damages.

On the part of the bark the contention is that the keel split because the dock owner attempted to apply the power of the hydraulic pump directly to the keel at a point close to the end of the timber, and without placing a plank between the jack and the keel to distribute the pressure. On the part of the dry-dock company it is contended that the damage resulted from a defect in the keel, a bad heart shake in the timber, which made the keel unsound. The weight of the evidence is that the keel was of pitch pine; that pitch pine is a wood commonly used for this purpose, and that while there was a heart shake, as is usually the case in this kind of timber, the keel was sound and strong, able to endure the pressure required to shift the block if distributed by means of a plank between the jack and the keel.

Next, it is contended on the part of the dry-dock that it was no negligence on the part of the dock to omit to use a plank to distribute the pressure. But the evidence shows that it is an ordinary precaution adopted under similar circumstances to place between the cap of the jack and the keel a bit of plank by which the pressure is distributed. In this case such a precaution was the more necessary because in ships constructed like the libellant's the stem runs down flush with the bottom of the keel, and the end of the keel abuts up against the aft side of the stem, where it was held in position by dead wood inside; dovetailed plates of heavy metal being bolted on the outside, by which the keel is fastened to the stem. Common prudence required the use of a plank in such a case.

Next, it is contended in behalf of the dock that the plank was omitted in this case because the block was not high enough to permit a plank to be inserted between the jack and the keel. But the proof is that the blocks were 20 inches high and the jack only 18. This would have enabled a plank to have been used, and furthermore, if the blocks were too low it was the fault of the dock owner, who knew that the block had to be shifted after the vessel was raised, and whose duty it was to provide proper blocks.

The libellant in the second case must have a decree for the amount of the damages sustained by the splitting of the keel, and a reference to ascertain the amount. The libellant in the first case, on payment of the damages, will be entitled to a decree for the amount of his bill.

THE CITY OF ALEXANDRIA.

(District Court, S. D. New York. December 20, 1890.)

COLLISION—PRACTICE—DECREE.

Where several libelants, having distinct damage interests, recover in a cause of collision, the decree may be in form for recovery by all of the aggregate sum, and directing a distribution to each of the sums respectively adjudicated to them.

In Admiralty. Libel for damages by collision.

George A. Black, for libelant.

Robert B. Benedict, for claimant.

BROWN, J. In this cause of collision the damages were divided, (31 Fed. Rep. 427,) and, a number of seamen and others having been afterwards joined as co-libelants to recover damages for their individual losses, the libelants have presented for settlement a decree which is, in effect, a several decree in favor of each individual interest. The claimants object thereto, and ask that the decree be a single decree, upon which a single execution would issue, with directions for distribution by the clerk to the several libelants of the amounts awarded to them, respectively. The difference in the form of the decree has respect to its supposed bearing upon the right to appeal, and upon a stay of proceedings as respects the various individual interests. It is not necessary to determine whether any difference might result in that respect. The precise question here raised seems to have been presented to Judge WOODRUFF, as circuit judge of this circuit, and to have been determined by him in favor of the claimants, in the case of *Avery v. The Wanata*; and, as the question was deliberately considered by him, his decision should be followed here.¹ See *The Connemara*, 103 U. S. 754; *Ex parte Baltimore, etc.*, R. Co., 106 U. S. 5, 1 Sup. Ct. Rep. 35; *The Propeller Bur-*

¹ Per WOODRUFF, C. J. The claimants ask that the decree herein may award a gross sum to the libelants, and execution therefor; the same to be distributed by the clerk to the several libelants, according to the amounts of their several loss or damage caused by the collision, for which the schooner is condemned. The libelants, on the other hand, ask that the decree be in substance severed decrees; that is to say, that it condemn the schooner for each several amount of loss, and award execution to each libelant to collect the amount of his separate loss. The materiality of these conflicting claims is supposed to arise from the apprehension of an appeal by the libelants to the supreme court, and a suggestion that, if the decree were in the form last mentioned, no appeal would lie from those parts of the decree which awarded to either or any of the libelants a sum less than \$2,000; and that the supreme court would not have jurisdiction to reverse any part except that which awards more than \$2,000 to one of the libelants. Whether the form proposed by the claimants of decreeing the payment of a gross sum, to be distributed among the libelants, will affect the question of the jurisdiction of the supreme court to reverse the whole decree if found erroneous, is not for this court to decide. If the apparent injustice of compelling the claimants to pay a part of the loss when the decision of the supreme court, as the case may be, declares that the claimants or their schooner have been wrongfully condemned, and ought not to be required to pay anything, can be avoided without violating any important rule of practice or form, then surely such avoidance would be matter for satisfaction rather than regret. Such apparent injustice was strongly illustrated in the case of *Rich v. Lambert*, 12 How. 347, and perhaps still more strikingly in the cases of *The Mary Eveline* and *Petty v. Merrill*, 3 Ben. 438, 16 Wall. 838, 348. I therefore settle the decree in the form which the claimants have requested.

lington, 137 U. S. —, 11 Sup. Ct. Rep. 138. The form of the decree will be in favor of the libelants for the gross amount awarded, with further directions that the said sum be distributed to the different named libelants in the amounts heretofore adjudicated to each.

THE HOLLAND.¹

BALTIMORE & O. R. R. Co. *et al.* v. THE HOLLAND.

(District Court, E. D. New York. December 19, 1890.)

SALVAGE—FIRE ON PIER—TOWING ENDANGERED VESSEL—AWARD.

As the steam-ship Holland was lying at her pier, a sudden fire broke out on the side of the pier opposite to where the steamer lay. The officer in charge of the steam-ship requested a tug, lying near, to tow the steam-ship away, and shortly afterwards another tug was signaled by the steam-ship and took another line, but, getting into such a position as to be able to bring but little power to bear, a third tug came to her assistance. Under power of these three tugs, and with two additional tugs keeping her off from the pier, the steam-ship was moved out of danger. The city fire department, with twelve engines and two fire boats, came to the fire soon after it started. The steamer could have been warped across the slip by her donkey engines, which had steam up. The service of the tugs lasted some two hours. With her cargo the steamer was worth \$600,000. *Held*, that the service was a salvage service, in which the value of the property saved was great, but the peril moderate, and \$4,500 was awarded to the tugs in proportion to their relative merits.

In Admiralty. Consolidated suit to recover salvage.

Hyland & Zabriskie, for the Howard Carroll.

Wing, Shoudy & Putnam, for the John Fuller.

Tracy, MacFarland, Boardman & Platt, for the A. C. Rose.

Martin & Smith, for the Henry T. Sisson.

Peter S. Carter, for the George L. Hammond.

John Chetwood, for the Holland.

BENEDICT, J. This is a consolidated action in which the owners and crews of five steam-tugs seek to recover salvage for services rendered the steam-ship Holland on the 7th day of December, 1889. The Holland was a large steamer belonging to the National Steam-Ship Company which had just arrived from sea and been moored on the north side of her pier in the North river. She had no steam on. With her cargo on board she was concluded to be worth \$600,000. About dinner time of the 7th day of December, 1889, fire broke out in the upper deck of the pier-house on the side of the pier opposite to that where the steamer lay. The fire was sudden and proved disastrous, five lives being lost, and the pier-shed for the most part destroyed. As soon as the fire broke out the officer in charge of the Holland determined to move her from the pier, and accordingly requested the tug Howard Carroll, then lying at the end of the same pier, to take a line from the steamer in order to

¹Reported by Edward G. Benedict, Esq., of the New York bar.

tow her away from the burning wharf. The Carroll at once moved under the bow of the steamer, and took from her a line by which she commenced to tow the steamer. Very shortly afterwards the steam-tug Henry T. Sisson was signaled by the officer in charge of the steamer to take an additional line, which she did, but in so doing got into a position where she could bring little power to bear. At this time the Rose came, and making fast a line to the bow of the Sisson, towed that tug into a position which enabled her to pull upon the steamer. Under power of these three tugs the steamer was moved from her berth to a safe place in the stream. While she was moving, in order to prevent the steamer from being damaged by or doing damage to the pier as she moved out into the ebb tide, the officer in charge of the steamer requested the tug Fuller and also the tug Hammond to push against her port side in order to keep her away from the wharf, the tide then tending to set the steamer against the wharf. In this way the steamer was taken out of danger.

The right of the libelants to recover salvage compensation for these services, although denied in the answer, has been conceded upon the argument. The question submitted for decision relates only to the amount. Manifestly it is a case of salvage, for the steamer was removed from a place of peril to a place of safety by the voluntary efforts of these tugs. While the steamer was undoubtedly exposed to some danger, that danger was not great. The fire department with 12 engines were soon playing water upon the pier. Two fire boats made their appearance in the slip, and the result seems to indicate that their efforts would have been sufficient to prevent the steamer from receiving any considerable damage if she had remained at the wharf. Still there was risk, for it could not be known at the outset to what extent the fire would reach, and it was dangerous. The risk was considered by the officer in charge sufficient to require her removal from the pier. It is also evident that if these tugs had declined to take the steamer into the stream she could have been warped across the slip to the pier above, and so out of danger. For, although she had not steam upon her engines, her donkey boilers had steam and could have been used to work the winches. It is a case, therefore, where the value was large, but the peril was moderate. Moreover the services rendered by these tugs was short in duration, not exceeding two hours. It was not extraordinary in character, and involved no risk to them. Nevertheless, being a salvage service, the tugs are entitled to more than common towing compensation. In my opinion the sum of \$4,500 will be a proper salvage award in a case like this. In apportioning this amount among the five tugs it is to be noticed that it is conceded that the service was requested by the officer in charge of the steamer in the case of every tug except the Rose. In regard to the Rose the testimony of the claimants' witness shows that the Rose rendered a necessary service in taking hold of the Sisson and pulling her into a position where she could tow the steam-ship to advantage. Many witnesses testify that the officer by signals directed the Rose to help the Sisson. The officer in charge of the steamer says that he made

signals to the Rose not to take hold. But as the Rose at once gave a line to the Sisson the officer thinks, as he says, that his request was misunderstood. If it had appeared that the Rose had intentionally taken hold in opposition to the known direction of the officer in charge of the steamer I should have refused her any compensation, but that cannot be found to be the fact upon the evidence. The Rose was the most powerful and valuable of all the tugs, but the service rendered by her was similar to that rendered by the Niel, for which no claim is made. In so far as the effort of the Rose enabled the Sisson to get into position, it was valuable, but beyond getting the Sisson into position her services were unnecessary. The Niel left when the Carroll was put in position, and the Rose could have left when the Niel did without interfering with the relief of the steamer. Under all the circumstances I allow to the tug Howard Carroll, her officers and crew, the sum of \$1,250; to the tug John Fuller, her officers and crew, the sum of \$800; to the tug Henry T. Sisson, her officers and crew, the sum of \$1,000; to the tug George L. Hammond, her officers and crew, the sum of \$650; to the tug A. C. Rose, her officers and crew, the sum of \$800.

GOKEY *et al.* v. FORT *et al.*

(District Court, S. D. New York. December 24, 1890.)

1. SHIPPING—LIMITATION OF LIABILITY—ACT JUNE 24, 1884—PERSONAL CONTRACTS.

The act of June 26, 1884, limiting the liability of the owners of vessels "on account of the same" to their interest in the vessel and the freight pending, is to be construed as *in part materia* with the act of 1851, (Rev. St. §§ 4283-4285,) and in accordance with the general maritime law, and does not embrace the personal contracts of such owners, or such as they have adopted as their personal liabilities.

2. SAME—LIABILITY FOR REPAIRS—COLLISION—RES ADJUDICATA.

Repairs were made on the schooner P. in her home port, by order of the managing agent, with knowledge of some of the owners. On the third voyage afterwards, through her fault, a collision claim arose against her, exceeding her value. The owners, upon the surrender of the vessel, and pending freight, thereupon obtained a decree limiting their liability, which decree was pleaded in bar of the claim in this suit against the owners *in personam* for the bill of repairs. *Held*, that the decree was not a bar; that the claim was a personal contract of the owners, not subject to limitation, or, if so, only upon surrender of the vessel and freight as they existed at the close of that voyage, free from liens or demands growing out of prior or subsequent voyages.

In Admiralty.

Alexander & Ash, for libelants.

Owen, Gray & Sturgis, for respondents.

BROWN, J. The libelants sue to recover a bill for repairs upon the schooner J. J. Pharo, of New Jersey, in her home port, in May, 1889. The respondents were the owners of the vessel at the time. The amount of the bill is not disputed, but the respondents set up as a defense the proceedings for the limitation of their liability subsequently taken, and

a decree of this court therein, exempting them, in accordance with the provisions of the Revised Statutes, §§ 4283-4285, and the act of June 26, 1884, (23 St. at Large, p. 57, § 18.) The libelants claim that they are not within the provisions of either act, and are not affected by the decree. In the proceedings to limit liability, the vessel was sold, and the proceeds were deposited in the registry of the court. The vessel was in the coasting trade, and on the 31st of July, 1889, by her own fault, came into collision with the brig Kaluna, inflicting damages that exceed the proceeds of the vessel deposited in the registry, and the decree was founded upon those claims. The vessel had been run upon shares by the master. He acted as ship's husband and managing agent, transacting all her business, and reporting to the owners. The repairs in question were incurred in the yearly overhauling of the ship. They were ordered by the master, under his authority as managing agent, in the home port, with the knowledge also, at the time, of some of the owners. The collision was about two months after the repairs were made, and upon the third voyage after their completion.

1. In the case of *The Alpena*, 8 Fed. Rep. 280, it was held by Judge BLODGETT, in construing the act of 1851 and the provisions of the Revised Statutes, that each voyage or trip—

"Must be treated as a separate venture, involving its own particular hazards, losses, and earnings; and that, when each such voyage is ended, it is for the owner to decide whether the losses have been such as to make it expedient for him to invoke the protection given by this act of congress. * * * The language as well as the evident reason of the statute shows that this proceeding can only be had for the purpose of apportioning the owner's interest between several persons who have suffered losses on the same voyage."

Claims arising out of prior voyages were therefore held excluded from the limited liability proceedings, and not to be bound by the decree therein. I concur in the conclusion reached by Judge BLODGETT in that case, although the practice seems to be that liabilities for torts arising out of a prior voyage, unliquidated and undefined in amount, and often wholly unknown, may be limited upon a surrender of the vessel or her value after a subsequent voyage; the value and freight being determined according as they existed at the close of the prior voyage. See *The Benefactor*, 103 U. S. 239, 245, 9 Ben. 44, 47; *The City of Norwich*, (*Place v. Transportation Co.*) 118 U. S. 468, 491, 6 Sup. Ct. Rep. 1150; *The Great Western*, 118 U. S. 525, 6 Sup. Ct. Rep. 1172; *The Doris Eckhoff*, 30 Fed. Rep. 140. I think the act of 1884 is doubtless to be treated as *in pari materia* with the act of 1851, (Rev. St. §§ 4233, 4285,) and designed to extend the act of 1851 to cases of the master's acts or contracts, and thus to bring our law into harmony with the general maritime law on this subject. *Butler v. Steam-Ship Co.*, 130 U. S. 527, 553, 9 Sup. Ct. Rep. 612; *The Amos D. Carver*, 35 Fed. Rep. 669; *Force v. Insurance Co.*, Id. 778; *Miller v. O'Brien*, Id. 779, 783. The act of 1884, like the act of 1851, limits the owner's liability to the "value of such vessel and freight pending." But there is no "freight pending," except upon the current voyage; and this shows that the debts of the last voyage only are

intended. It cannot be that prior debts are to be included but not prior earnings. *The City of Norwich, ut supra.* In the case of debts contracted for the benefit of the ship and of her owners, which are known, and are for known or ascertainable amounts, and of which the owners reap the benefit in the improvement of the ship, and in the freights subsequently earned, there may be sufficient reason to hold that the owners, having knowledge of such debts, adopt them as their own personal liabilities, if the vessel is sent out upon subsequent voyages, and that by so doing they lose their right to limit their liability in respect to such beneficial contracts, even if they were not at first personally liable therefor.

2. But the respondents were individually liable for the contracts of their managing agent, made in the home port, in the ordinary repair of the vessel, these repairs being known and approved by some of the owners. *The Two Marys*, 10 Fed. Rep. 923; *Scull v. Raymond*, 18 Fed. Rep. 549. It has been held that the limitation provided by the act of 1884 upon the liabilities of the owners "on account of the ship" does not extend to their personal contracts, but only to the debts and liabilities that arise out of the navigation or business of the ship, or from the contracts of the master, under his general powers in the course of the voyage. *The Amos D. Carver, supra*; *McPhail v. Williams*, 41 Fed. Rep. 61. Such has long been the construction of the broad provisions of the ordinance of Louis XIV., as well as of the similar provisions of section 216 of the Code of Commerce, (1 Valin, Comm. 568;) Emerigon, Cont. à la Grosse, c. 4, § 11; 2 Desjardin, Droit, Com. Mar. §§ 288-286; 2 Valroger, Com. du Code de Com. § 256. And, in general, repairs made in the home port by the owners, or by their authorized agent, are treated as the personal debts of the owners, and cannot be discharged by a surrender of the vessel. It is the same with the captain's foreign contracts from the time they are ratified by the owners. Several of the maritime codes thus expressly provide. See Italian Code Mar. § 491; 3 Revue, Internat. du Droit Mar. 316, 318; 4 Revue Internat. du Droit Mar. 337-339; and Desjardin, *ut supra*. Valin says: "There are cases, however, in which the owner cannot free himself by making this abandonment. * * * The reason is, because these debts are his own personal debts, as much as if he had contracted them himself." "It is universally recognized in modern law," says Desjardin, (section 283,) "that the right of abandonment cannot be invoked by the owner in order to limit his own personal obligation. The right of abandonment ceases also if the obligation at first contracted by the captain is ratified by the owner; it is the same as if the owner had acted himself. (Section 284.) All legislations that permit the owner to limit his obligation by abandonment disallow this right from the time he has transformed the captain's engagement into his own personal obligation." (Section 286.) In the case of *Norwich Co. v. Wright*, 13 Wall. 104, 120, and of *The Scotland*, 105 U. S. 24, 28, 29, Mr. Justice BRADLEY, in delivering the opinion of the supreme court, states that "the act of congress seems to have been drawn with direct reference to these previous laws," and that "the rule adopted by congress is the same as the rule of the general maritime law." *The City of*

Norwich, 118 U. S. 468, 490, 6 Sup. Ct. Rep. 1150. The general purpose of both is the same. The object of both was to encourage ship-building and commerce, and to enable persons having a moderate capital to engage in commerce without becoming liable for an indefinite amount beyond what was invested in the enterprise, through the faults or contracts of others. This principle becoming, early in the middle ages, a rule of the maritime law, secured, to a considerable extent, for persons engaging in commerce, the same beneficial results that the municipal law educed by other means; namely, by the formation of corporations, and, more latterly, by associations "limited," by which individuals may engage in trade without being liable beyond the amount of invested capital.

Construing the acts of 1884 and 1851 in the light of these decisions, and of the general maritime law which it was their purpose to introduce into our jurisprudence, I must hold that the decree set up in the answer, limiting the liability of the respondents, as a decree based on claims growing out of a subsequent voyage, does not affect the libellant's prior demand, and that this prior demand was from the first a personal liability of the respondents, and not subject to limitation at all; and that, if it were, it could only be thus limited upon the surrender of the vessel, or her value and the freight as they stood at the end of that voyage, free from all demands or liens growing out of any of her other voyages prior or subsequent.

Decree for libellants, with costs.

THE LAGONDA.¹

THE JAMES A. GARFIELD.

MATHIESEN v. THE JAMES A. GARFIELD.

(District Court, E. D. New York. December 17, 1890.)

1. DEMURRAGE—YACHT.

Demurrage may be recovered for the detention of a yacht, caused by a wrongful act, at the market rate of such craft, though the yacht was never let for hire, and no substitute was employed during the time of such detention.

2. SAME—AMOUNT OF DEMURRAGE—EXPERT TESTIMONY.

The amount of demurrage to be recovered by a pleasure yacht may be shown by the testimony of those engaged in chartering yachts, as to what, in their opinion, the owner could have obtained for her use during the period of detention.

In Admiralty. On exceptions to commissioner's report. See 42 Fed. Rep. 304.

R. D. Benedict, for libellant.

Goodrich, Deady & Goodrich, for claimant.

BENEDICT, J. This case comes before the court upon exceptions to the commissioner's report. The action is brought to recover the dam-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

ages sustained by the libellant by reason of injuries done to the steam yacht *Lagonda*, in a collision between that yacht and the tug *James A. Garfield*. An interlocutory decree in favor of the libellant was entered, and the case referred to a commissioner, to ascertain and report the amount of the libellant's damages. The commissioner, among other things, reported that the yacht had been detained eight days, while undergoing repairs made necessary by the collision, and allowed the sum of \$48 for such detention; being interest for eight days on \$36,000, the cost of the yacht. To this the libellant excepts. It appeared before the commissioner that the *Lagonda* was a pleasure boat, kept for the personal use of the owner, and without any intention to use her for profit; that the yacht was in commission at the time of the collision; that she was detained eight days, while repairing the damages caused by the collision. No evidence was introduced to show that the owner desired or sought a substitute for the yacht during that period. Upon the evidence before him, the commissioner found that there was no market rate for the use of yachts of the size and character of the *Lagonda*, and accordingly he allowed as damages for the detention of the yacht eight days' interest on the amount she cost the owner. It cannot be doubted that demurrage is recoverable for the detention of a yacht caused by a wrongful act. In the case of *The Walter W. Pharo*, 1 Low. 437, Judge LOWELL gave demurrage for a yacht kept, as this one was, for pleasure, and never let for hire. It was there said: "It is no concern of the respondents what use the libellant chose to put his vessel to. He had the right to change his mind at any moment." So here, although it may be that the owner of this yacht at the time she was run into had no intention of chartering her, or employing her for profit, still he was at liberty to charter her at any moment. Death, sickness, loss of fortune, mere whim, might have impelled him to put her to some profitable use. If it appears, therefore, that the yacht could have been chartered by her owner during the time of the detention in question, then any sum he could have realized by chartering her may be recovered by him from the wrong-doer who caused her detention.

The evidence taken by the commissioner was sufficient to show that this yacht could have been chartered for hire at the time she was run into. For instance, one witness called by the claimant, in answer to the question, "What is the market demand for yachts of this class in this port?" says: "The demand is greater than the supply. There is no trouble about chartering." The testimony of other witnesses was to the same effect. I cannot doubt upon the evidence that, if the owner of this yacht had concluded to charter her for hire, he could have done so, and I judge from the testimony that it would have been possible to charter her for eight days only. But that fact is not necessary to a recovery. It was open to the owner to charter his yacht for the month or for the season. It is sufficient to entitle him to recover for her detention, if it appears that he could have realized money from her hire during the period of her detention. The ground upon which the commissioner seems to found his decision is absence of proof of an established rate at which

yachts were chartered, and evidence that the rate in every instance depends upon the personal inclination of the owner; and so he allowed the libellant eight days' interest on the cost of the yacht, and this, although it is manifest that the owner had no intention of realizing interest on his investment. But proof of a rate established by custom, or by repeated similar transactions, cannot be required in a case of this description. If it appears that the yacht could have been chartered for hire, the amount lost to her owner by being deprived of ability to charter her may be shown by the testimony of those engaged in chartering yachts, as to what, in their opinion, the owner could have obtained for her use for eight days in case she had been chartered. The testimony of the witness Manning seems to me to justify the conclusion that this yacht could have been chartered by her owner for a season of three months for the sum of \$6,000, the owner furnishing the crew. Under such a charter, the vessel would have earned for her owner in eight days the sum of \$552, and that sum libellant is, in my opinion, entitled to recover for her detention.

The first exception on the part of the libellant is therefore allowed. All other exceptions are overruled.

MERRITT v. ONA *et al.*¹

(District Court, E. D. Pennsylvania. November 14, 1890.)

SHIPPING—CHARTER-PARTY—LAY DAYS.

A contract provided that merchants should have, to load a vessel, 20 days, "counting from the day of readiness until the day of dispatch." Held that, as the contract was not one by which a present interest was vested, the "day of dispatch" and "day of readiness" were to be excluded.

In Admiralty.

Libel by John Merritt, master of the bark John R. Pearson, against Nora Ona & Co., respondents, and S. & J. Welsh, garnishees. The case turned on the construction of the following clause in the charter-party:

"Twenty running lay days, Sundays excepted, are to be allowed the said merchants for loading the vessel, counting from the day the vessel shall have been in readiness for cargo, the captain having given timely notice to that effect, until her day of dispatch."

Curtis Tilton and *John F. Lewis*, for libellant.

"From a day" does not necessarily exclude the day. *Lysle v. Williams*, 15 Serg. & R. 187. The day a vessel is in readiness is always counted. *Gronstadt v. Witthoff*, 15 Fed. Rep. 271. "Lay days begin to run when the vessel has arrived." *Aylward v. Smith*, 2 Low. 192; *Hodgdon v. Railroad Co.*, 46 Conn. 277; *The Grafton*, Olcott, 49; *Irzo v. Perkins*, 10 Fed. Rep. 779. Technical rules of construction are not to be applied to a charter-party. *Lower v. Bangs*, 2 Wall. 738.

¹Reported by Mark Wilkes Collett, Esq., of the Philadelphia bar.
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James F. Bullitt and R. C. Dale, for defendant.

Where the computation is from the day of the date, or from the day an act is to be done, such day is to be excluded. *Sheets v. Selden's Lessee*, 2 Wall. 178; *Best v. Polk*, 18 Wall. 112; *Cromelien v. Brink*, 29 Pa. St. 532; *Mark's Ex'rs v. Russell*, 40 Pa. St. 372; *Menges v. Frick*, 73 Pa. St. 137; *Weeks v. Hull*, 19 Conn. 376; *Page v. Weymouth*, 47 Me. 239; *Bemis v. Leonard*, 118 Mass. 508; *Cornell v. Moulton*, 3 Denio, 12; *People v. Railroad Co.*, 28 Barb. 284; *Judd v. Fulton*, 10 Barb. 117; *Lang v. Phillips*, 27 Ala. 311; *Insurance Co. v. Palmer*, 81 Ill. 88; *Chiles v. Smith's Heirs*, 13 B. Mon. 461. The word "until" ordinarily excludes the day to which it applies. *People v. Walker*, 17 N. Y. 502; *Webster v. French*, 12 Ill. 302; *Clerk v. Ewing*, 87 Ill. 344.

BUTLER, J., (after stating the facts as above.) The libellant contends that the enumeration should include the day of "readiness" and also that of "dispatch." The respondents deny that either should be included. The natural reading of the language sustains the denial. The weight of legal authority also sustains it,—unless the contract falls within an exception stated, where a "present interest is vested." As is said by the supreme court of this state, (*Cromelien v. Brink*, 29 Pa. St. 522,) "the man who undertakes to reconcile the English decisions on the legal computation of time will find himself usually engaged in a hopeless task." The remark may be applied with equal truth to the American decisions. In Pennsylvania, *Goswiler's Appeal*, 3 Pen. & W. 200, was overthrown by *Thomas v. Afflick*, 16 Pa. St. 14, which after being followed in *Barber v. Chandler*, 17 Pa. St. 48, was itself overthrown by *Cromelien v. Brink*, and *Goswiler's Appeal* again set on its feet. This case (*Cromelien v. Brink*) presents a full review of the question and the authorities and settles the rule in conformity with the weight of authority elsewhere. Nothing need be added to what there is said. It exhausts the subject.

The contract before us does not fall within the exception stated, and the departure should not be extended; it may be well questioned whether it would be made to-day in the absence of the precedent. It is safer to enforce contracts as written than to vary them upon supposed evidence of intention found outside of their terms. The respondents are given 20 days for loading, "counting from the day of readiness * * * until the day of dispatch." This he would not have if either the day of "readiness" or the day of "dispatch" was included in the enumeration. The argument that this view imposes two days of idleness on the vessel does not seem entitled to weight. If the argument is sound, the idleness is self imposed, as it results from the contract. But such idleness is not a necessary result of our view of the contract. Her "readiness" need not cover the entire day; it may be confined to the evening; nothing more is required, and she may sail on the day of "dispatch." The respondent is required to dispatch her promptly on the morning following the twentieth day. *Gronstadt v. Witthoff*, 15 Fed. Rep. 271, and other admiralty cases cited by the libellant, are not applicable to the facts involved here.

The libel must be dismissed, with costs.

PORTLAND SHIPPING Co. v. THE ALEX GIBSON.

O'BRIEN v. PORTLAND SHIPPING Co.

(District Court, D. Washington, N. D. October 31, 1890.)

1. CHARTER-PARTY—INTERPRETATION OF CONTRACT—STEVEDORE.

A charter-party containing a clause reading, "The vessel to employ stevedore satisfactory to charterers; but, if appointed by them, the charge not to exceed that current at the time, and to be stowed under the captain's supervision and direction," does not give the charterer an absolute right to select the stevedore. A clause so worded is to be understood as an agreement that the stevedore must be satisfactory to both parties; and in such a case the charterer is not entitled to damages because of delay in commencing to load, resulting from a disagreement between him and the master in regard to the selection of a stevedore.

2. SAME—BREACH OF CONTRACT—DAMAGES.

Damages cannot be recovered by the charterer by reason of the vessel having been removed from the loading port previous to the signing of the bills of lading, and without sailing orders from him, where the master acted prudently, and for the interest of all concerned, and the charterer suffered no loss or injury thereby.

3. DEMURRAGE.

Delay in loading, resulting from the failure of the charterer and master of the vessel to agree in selecting a stevedore, where the contract requires the employment of a stevedore satisfactory to both, does not give the vessel a right to demurrage.

4. ADMIRALTY—DETENTION OF VESSEL—DAMAGES.

The arrest and detention of a vessel by legal process in a suit *in rem*, which, although unfounded, is not *malu fides*, does not entitle the owner to damages.

(Syllabus by the Court.)

In Admiralty.

C. E. S. Wood, for libellant.

J. C. Haines, for claimant and cross-libellant.

HANFORD, J. The ship Alex Gibson was chartered by the libellant to carry a cargo of wheat from Tacoma to a port in Europe to be designated by the charterer. A charter-party was signed in Portland, in the state of Oregon, containing, among others, the following provisions:

"The vessel to employ stevedore satisfactory to charterers; but, if appointed by them, the charge not to exceed that current at the time, and to be stowed under the captain's supervision and direction. Charterers to furnish the vessel with sufficient cargo for stiffening, as customary. The captain gives them usual 48 hours' written notice of when the vessel will be ready to take in same, and of the quantity required. * * * Bills of lading to be duly and promptly signed when required by charterers. * * * 30 working lay days, (rainy days not to be counted as lay days,) to commence twenty-four hours after the inward cargo ^{and} or ballast shall have been finally discharged, and the captain has given charterers written notice that his vessel is ready to receive cargo, are to be allowed charterers for loading and waiting orders at Tacoma, as hereinbefore provided. * * * Loading days not to commence before December 15, '87, except at charterer's option. * * * It is agreed that for each and every day's detention by default of said parties of the second part, or their agents, four pence sterling, or equivalent, per register ton per day shall be paid, day by day, by said parties of the second part, or their agent, to said party of the first part, or his agent."

The ship was at her loading berth, and ready to receive stiffening, on December 12, 1887, but the charterer, although then ready with sufficient wheat on hand, refused to load her, because of a disagreement with the master of the ship as to the selection of a stevedore, and insisted that certain persons, who were objectionable to the master, and none other, should be employed to stow the cargo; and in consequence of this disagreement the loading was not commenced until January 5, 1888. The contract does not, by any express provision, bind the vessel to commence loading or to sail by any particular date; but the libelant claims that the delay in commencing to load was a violation on the part of the vessel of the implied condition of the charter-party that she should, with reasonable promptness and dispatch, receive her cargo and proceed upon the voyage. As soon as she was loaded, the vessel, contrary to orders from the charterer to avoid expense which would result from detention of a tug, left Tacoma, and was towed to Port Townsend, the place to which she had to go to ship her crew for the voyage. Bills of lading were not signed, nor presented to the master for his signature, before the ship left Tacoma; but the captain returned and signed them at that place while the ship was at Port Townsend, in fulfillment of a promise made by him to the charterers' agent before leaving there. The libelant claims that by so leaving the loading port without orders, and previous to the signing of the bills of lading, the charter-party was also violated on the part of the ship.

For these alleged breaches of contract the libelant brought this suit to recover as damages an amount sufficient to cover a loss alleged to have been sustained by reason of the decline in price of wheat in England between the times when the Alex Gibson should have been loaded, if the charterers' stevedore had been employed at first, and the time when she was actually loaded; and also certain alleged disbursements and expenses, including counsel fees.

I hold that the charter-party cannot be fairly understood or construed so as to support the libelant in its contention for the absolute right to select a stevedore, and to insist on that stevedore, and none other, being employed by the master, regardless of his will. To employ a person is to contract with him, so as to become liable to him for compensation, and to assume the responsibilities and liabilities of an employer; and requires the meeting of minds and the free assent of both parties to the assumption of the relation of master and servant. It is usual in the charter-party to provide that the vessel shall employ the charterer's stevedore. Such an agreement is fair, because, by its terms, it indicates a particular stevedore, and the master or owner by entering into the contract assents to his employment; and such a provision in the charter-party is not inconsistent with the right of the master to discharge the employe for disobedience, incompetency, or other sufficient cause. But an agreement binding one to employ for a particular service, requiring skill and fidelity, whomsoever should be selected in the future by another, regardless of the employer's judgment at the time as to the competency and trustworthiness of the one so to be selected, would be un-

reasonable, for it would be the same as for a man to promise to in the future willingly do something contrary to his will. The agreement under consideration is not so worded as to express an intention to bind the vessel to employ as stevedore a person objectionable to the master, and I cannot by construction give to it that meaning. What is termed the "stevedore clause" in this contract is unusual, ambiguous, and meaningless, unless construed to mean that a stevedore satisfactory to both parties should be employed. I shall so construe it rather than reject it altogether as being void for uncertainty.

The attempt made to aid in giving the contract the interpretation contended for by the libellant, by offering proof of a general custom at Portland, where this charter-party was signed, allowing the charterer the absolute right of selecting the stevedore under an agreement worded as this one is, fails of its object. The testimony shows that in Portland there are only two persons or firms engaged in stevedoring, both of whom are satisfactory to the shippers of wheat, and that the form of the stevedore clause in this contract was adopted there, as a substitute for the usual clause, for the express purpose of allowing the ship-masters to employ either of said stevedores as they should elect. This does not even tend to prove any general custom or practice which would require the master to yield to the charterer in case of a disagreement between them as to the selection of a stevedore.

There was no breach of contract by failure to sign the bills of lading, because the captain did sign them when they were presented for his signature, and until then the contract did not require him to sign them. The master acted reasonably in proceeding to Port Townsend with his vessel when she was ready to go, and the tug was ready to take her, and, although such proceeding without orders was technically a violation of the charter-party, still the libellant was not injured thereby, and is not on that account entitled to recover damages.

As the court cannot find that the contract has been violated to the injury of the libellant, no damages can be awarded to it, and the libel will be dismissed.

The owner of the vessel has filed a cross-libel, to recover demurrage for the time the ship was delayed in loading in excess of what would have been the lay days if there had been no disagreement as to the employment of a stevedore, and also damages for the time the ship was detained by legal process after being arrested by the marshal under the attachment and monition issued in this case.

As to the first part of this claim, I think it is right in this case to hold the parties to the letter of their contract as to lay days; and I find from the evidence that the ballast was not all discharged, and the ship was not finally made ready for her cargo, until the 12th day of January, 1888, so that the 14th day of January must be counted as the first lay day, the six intervening Sundays and two stormy days must be omitted from the count, and the result is that February 20th was the last of the lay days, according to the terms of the contract. The ship was loaded and left Tacoma February 16th. The bills of lading were

signed and her orders to sail were given on the 20th. Her crew was shipped and the last man was received on board on the 23d, and on that day she could have sailed if this suit had not been commenced. After filing a satisfactory stipulation, she was released, and on March 8th proceeded on her voyage, under command of a new master; Capt. Speed being obliged, on account of this suit, to remain. The time, therefore, of actual detention of the vessel by the use of legal process in this case was from February 23d to March 8, 1888, 14 days. I do not find that the libelant was prompted by malice in commencing this suit. Its officers and legal advisers may have honestly entertained the belief that sufficient ground for the proceeding existed; but certainly, as the commencement of proceedings was delayed until after the ship was loaded, and the bills of lading were duly signed and delivered, the case was managed so as to force the vessel either to compromise, and pay an unjust claim, or suffer the greatest possible inconvenience and loss by being delayed while resisting the demand; and, as the court finds that the libelant had no cause of action, it follows that the arrest and detention of the ship was wrongful, and the owner suffered thereby a serious pecuniary loss. But for this he is without remedy, for in proceedings *in rem* the allowance of process is the act of the law, so that no damages are allowed for the arrest and detention of the vessel unless there is bad faith or deceit practiced in suing out the writ, or the suit is one that may be characterized as a malicious prosecution. Hen. Adm. p. 337; *The Adolph*, 5 Fed. Rep. 114; *Kemp v. Brown*, 43 Fed. Rep. 391.

The expenses of the litigation have not been to any appreciable amount increased by reason of the cross-libel beyond what was necessary in resisting the libelant's demand. But for the original suit, it is not probable that any expense or trouble would have been caused by the cross-libelant; therefore, no costs will be awarded against him. Findings in accordance with this opinion may be prepared, and a decree dismissing the libel, with costs, and also dismissing the cross-libel, will be entered.

EARNMOOR S. S. Co. v. UNION INS. Co.

SAME v. CALIFORNIA INS. Co.

(District Court, S. D. New York. November 23, 1890.)

1. MARINE INSURANCE—ORDINARY NEGLIGENCE—STRANDING.

In an action on a marine insurance policy containing no exception for losses occasioned by want of ordinary care, but covering perils of the sea and "all other perils * * * that have or shall come to the hurt * * * of the said ship," ordinary negligence of the ship's master is no defense.

2. SAME—YORK-ANTWERP RULES—GENERAL AVERAGE.

Rule 5 of the York-Antwerp rules, which provides that, when a ship is intentionally run ashore because she is sinking, no damage caused "by such intentionally running on shore" shall be made good as general average, has no application to an action on a marine policy which provides that general average shall be payable according to the York-Antwerp rules, where the ship was run ashore after she was beginning to sink, to prevent further loss, and no further damage was caused thereby.

3. SAME—SEAWORTHINESS—DRUNKEN PILOT.

A charge of unseaworthiness by reason of the pilot's intoxication is not sustained where there is no direct evidence of his condition beyond the fact that he had been drinking, and no evidence that he was not perfectly capable when the vessel left port, or, if he was not, that the master knew the fact, and where the pilot, when sober, was one of the best.

4. EVIDENCE—MOTION FOR REARGUMENT—AVERAGE ADJUSTMENT—NEW OBJECTIONS.

On motion for reargument, new objections to an average adjustment will not be entertained. Such an adjustment, when made up under the supervision and approval of the insurers' agent, and received and not objected to by them, is *prima facie* evidence of the correctness of the items it contains.

In Admiralty. To recover under marine insurance.

Wing, Shoudy & Putnam, for libelants.

George A. Black, for respondents.

BROWN, J. The above libels were filed to recover losses by sea perils upon a policy of insurance insuring the steam-ship Earnmoor for one year from March 8, 1888, for \$13,500, issued by the respondents, whereby it was provided that the liability of each company should be several, and not joint, for one-half of any sum coming due under the policy. In the policy the hull of the steam-ship was valued at \$89,725, and her machinery and boilers at \$36,375; total, \$126,100. On January 10, 1889, the ship sailed from Philadelphia, bound for St. Thomas, with a cargo of coal. She left her wharf about 6 P. M., in charge of a pilot. About three hours later, when near Edgemoor, proceeding down the Delaware river, she struck a sunken rock, and passed over it. She began to fill rapidly, and, to avoid sinking in deep water, was run ashore on the Delaware side. The voyage was abandoned, the coal, after being removed from the ship, was sold, and the ship removed to a dry-dock and repaired. In the adjustment \$43,344.07 was charged to particular average on the vessel, and \$44,589.44 was charged to general average; of which \$40,510.70 was charged against the vessel, \$1,759.15 against freight, and \$2,319.59 against cargo. No separation was made in the average adjustment as between the hull and machinery and boilers. The insurers and underwriters were very numerous, of whom the respondents represented about one-ninth in interest. By adjustment for general and particular average, the respondents were each charged with the sum of \$4,488.69, to recover which the above libels were filed. The answer, besides certain general denials, averred that the steamer was sailing under a charter which provided that the York-Antwerp rules should govern in the adjustment of general average; that the steamer was unseaworthy at the time of leaving the port of Philadelphia; and that her injuries were caused by such unseaworthiness, and by the negligence of those in command of her, and not by any peril insured against. The charge of unseaworthiness was sought to be proved by showing that the ship's compass was defective, and that the pilot was incompetent by reason of intoxication; the charge of negligence, by similar evidence; and on the ground that, when the pilot's condition was ascertained, it was the duty of the captain to come to anchor in the river, rather than attempt to go on according to his own judgment.

1. *Unseaworthiness.* This charge is not sustained. There is no evidence that the vessel was not seaworthy when the policy attached. The evidence is to the contrary. The evidence with regard to the condition of the compass at the time of the accident is not conclusive, and the compass had nothing to do with the accident, as the vessel was being steered by lights and land-marks, and not by compass. As regards the pilot's condition, there is no direct evidence beyond the fact that he had been drinking. The pilot commissioner subsequently suspended him. The pilot, when sober, was one of the best. No charge of drunkenness was preferred against him. There is no indication in the testimony that when the ship left Philadelphia the pilot was not perfectly capable, or, if not, that the master had any suspicion of the fact. See *Hays v. Insurance Co.*, 6 N. Y. Supp. 3; *The Maria*, 1 W. Rob. 95, 110.

2. *Negligence.* Not long before the accident, the pilot twice left the bridge, requesting the master to take charge until his return, and to steer for a certain light ahead. The master, being under apprehension because the ship was run so close to the west bank, each time put the ship's head more to the eastward. The pilot, on his first return to the bridge, brought the ship back again, and upon his second return, while making a similar change, the ship struck. No other explanation than the above is afforded by the testimony. It is perhaps but reasonable to assume that the master had by this time perceived that the pilot had been drinking, and was under the influence of liquor, and feared to trust him. In such a situation he was called on to exercise his best judgment,—whether to resist the pilot openly, and go according to his own judgment, or to come to anchor. The situation was an embarrassing one, and the evidence, as regards all the particular circumstances of the time, place, and exposures, is too meager to warrant me in holding the master chargeable with negligence rather than an error of judgment. Even if it appeared that the circumstances were such that the most prudent course was to come to anchor, and that the master should be held to some extent negligent in going on, the case is certainly not one of willful misconduct, nor of such gross negligence as alone would absolve the insurers from their contract.

It has long been the settled doctrine in cases of marine insurance, as in cases of fire insurance, that under policies of the usual form ordinary negligence is no defense. The general doctrine in this country, illustrated by very numerous adjudications, is that stated by Mr. Justice GRAY in *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 438, 9 Sup. Ct. Rep. 469:

"A policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew; because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them."

Insurance Co. v. Sherwood, 14 How. 351, 362-366; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 323, 6 Sup. Ct. Rep. 750, 1176; *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 408, 421, 10 Sup. Ct.

Rep. 934. In the case last cited, negligence was held to be a defense, because the policy expressly excepted "losses occasioned by the want of ordinary care and skill in navigation," as well as by barratry. In the present case there was no such exception. The policy was in the usual form, covering the risk of barratry, perils of the sea, and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship." The policy also contained a clause making the insurers "free from average under three per cent., unless general, or the ship be stranded, sunk, or burned;" and "general average, payable as per foreign custom, if required, or per York-Antwerp rules, is in accordance with the contract of affreightment." It also contained a further provision for the payment of "three-quarters of any sum the assured might have to pay to any other vessel, or the goods and effects on board thereof, in consequence of collision;" *i. e.*, it insured against negligence causing collision. Some English cases of the highest authority are cited by the respondent to the effect that the term "sea peril" should receive no different interpretation in a policy of insurance than in a bill of lading, (*The Xantho*, L. R. 12 App. Cas. 503; *Hamilton v. Pandorf*, Id. 518;) and from this it is argued that negligence must be a defense as good and available in an action on a marine policy as in an action upon a contract of carriage. The cases cited, however, expressly negative the conclusion thus sought to be drawn from them. In *The Xantho*, page 510, Lord HERSHELL says:

"Now I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause; and the ship-owner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils."

Subsequently, the same view was repeated in *Hamilton v. Pandorf*, by Lord WATSON, Id. 526; by Lord FITZGERALD, Id. 528.

3. *York-Antwerp Rules*. Rule 5 of the York-Antwerp rules provides that "when a ship is intentionally run on shore because she is sinking, no damage caused to the ship or cargo and freight, or any or either of them, by such intentionally running on shore, shall be made good as general average." The clause in this policy providing that "general average shall be payable as per foreign custom, if required, or per York-Antwerp rules, if in accordance with the contract of affreightment," was evidently inserted for the benefit of the insured. The vessel, at the time of this loss, was sailing under a charter and under a subcontract of affreightment that adopted the York-Antwerp rules; but in abandoning the voyage the evidence shows that the parties present adopted the most economical course for all, and that all who were reasonably accessible, including the respondents' agent, assented to a general average adjustment. If the point were material, I should think it was competent for the parties to the charter and the ship-owner to waive this provision.

I do not perceive, however, that the clause has any material bearing upon the case, for the reason that the evidence negatives the supposition that there was any damage whatever caused to the ship, the cargo, or the freight by running ashore. The clause relied on is very precise in limiting its application to damage caused by "such intentionally running on shore." But this vessel was run ashore to save her from completely sinking in deep water, after she was filling and beginning to sink. This was done in order to prevent a far greater loss. Running ashore was an act of salvage, and a great benefit to all concerned, including the respondents, by preventing a greater loss.

4. *The Adjustment.* The evidence indicates that the adjustment of general average resulted in advantage to the respondents. The cargo contributed more than it received. Any objection to a general average adjustment on the ground that the loss had been brought about by negligence might help the cargo, but not the ship, nor the respondents as insurers of the ship. The expenses of unloading the cargo and of lightening and floating the ship, even if treated as not within the definition of technical general average, through the lack of the elements of danger and sacrifice, under the special circumstances of this vessel, (*The Alcona*, 9 Fed. Rep. 172; *Bowring v. Thebaud*, 42 Fed. Rep. 794,) concerning which I express no opinion, would, nevertheless, so far as they were necessary, and were done for the account and benefit of both the cargo and the ship, be apportioned between the two upon the same equitable principles upon which general average itself rests, (*L'Amerique*, 35 Fed. Rep. 835, 848.)

There is nothing in the evidence to show that the separate valuation of the hull and machinery in this policy affects the amount charged against the respondents in the adjustment. The vouchers have been put in evidence. They were exhibited to the agent of the respondents at the time, and were approved by him, such as were disapproved being rejected, and the reasonableness of the various charges was testified to by competent experts. This is sufficient to warrant a recovery of the amount as adjusted, independently of the adjustment book, which was received only as a convenient summary of the other matters given in evidence. Upon the whole evidence, I am satisfied that the libelants are entitled to at least the amount specified in the adjustment, namely, \$4,488.69, against each of the respondents, with interest from the time of the demand, with costs; and decrees may be entered therefor.

ON MOTION FOR REARGUMENT.

(December 20, 1890.)

BROWN, J. On the main question litigated, namely, the degree of the master's negligence, if any, that led to the stranding, I remain of the opinion previously expressed, that there was no such kind or degree of negligence as discharged the insurance policies.

As respects the amount with which the insurers should stand charged,

it does not appear that the amounts allowed are greater than the evidence warrants. Mr. Martin, as the respondents' agent, not only examined and approved the bills which entered into the average adjustment while it was being made, but approved the adjustment when it was made up, and, in answer to the respondents' inquiries, informed them that it was correct. This testimony was explicit upon the trial. The respondents had full knowledge of everything that entered into the adjustment long before, and it does not appear that any objection was made. On the trial the principal bills were presented and marked as exhibits, and a large bundle of the others was produced and presented for inspection with the adjustment. In connection with Mr. Martin's evidence I think the adjustment, under such circumstances, is *prima facie* evidence of the correctness of the items contained in it. The charges for services and commissions were proved, and no evidence against them offered. No question as to the general details was made, or could, under such circumstances, properly be made. To the cargo, as entering into general average, objection was made; but that item benefited the respondents. Now, objections to the freight are sought to be raised; but the aggregate amount charged against the respondents, as insurers of the vessel, is only their proportion of about \$83,900, as the whole amount chargeable against the vessel; and this amount remains after excluding the balance of about \$2,700 in favor of the freight, complained of in the general average allowance. So that, again, no prejudice to the respondent in this respect is shown.

As to the other items referred to in the affidavits presented on this motion on both sides, it does not seem probable that any injustice has been done to the insurers in adopting the figures of the adjustment as to the extent of their liability. The cargo adjustment gives an advantage to the insurers, if a general average was not warranted. The litigation has been on wholly different questions; and I must decline to enter anew upon the details of the adjustment which were approved by respondents' agent, acquiesced in by them, and not brought forward until after the decision of the cause.

Motion for reargument denied.

THE RICHARD S. GARRETT.¹

MCCARTHY v. THE RICHARD S. GARRETT.

(District Court, S. D. New York. December 2, 1890.)

MARITIME LIENS—REPAIRS—RESIDENT OWNER—LICENSE—CREDIT TO VESSEL.

Where repairs were made in New Jersey on a vessel, one of whose owners resided in New Jersey but the other two in New York, and in the application for license at the custom-house all of her owners were stated to be of New York, and the material-man had no knowledge to the contrary, and dealt on the credit of the vessel, *held*, that a suit *in rem* would lie to recover the price of the repairs.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Suit to enforce a lien for supplies.

Wing, Shoudy & Putnam, for libelants.

Peter S. Carter, for respondent.

BROWN, J. The work on the repairs and the value are admitted as claimed. The claimant alleges that the libelants agreed, in the settling of the former disputed bills, to allow a credit of \$100 upon the present bill, which the claimant asked for in consequence of an average charged him by the insurers. The claimant testified to such an agreement, but this testimony is contradicted in all its parts by the libelant, with whom the conversation is stated to have been held. The burden being upon the claimant to establish such a defense, and no writing or other evidence being produced to sustain this claim as opposed to that of the libelant, I am obliged to treat it as not proven.

It is further claimed that a suit *in rem* will not lie, because one of the claimants, an owner of one-third interest, was a resident of New Jersey, where the repairs were made. The tug, however, hailed from New York, her other two owners were residents of New York, and in the application for her license at the custom-house in New York all of her owners were stated to be of New York. The libelant had no knowledge to the contrary, and rightfully supposed she was a New York vessel, dealt with her as such, and made the repairs upon the credit of the vessel. Under such circumstances she must be treated as a New York vessel. *The St. Jago de Cuba*, 9 Wheat. 416, 417; *The Francis*, 21 Fed. Rep. 715, 717; *The Jennie B. Gilkey*, 19 Fed. Rep. 127; *The Ellen Holgate*, 30 Fed. Rep. 125. The New Jersey law, moreover, gives a lien in such cases.

The defense not being established, decree for libelant for \$106 and costs.

WHEELWRIGHT *et al.* v. WALSH.¹

(District Court, S. D. New York. December 6, 1890.)

1. CHARTER-PARTY—REFUSAL TO LOAD—DAMAGES—FILLING PRIOR CONTRACT—MARKET VALUE.

Where a chartered vessel refused to take the cargo, (lumber,) and, owing to the consequent delay in arrival, the charterer was compelled to fill a contract of sale made long before by buying other lumber at a higher price, and there was no evidence of any fall in market price between such purchase and the arrival of the charter cargo, *held*, that the difference between his contract price and the price paid was not the rule of the charterer's damage, but the fall in market price, if any, during the delay in arrival; and, if there was no fall, then the only damage was the interest on the amount paid for the lumber so purchased during the time that elapsed before the charter cargo arrived.

2. SAME—WHARFAGE EXPENSES—HANDLING OTHER CARGO.

The cargo destined for the chartered vessel lay on a wharf obstructing other loading, and causing extra expense in handling other cargoes over it. The evidence showed that the expense thus incurred was less than the cost would have been to remove the cargo there waiting until it could be shipped. *Held* that, treating this as a substituted expense, it should be allowed as an item of the charterer's damage.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. On exceptions to commissioner's report.

Owen, Gray & Sturges, for libelants.

Carpenter & Mosher, for respondent.

BROWN, J. The respondent having been held liable for the breach of a charter of the *Caroline Miller* to bring a cargo of lumber from Fernandina to New York, (42 Fed. Rep. 862,) the respondent in the report on damages has been held liable, not only for the difference of freight in sending the lumber by other vessels, but for a supposed loss occasioned to the libelants in consequence of their being compelled to purchase in New York a certain amount of lumber in order to fill in time their own contract of sale to McLean, which they had designed to fill from the charter cargo, on which purchase the libelants paid a higher price than that at which they had several months before contracted to sell and deliver to McLean. Another item allowed is for the extra cost of handling certain other lumber belonging to the libelants at Fernandina, in passing it over the lumber that lay on the dock ready for shipment under this charter. The charter did not make reference to any specific lumber, nor require its delivery at any specific time. The voyage was in fact once postponed at the libelants' request for the transportation of a cargo of railroad ties by the same vessel, and that intermediate voyage has caused all the litigation. This claim is not even for any fall in the market price of the lumber intended to be forwarded by the Miller, but because the cargo did not reach New York in time for the libelants to fill a specific order. This order and intended destination of the lumber for McLean were not referred to in the charter, and were not any part of the contract between these parties. They were not within the contemplation of the respondent when the charter was made, nor was this alleged loss in the additional price paid one of the ordinary or natural consequences of the breach of it. *Telegraph Co. v. Hall*, 124 U. S. 444, 455, 456, 8 Sup. Ct. Rep. 577; *Railway Co. v. Kellogg*, 94 U. S. 469, 475; *The New York*, 40 Fed. Rep. 900. The loss, if any, did not arise from the breach of the charter alone, but from the libelants' special contract as well, made several months before, to sell and deliver at a price named, of which the respondent had no knowledge. Again, there was no evidence that the contract price with McLean was the market price of lumber at the time when the Miller, had she performed her charter, might reasonably have been expected to arrive in New York. The defendant cannot be held bound to such a price, fixed long before delivery by the Miller was to be expected. The contract price to McLean, fixed months before, was, moreover, no legal criterion for determining whether the libelants sustained any legal damage by the Miller's breach of charter, and the consequent delay in the arrival of the lumber. That would be determined by the market price of lumber during this interval. I do not find any evidence in the case as to the market price of lumber at any time. In the absence of any such evidence, it must be assumed that, in making the purchase to fill the McLean order, the libelants paid no more than the market price; and that when their own

lumber arrived by other vessels a few weeks afterwards, it was worth as much as they had paid for what they purchased, and that consequently no legal damage of that kind resulted. There is no evidence of any fall in the market price in the mean time, or that what arrived late could not be sold, or was not sold, by the libelants for as much as they had paid in order to fulfill the McLean contract. The burden of proof is upon the libelants; and, without some proof of change in market value, there is no basis to recover under this head, except for interest on the amount so purchased during the few weeks that elapsed until their own lumber arrived to replace that purchased. Upon both these grounds, this item of damage should be disallowed. *The Tribune*, 3 Sum. 144, 151; *Oakes v. Richardson*, 2 Low. 173, 178; *The City of Alexandria*, 40 Fed. Rep. 697, 700.

As respects the other item of damage in the extra cost of handling other lumber over the cargo waiting for the Miller, I have also great doubt. Considered by itself, it would be excluded as a remote and accidental consequence; but the evidence shows that the extra expense allowed was incurred instead of the greater expense that would have arisen from removing the Miller's cargo from the dock, where it lay waiting for her, until other transportation could be procured. There is some difficulty in determining the real damage from this cause. The commissioner has endeavored to adjust it, evidently with scrupulous care, and on the whole I conclude not to disturb his finding in this respect, treating it as a substituted expense in place of that which would be naturally incident to the Miller's cargo itself, and the necessary rehandling thereof in consequence of the breach of the charter. *The Rosend Castle*, 30 Fed. Rep. 462; *The Giulio*, 34 Fed. Rep. 909. With the above modification, the report is confirmed.

PETTIE v. BOSTON TOW-BOAT Co.¹

(District Court, S. D. New York. December 3, 1890.)

1. TOWAGE—DAMAGES—OLD VESSEL—INABILITY TO RAISE VESSEL SUNK.

When a barge was sunk by being negligently towed upon a sunken rock, and, in consequence of her old and weak condition, which rendered raising impossible, she became a total loss, *held*, that full weight should be given to this circumstance and the previous history of the boat by reducing the assessment of her value.

2. SAME—WEAKNESS NOT CONTRIBUTORY TO ACCIDENT—APPORTIONMENT.

A previous condition of weakness on the part of a vessel negligently sunk not having contributed to the accident or induced the fault, and it not being possible that any express notice of such condition could have affected the navigation, and her old and leaky condition being known, *held*, that these conditions constituted no such fault in the vessel sunk as permitted a division of damages.

3. SAME—OVERVALUATION—COSTS.

On the assessment of damages, the recovery of a much less sum than claimed for the value of an old vessel is not sufficient evidence of fraudulent exaggeration to deprive the plaintiff of his statutory right to costs, where the libellant's estimates are largely sustained by reputable witnesses, though the court adopt a much smaller valuation.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. On exceptions to commissioner's report.

Hobbs & Gifford, for libellant.

Wilcox, Adams & Macklin, for respondent.

BROWN, J. Upon all the testimony in this case, I cannot resist the conclusion that the inability to raise the libellant's barge was because she was weak and rotten about her deck and water-ways, so that she could not sink with a hole in her bottom, and lie in a moderate tide even in mild weather, without partially breaking up, and thus become incapable of being raised. This previous condition, however, in no way contributed to the accident or induced the fault of the tug, nor could any notice of this condition be supposed possibly to have affected the navigation of the tug. I cannot find, therefore, that the barge was partly in fault, so as to direct any division of the damages. *The Granite State*, 3 Wall. 310. Nor was the loss in part occasioned by an intervening agency, so as to render the loss not the natural result of the tug's negligence. *Railway Co. v. Kellogg*, 94 U. S. 469, 475; *Mould v. The New York*, 40 Fed. Rep. 900; *The Bordentown*, Id. 682, 688, 689. The result was natural and to be looked for in the case of sinking an old and leaky boat, such as the claimant knew, or might have perceived, this boat to be. There is no evidence of any concealment, nor does it appear that the boat was unfit for the proposed voyage, but only that she was unfit to have a hole knocked in her bottom, and be sunk, without the risk of total loss. The duty to raise and repair, under such circumstances, if possible, and if anything can be saved thereby, is well settled. Here the accident resulted in a total loss in consequence of the weakness of the barge, which rendered raising impossible.

I am quite satisfied that a barge of ordinary seaworthy condition would not have proved a total loss as in this case, and this must greatly affect the estimate of her value as a basis of recovery. The history of the barge also is not favorable to any high estimate of her value, and the evidence seems to me to show that she was so old and weak as to be unable to bear sinking without going to pieces. Much as I must regard the judgment of the commissioner who saw the various witnesses, I nevertheless feel constrained to make a larger deduction from the libellant's estimates of her market value than was made by him. I cannot regard it as credible that the market value of such a barge, that could not sink, through a hole in her bottom, without going to pieces, is any greater than the estimate testified to by the most competent of the respondent's experts. I allow, therefore, \$1,750 for the barge, and the report is modified accordingly.

It is not entirely clear upon the evidence that reasonable diligence was not used in the endeavor to save the cargo, or that these endeavors were not reasonably prosecuted until bad weather prevented further salvage. With the above modification, therefore, the report of the commissioner is confirmed.

It is further urged that the libellant should be disallowed the costs of the reference, on the ground that three-fourths of the testimony, amount-

ing, in all, to about 600 pages, taken before the commissioner, was made necessary through the libelant's attempt at a fraudulent exaggeration of the value of the barge. It is not contended that the mere fact of a recovery of a much less sum than that claimed is a sufficient cause for exercising the equitable power of the court, in admiralty causes, to deprive the successful party of his statutory right to costs. The litigant always has it in his power either to make a legal tender under the rules, or to admit an assessment of damages at a specified sum. If, as in this case, he does neither, but contests every part of the demand, it should be only in a clear case of oppression or of some malpractice that the statutory costs should be withheld. *The Mariner S.*, 28 Fed. Rep. 664; *The Straits of Gibraltar*, 32 Fed. Rep. 297. Differences in the estimates of the value of old vessels quite as great as this are not uncommon; and, considering the difficulties attending such estimates, I am not prepared to find that the differences in the present case, ranging from \$1,250 to \$6,500, prove a fraudulent exaggeration of value. In *The North Star*, 15 Blatchf. 532, and *The Utopia*, 16 Fed. Rep. 507, the reductions were much greater, and costs were allowed the libelants. Some special circumstances are relied on by the respondent as showing fraudulent overestimates of value. These circumstances are not conclusive on that point. The estimates are sustained to a considerable extent by disinterested and reputable witnesses, who cannot be supposed accessible to such motives. The costs are allowed as taxed.

THE CHATHAM.

HALL v. THE CHATHAM.

(District Court, E. D. Virginia. November 3, 1890.)

COLLISION—BETWEEN STEAM AND SAIL—DANGEROUS PROXIMITY.

A steamer and a schooner approached each other end on, or nearly so, at the rate of 866 yards per minute, on a bright moonlight night, in a channel 420 yards wide. The steamer kept on her course until within 50 to 70 yards of the schooner, when the master of the schooner, alarmed at the danger, changed his course, whereupon the steamer turned and backed, but too late to avoid a collision. *Held*, that the steamer was liable, since her neglect to keep away from the schooner until within "dangerous proximity" justified the latter in changing her course.

In Admiralty.

Sharp & Hughes, for libellant.

Walke & Old and *R. H. Baker & Son*, for respondent.

HUGHES, J. This libel is brought by the owner of the schooner F. S. Hall against the ocean steam-ship Chatham, for damages received in a collision between the two vessels which occurred on the evening of October 4, 1889, on the Elizabeth river, at a point testified to be three-eighths of a mile north of Craney island light-house, and about five and a half

miles out from Norfolk. The schooner was bound into Norfolk from Newark, N. J., with a load of phosphate and some kegs of powder. The steamer was bound out from Norfolk for Boston, Mass., with her usual assorted cargo. The schooner was of 152 tons burden, 101 feet long, and drew 8 feet water. The steamer was of 1,900 tons, 285 feet long, 40 feet beam, and 15 feet draught. The channel, for 15 feet draught, was 420 yards wide at the place of collision. The night was a bright moonlight, with a moderate wind from N. E. The schooner was coming in on an ebb tide, before the wind, until just before the collision, and running over the ground at the rate of three and a half miles an hour. The steamer was going out on a course which her master intended to be, and I think was, about on the line of mid-channel, and was running at the rate of nine miles an hour. The two vessels, before the collision, were therefore nearing each other at the rate of 12 and a half miles an hour, or 366 yards a minute. No other than these two vessels were in the river near them. The steamer passed Craney island light at 8:12 P. M., by her own time; and the collision occurred at 8:14 P. M., or two minutes after passing Craney island. The schooner kept her course until within 50 or 75 yards of the steamer, or 8 to 12 seconds before the collision, and then starboarded helm, and threw up her starboard bow to receive the impact of the steamer, which at the same time backed her engine and ported her helm. The latter received no injury. The damages to the schooner, all told, including demurrage, are claimed to be about \$1,800.

The foregoing facts are not disputed. As to other facts the evidence is very conflicting. The schooner's crew consisted of four seamen and a steward. The four seamen all testified under cross-examination as well as direct. The number of the steamer's crew is not given. Only three of them were examined, viz., the master, the lookout, and one wheelman. None other of the steamer's crew were examined, or produced for examination, for libellant. One of the wheelmen was not examined, and was not produced for examination. The four witnesses of the schooner and the lookout of the steamer concur in stating that when the steamer got within 50 to 75 yards of the schooner the schooner starboarded her helm, and all seven of the witnesses state that the steamer thereupon gave one whistle, ported her helm, and backed her engine with all speed. All agree that these maneuvers of the two vessels brought them in collision of the schooner's starboard, with the steamer's port, bow.

This collision ought not to have happened. One would naturally suppose it occurred from the schooner's master taking fright just at the critical moment, losing his head, and in blind panic thrusting his helm just in the direction contrary to the one of safety. We are in the habit of presuming that the skillful mariners who navigate great ocean steamers are very unapt to make mistakes in passing sail-vessels, and that the masters of schooners, being often men of less perfect training and less skillful seamanship, are far more liable to be the authors of collisions that happen with steamers than the masters of the steamers. This has been my own inclination of mind. But presumptions of this sort must not be allowed

to override positive evidence. There is a strong *prima facie* presumption against the steamer. She was moving in a channel 420 yards wide, meeting a schooner, in bright moonlight, with no baffling wind, and with no obstruction whatever, to require divergence from her proper course. She was bound by the law of navigation to keep out of the way of the schooner. Yet she ran so close as to endanger collision from any unforeseen maneuver of the schooner, and did run into that vessel in the wide, clear channel. The case is strongly presumptive against the steamer, whose primal duty was to keep out of the way. It is very true that her master had the right to pass near to or distant from the schooner, as he might elect to do, and that the schooner was bound by the law of navigation to keep on her course without change until the steamer passed. But there was a limit to this discretion of the master and this acquiescence of the schooner, and this limit was passed if the steamer came within so dangerous proximity to the schooner as, in its own master's judgment, to threaten his safety. In this case the schooner's master, lookout, and first officer all believed themselves in the jaws of danger when the steamer had come within 50 to 75 yards of them, end on or one point on the port bow, within 8 to 12 seconds of striking them, and her master, using the privilege of rule 24 of navigation, the right of *saue qui peut*, starboarded his helm. Until this close and dangerous proximity had been reached, no signal of any sort had been given the schooner of the steamer's intention to pass threateningly close to her and yet to clear her. The law imposes a mutual obligation under such circumstances as these,—the sail-vessel must keep her course, the steamer must keep out of her way. But if a steamer, approaching rapidly and very threateningly, gives no indication of an intention to keep out of the sail-vessel's way, that is to say, of doing her own duty, then the schooner is relegated to its supreme right of *saue qui peut* by any maneuver suggesting itself.

The testimony taken in this case is exceedingly obfuscating and contradictory. In some respects it runs into unintelligible vagary. For instance, the weight of the evidence, both of the libellant and respondent, is that the schooner was on the "best of the west side" of the channel on the way coming up the river until a few moments before the collision. I suppose the "best of the west side" means more than half-way off between mid-channel and the western edge, and, inasmuch as half the width of the channel was 210 yards, the schooner was more than 105 yards west of mid-channel. How, then, if the steamer was near mid-channel, could she have been so near the schooner as to frighten the master into a disastrous movement of its helm? The evidence of all the schooner's seamen and of the steamer's lookout is that the two vessels were approaching each other, (four of them say end on, the other says at an angle of one point on port bows,) and that the vessels were only 50 to 75 yards distant from each other when the schooner's helm was starboarded. Evidently the schooner could not have been 105 yards out west of mid-channel when she was almost directly forward of the steamer and only 50 to 75 yards off. This consideration forces me to

reject the contention, however strongly supported by testimony, that the schooner, when she starboarded her helm, was more than 105 yards west of mid-channel.

Equally incredible is the testification that the collision occurred on the extreme eastern edge of the channel at the letter "C" marked by the steamer's master on the chart filed in the cause. That point is 210 yards from mid-channel, and if the steamer was moving in mid-channel until the schooner starboarded her helm, and the collision occurred in 8 to 12 seconds after the maneuver, how could both vessels have got to a distance of 210 yards to the east before the collision happened? More incredible still, if the schooner was 105 yards on the "best of the west side" of mid-channel, the two vessels would have had to run 315 yards across the channel to get into collision after the schooner starboarded, if the collision occurred at the place marked "C." I must reject both these contentions, urged in behalf of the respondent, and am constrained to conclude that the collision could not have occurred either as far as 105 yards west of mid-channel, or as 210 yards east of it. The steamer had no business to be so far out on either side. I cannot believe she was in either position, much less in both; and it seems to me to be a cut-throat contention in her behalf to insist that she was thus far from mid-channel on either side, west or east, or on both sides. If the schooner was 105 yards west, why should the steamer have run so far out towards the schooner there, as to frighten the master into starboarding his helm? And if the collision occurred 210 yards east of mid-channel at "C," why should not the schooner, when as far away from mid-channel as that, have escaped the steamer handsomely? I cannot but reject both these contentions.

What, then, are we to believe in this case? It is natural to presume that the master of the steamer, having the schooner either dead ahead or one point on his port bow, ran along mid-channel after passing Craney island, expecting to run very near to, but yet to clear her without risk of collision. This is my own presumption, and would seem to be the most reasonable one the case admits of. Adopting it, the question which presents itself is, did not the steamer run too near to the schooner? Did it not glide, against the master's wish and intention, and probably without his knowledge, into such "dangerous proximity" to the schooner as to produce reasonable alarm in the schooner's master, under which alarm he starboarded his helm as a means of easing the impending blow? If the steamer did run into this "dangerous proximity," then the schooner's master was justified, in any maneuver he made intended to mollify the concussion, by rule 24 of navigation, which allows a sail-vessel to change its course when in the jaws of danger. This, then, is the pivotal question in the case: Did the steamer run too near the schooner? And this question resolves itself into the form whether or not, in a channel amply wide, and clear of ships, a steamer which is approaching a sail-vessel, either end on or with the latter within one point on her port bow, and at the rate of 366 yards a minute, may run to within 50 or 70 yards of the sail-vessel without any change of course,

and without making known to the sail-vessel in some unmistakable manner that she intends keeping out of its way.

I am of opinion that this question admits of but one answer; which is, that under the conditions described a steamer has no right to run so near. Eight to twelve seconds is too short a time to leave to a sail-vessel for deciding whether or not to resort to rule 24. Of course, the case that has been stated contains as one of its essential features the assumption that the two vessels were approaching each other end on, or within one point on the port bow, and in that alignment the steamer had come within 50 or 75 yards, equivalent to 8 to 12 seconds, of the schooner. It utterly discards the contention of the respondent, that the schooner was out more than 105 yards west of mid-channel, or even 50 to 75 yards distant at right angles from the line of mid-channel pursued by the steamer. If they were approaching end on, the schooner was on that same line of mid-channel. If they were approaching, each within one point on the other's port bow, I calculate that the schooner was not further than about 15 to 20 yards from the line which the steamer was traversing, certainly not more, shortly before reaching within 50 to 75 yards of proximity.

The case stated assumes that the schooner's master had reason to be alarmed at the approach of the steamer. The first cause of this alarm was his having seen the steamer's green light soon after she passed Craney island. Respondent treats this unimportant averment as very material, and produced experts to prove that this was impossible. It is to be observed that in order that the side-light of a long, narrow, trimly-built steamer, with deck high up above water, and lights well out from the sides, may be seen half a mile off, it is not necessary for her to show her whole broadside to a ship. The schooner was half a mile distant when the steamer passed Craney island, and could have seen the Chatham's high and bold green light if the Chatham's starboard side was shown at but a very slight angle. Not only do all the seamen of the schooner testify positively that they did see the green light just after the steamer passed Craney island, but the latter's lookout testified that on passing the island a steamer has to bear a little westward; and expert Mayo avers and reiterates the same statement. I find no testimony in the case showing how many or how few points such a steamer as the Chatham must veer from a direct line to afford a brief glimpse of a side-light to a vessel half a mile ahead of her; but one of the witnesses says, what my own reflection inclines me to believe, that it requires but three or four points. On a question like this expert testimony is of little avail to contradict the positive testimony of several witnesses. The emphatic asseveration of the schooner's four seamen is that the steamer, when abreast of Craney island, showed her red light; that she soon after showed her green light for a brief space; and that after that she showed both lights, and continued to show both, seeming to approach the schooner end on, until she was within 50 to 75 yards of her; that the schooner's lookout, believing a collision to be inevitable, ran for safety to the aft part of the vessel; that, as he did so, the master

of the schooner, himself believing a collision inevitable, starboarded his helm to relieve the concussion; that thereupon the steamer blew one whistle, backed her engine with all steam, and ported her helm; and that from these two maneuvers of the respective helms the collision resulted, starboard bow of schooner striking port bow of steamer. That the respective bows of the two vessels came together in this manner is conceded; and if the testimony of the schooner's seamen, as recited, be true, then the master was justified in trying as best he could to avoid or relieve the collision. I think the testimony is true, and I think the fault was in the steamer's running into too "dangerous proximity" to the schooner, and thereby failing to keep out of her way in the sense which the law of navigation requires. See *The Carroll*, 8 Wall. 302, as to the law of "dangerous proximity." See, also, for numerous authorities on the point presented in this case, *The Schmidt v. The Reading*, 43 Fed. Rep. 398.

I will decree for the libellant.

GILKEY *et al.* v. THE BETA, Etc.

(District Court, S. D. New York. October 31, 1890.)

1. COLLISION—DAMAGES—RATING FOR INSURANCE—ALLOTMENT NOTES.

Although the expense of the new rating of a vessel repaired after collision, as an expense necessary to put the vessel into her previous insurable condition, may be recovered under the rule of *restitutio in integrum*, it is rightly excluded when the vessel is repaired in a different manner from her original construction; nor are allotment notes recoverable as advances to the crew when freight and demurrage are allowed for.

2. SAME—SUBSEQUENT CAPSIZING—PROXIMATE CAUSE.

After collision at sea the schooner B. H., filling but not sinking, was during one day towed in from sea to Fortress Monroe, and there left in charge of her captain, who afterwards employed a tug to tow her to Norfolk, a trip of an hour or two only, during which she capsized, no cause of capsizing being made known, and the master testifying that he could not explain it. *Held* that, considering the much longer previous towage at sea under more difficult circumstances, the subsequent capsizing of the schooner, without any change in her condition, and without explanation, was to be inferred *prima facie* to be due to mismanagement, and not to the collision, as the proximate cause, and that the additional damage and expense caused by such capsizing could not be allowed in the assessment of the collision damages.

Exceptions to the Commissioner's Report.

Owen, Gray & Sturgis, for libellants.

Wing, Shoudy & Putnam, for claimant.

BROWN, J. 1. When, in consequence of collision and repair, a new rating and certificate have to be procured in place of the former rating and certificate in order to obtain insurance on the vessel, considering that marine insurance is not merely universal, but practically necessary for the support of maritime commerce, I think the expense of such a new rating, which is an expense necessary to put the vessel into her previ-

ously insurable condition, comes within the rule of *restitutio in integrum*, and should therefore be allowed as part of the damages. *The Belgenland*, 36 Fed. Rep. 504, 507. The rating is an incident attached to the vessel, and valuable to the owner. I see no reason why his pecuniary loss in this respect, when consequent on the collision, should not ordinarily stand on the same footing as any other direct pecuniary loss therefrom. It was disallowed by the referee in this case, as his report shows, because the vessel had been repaired in a different manner from her original construction, and was therefore "in some respects new." For rerating, as respects her new and different construction, the claimants could not be charged, and as the item was not divisible, it was here properly excluded.

2. The advance on allotment notes to the crew was rightly excluded, because the allowances for freight and demurrage covered such charges in another form.

3. The numerous items in regard to the damage to the vessel, cargo, and effects, and the charges and expense attending the raising and repair, as well as the value of the vessel herself, have been carefully considered by the commissioner, and to most of them I do not find in the evidence sufficient warrant for any material change in his findings, except as connected with the upsetting of the vessel, and the liberal allowances for personal effects.

4. Considerable damage, as the commissioner states, was no doubt caused by the capsizing of the schooner while being towed from Fortress Monroe to Norfolk. The collision happened at sea, off Cape Hatteras, two or three days previous. On the day after the collision she was towed in from sea to Fortress Monroe by the *Beta*, where she was left in charge of her master. On the following day a tug was employed by him to tow her to Norfolk, a trip of an hour or two only, and on the way she capsized. The captain was asked to explain why she capsized and answered that he could not do so. No further evidence was given on the subject. The schooner, through damage by the collision, (*The Beta*, 40 Fed. Rep. 899,) at once partly filled with water, but, as her cargo consisted of empty hogsheads and tierces, she did not sink, and was towed in that condition to Fortress Monroe. She had floated for two days, and had been towed this long distance at sea, and yet, on the short trip from Fortress Monroe to Norfolk, without any change in her condition suggested, and under far less difficulties of towing, capsized. The claimants were not present or represented. They have no means of ascertaining the cause of capsizing, and the libellant's captain says he cannot give any explanation, which is equivalent to saying that he knew of no change in her condition, and no reason why she should be upset. The fair inference, as it seems to me, under such circumstances, in the absence of explanation, is that she upset through the lack of proper management in towing, and, if so, the damage caused by upsetting is not a proximate result of the collision, but chargeable to the subsequent fault. It is doubtless extremely unsatisfactory to adjust such an item of damage upon evidence and presumption of such a kind, and in the absence of fuller, appropriate testi-

mony; but the general burden of proof is upon the libelant to establish not only damage, but that the damage claimed arose proximately from the collision; and this must be shown either by proof or by reasonable presumption from the circumstances. In ordinary cases, doubtless, the sinking of a vessel while on her way from the place of collision to the place of repair will be presumed to be the result of the collision itself, where no subsequent want of care affirmatively appears. But this presumption is a presumption of fact, which may or may not be reasonably drawn from all the circumstances of the case. *The Reba*, 22 Fed. Rep. 546. In the present instance such an inference, as I have said, does not seem to me to be justified. It is not a case of sinking, such as might naturally have happened if the vessel got water-logged. Nor was it a capsizing arising in the course of sinking. Had that been the case, the captain could easily have explained it. The captain was in the situation of an expert on the spot, and acquainted with all the circumstances of the collision, and its effects on the vessel up to the time she capsized. His inability to explain it excludes every supposable cause arising from the collision, and leaves only that of mismanagement remaining. The damage arising from capsizing cannot be separated from the previous damage with exactness; but sufficiently, perhaps, for substantial justice. The gross sum allowed for raising and towing, \$1,386.37, is not all owing to the upsetting. Had she not capsized, she must have been pumped out, and the water damage to the cargo and effects would have been about the same; but there is additional damage from mud, and damage to sails, and other articles, from the upsetting alone. Upon examining the evidence, I find there should be deducted \$2,200, for this cause, on account of the schooner and her furniture and sails, \$250 on account of cargo, \$250 on account of the captain's personal effects, and \$153.19 for one-fourth of the amounts allowed to the crew, respectively.

5. *Demurrage*. No reasonable objection can be made to the rate of demurrage allowed by the commissioner. The time allowed is liberal in any event, and disallowing the damages from upsetting the time must be reduced by at least 21 days, amounting to \$672. With the foregoing deductions the damages will aggregate the sum of \$14,701.48, for which sum, with interest from March 26, 1889, amounting in all to \$16,110.36, a decree may be entered, with costs.

THE EXPRESS.¹

THE NIAGARA.

THE N. B. STARBUCK.

THE CHARM.

NEW YORK & CUBA MAIL S. S. CO. v. THE EXPRESS, THE N. B. STARBUCK, and THE CHARM.

NEW ENGLAND TERMINAL CO. v. THE NIAGARA, THE N. B. STARBUCK, and THE CHARM.

(District Court, S. D. New York. November 28, 1890.)

COLLISION—STEAM VESSELS CROSSING—EAST RIVER NAVIGATION—WRONG SIDE—NOT SIGNALING—SWINGING COURSE.

The steam-boat E. was on a trial trip up the East river, running at the rate of less than eight knots, and in the middle of the river. While rounding Corlear's Hook, and before she had headed straight up river for the reach above, the steam-boat N., in tow of two tugs, was seen some way ahead in about mid-river, heading somewhat towards Brooklyn. The E. gave two whistles to indicate that she would pass the N. on the New York side, and, getting no answer, stopped and repeated her signal, when, seeing the leading tug give a sheer towards New York, the E. reversed, but nevertheless struck the N. on her starboard bow. The collision was on the Brooklyn side of mid-river. From the time she sighted the N. the E. had been continually swinging to port. The N., without steam, was in tow of the tugs S. and C., the S. ahead on a hawser, and the C. along-side the N. They had come from Ninth street, New York, bound down the East river, and might have kept on the New York side of the stream. The first signal of the E. was not understood by the S., though heard by many on shore. There was no satisfactory evidence of any timely signals from the tugs, and they gave no signal of three whistles under inspector's rule 3, in order to come to a common understanding. *Held*, that the tugs were in fault for the collision, (1) for unnecessarily going to the easterly side of the channel with the N. still headed towards the Brooklyn shore; (2) for not properly signaling, or answering the signals of the E.; (3) and for attempting to haul the N., after she was nearly across the line of the E., towards the New York shore at the time of her last signal, through probable inattention to the previous signals, and to the position and heading of the E. at the time. As to the fault of the N., question reserved.

In Admiralty. Cross-suit for damages by collision between the steam-boats Express and Niagara.

Carter & Ledyard, for the Niagara.

Wing, Shoudy & Putnam, for the Express.

Robert D. Benedict, for the Starbuck and the Charm.

BROWN, J. The above cross-libels were filed by the owners of the steamers Niagara and Express, each about 298 feet long, to recover the damages sustained by them, respectively, through a collision in the East river, a little before noon on December 2, 1889, just above Corlear's Hook. The steam-tugs Starbuck and Charm were made parties defendant in the original cause under the twenty-ninth rule, upon the petition of the owners of the Express. Upon the filing of the petition, the own-

¹Reported by Edward G. Benedict, of the New York bar.

ers of the tugs appeared without process, as claimants, and filed a stipulation for value.

The Niagara was coming down the river in tow of the two tugs, without any steam-power of her own, bound for the North river. The tide was near the last of the ebb in mid-river, running down not over a knot an hour, while the current was already setting upwards on both shores. The tug Starbuck was leading, with a hawser of from 120 to 150 feet attached to the Niagara's starboard bow. The Charm was along-side the Niagara, a little aft of amid-ships on her starboard side. The Niagara had been taken from the Ninth-Street dock, New York. She came down river within 100 feet of the ends of the piers to Third or Fourth street, when the tugs pulled sharply out into the river, so that when abreast of the Houston-Street ferry the Niagara headed for Havemeyer's on the Brooklyn side, at South Third or Fourth street, a change of at least three points. She proceeded to port towards mid-river, and swung gradually to the southward, so as to head for the upper part of the navy-yard, or Cobb dock. The pilot of the Charm was on board the Niagara, directing her navigation, in conjunction with the Niagara's captain, who was also present at the wheel, and gave some orders. When nearly abreast of the Broadway ferry, Brooklyn, and on a line running from the upper slip of the Grand-Street ferry, New York, she was struck on the starboard bow by the starboard corner of the Express, a new square-headed steam car-float, which had just rounded Corlear's Hook, coming from Rutgers street upon a trial trip up the East river. On leaving Rutgers street, the Express went out into about mid-river, and then up on the usual course. While rounding the hook, and before she had got headed straight up river for the reach above, the Niagara and her tugs were seen in about mid-river, and apparently off about Stanton or Rivington street, all heading towards the Brooklyn shore, and all showing their starboard sides. The master of the Express, deeming it imprudent to attempt to pass on the Brooklyn side, soon after gave a signal of two whistles, and, getting no answer, stopped her engines, and gave a second signal of two whistles, to which no answer was received. At about the same time the Starbuck took a sheer towards the New York shore, whereupon the Express reversed strong until the collision. At the time the last signal was given the Express was pointing nearly up-river, and for the stern of the Niagara, which was probably about 300 yards distant. The course of the Niagara was changed about a point by the sheer of the Starbuck, and by her own hard a-port helm. In behalf of the Express it is contended that the collision was caused by the Starbuck's sheer, and the Niagara's change of course, and through her improper presence on the Brooklyn side of the river, and inattention to the signals of the Express. On the part of the Starbuck there is some evidence that a signal of one whistle was given in answer to some signal from the Express, that was indistinctly heard by the Starbuck and not understood, and that there was one blast from the Charm when the vessels had approached very near each other. Neither of these signals were heard on the Express.

From the time the Niagara was first seen, probably about half a mile away, the Express was always on the swing to port until her engines were reversed. It is undoubtedly this circumstance that has led to more than usual diversity in the testimony in reference to the bearings of the Starbuck and Niagara at different times during this swing. There is no doubt, I think, that when the Niagara was first seen, the Express was about in mid-river between the marble yard and Ordnance dock, near the point indicated by Capt. Bixby on the chart, heading at that time about for the Broadway slip, (which is up-river at that point,) and that the Niagara was then about abreast of Rivington street, or South Fourth street, Williamsburg, heading for the northerly part of Cobb dock, and being then in mid-river, or, as the three Williamsburg pilots say, a little on the Brooklyn side. Upon those courses the Niagara would be heading about one point towards the Brooklyn shore, and the course of the Express would be crossing that of the Niagara by an angle of nearly four points. The weight of evidence is that the leading tug, the Starbuck, was heading at the time of the first signal from the Express about down river, which would make her course about a point more to starboard than that of the Niagara. It is claimed on behalf of the latter that this ought to have been perceived by the Express, and was sufficient evidence that the tugs were endeavoring to haul the Niagara towards the New York side of the river, and that the Express was consequently not justified in proposing to go to the left with a signal of two whistles. I am not convinced of the soundness of this contention. The clear weight of testimony, particularly that derived from disinterested witnesses, who had the best means of estimating, is that the collision took place decidedly on the Brooklyn side of the river, nearly, if not quite, two-thirds of the distance across towards the Brooklyn shore. Some two and a half or three minutes probably before the collision the Niagara was seen moving from across mid-river in that direction, nearly half a mile distant, at an angle of three or four points with the heading of the Express. I see no reason to doubt the truth of the testimony of the latter's witnesses that the Starbuck seemed to be moving in the same direction as the Niagara, and right ahead of her. It was impossible, I think, looking sideways at such an angle, to distinguish a difference of a point in the headings half a mile away or half that distance. The Niagara being much the larger vessel, her heading would be more easily and certainly perceived. The Express was bound to take notice, from the Niagara's evident heading and position, either in mid-river or already on the Brooklyn side, that the Niagara might be intending to go to the Brooklyn shore; and as her speed was not known, and the river above was much narrower, and so large a vessel upon a hawser was more or less unwieldy, the Express was bound to act with special caution, and not attempt to cross the line of the Niagara's course in order to pass her on the Brooklyn side, towards which she was drawing, until some change in her course was evident. Her master and pilot were called upon to determine what was most prudent under circumstances of uncertainty as to the Niagara's intentions; and in the absence of any signals from the

Starbuck or Niagara, signifying what their intentions were, I think the Express was justified in her signal of two whistles proposing to give the Niagara the easterly shore, towards which she was moving. The Express had a right to expect an answer, but got none. She then stopped her engines, and soon after repeated her former signal, and still heard no answer, though watching for one. In the mean time her stem had been swinging to the northward, bringing her in the rapid narrowing of the river on the easterly shore, somewhat on the easterly side, so that at the time of the last signal, when the vessels were probably about 350 yards apart, she was pointing about for the stern of the Niagara, and perhaps a point towards the easterly shore above Greenpoint. In this situation there was no reason why the vessels should not have passed clear, as they plainly would have done had the Niagara kept her course, and had not the Starbuck hauled off strongly to the westward, and the Niagara put her wheel hard a-port, so as to bring her across the heading of the Express. The moment this was perceived, the Express backed strong until her head-way by land was nearly or quite stopped, her head meantime swinging unavoidably somewhat to starboard, while the Niagara also hauled about a point to the westward.

I do not perceive any fault in the Express in these maneuvers. The collision, as it seems to me, was brought about by three faults on the part of the tugs and the Niagara: (1) Unnecessarily going to the easterly side of the channel, and with her course still kept directed towards the Brooklyn shore; (2) in not signaling herself, nor properly answering the signals of the Express, as required by the regulations; and finally (3) in attempting to haul the Niagara towards the New York shore and across the course of the Express, at the time of her last signal, evidently through inattention to the signals, the position, and the heading of the Express. From the testimony of several disinterested witnesses, as well as of many others on board the Express, there is no doubt that the signal whistles of the Express were clearly sounded, and ought to have been heard and heeded by the Starbuck and Niagara. There are few circumstances in which the need of proper signal whistles, such as the regulations expressly require, is more urgent than in a case like this, where vessels are rounding a sharp bend in the river, and one of them is a large ship upon a hawser without motive power of her own. The testimony of the pilot of the Starbuck in reference to his hearing and giving whistles seems to me quite unsatisfactory. It is plain that there was no endeavor on his part to come to any common understanding by signals, as it was his duty to do. He says he did answer a signal from the Express, but without exactly knowing what that signal was. He got no reply, and did not repeat his own signal. This is not a compliance with the regulations. He seems to have taken it for granted that the Express would keep out of his way; and, I think, he gave her very little attention till the last signal. There was also no lookout proper on either the Niagara or the tugs. I am not satisfied that any signal whistle was given by the Starbuck until she was so near that it was of no use. Her mate remembered none; and none was given by the Charm until the vessels were

very near together. It cannot be claimed that the absence of signals was immaterial. A common understanding by means of them was of the utmost consequence. Next to the requirement that each vessel should keep as near the middle of the river as may be, and pass to the right, signals are among the most important of the means provided by law for the avoidance of collisions. *The Connecticut*, 103 U. S. 710, 713. I cannot for a moment doubt that had proper signals been given by the Starbuck, at a reasonable distance, indicating that she intended to go towards the New York shore, the Express would have gone, as she might then have safely gone, towards the Brooklyn side. It was the conduct of the Niagara, in continuing to cross mid-river, and to approach towards the Brooklyn shore when first seen, and her continuance of that heading without any proper and timely whistles indicating an intention to go back to the New York side, that compelled the Express to hold herself in a position of expectancy to do what might be apparently needed, maintaining about her relative place in the river, as she did, until her last signal, when she was compelled to back by the darting of the Starbuck towards the New York shore, which made it impossible for her to go ahead safely on either side. This sudden hauling of the Starbuck towards the New York shore must also be ascribed to inattention by the Starbuck to the headings of the principal vessels,—the Express and the Niagara. There was no proper lookout on either the Niagara or the tugs. *The Ariadne*, 13 Wall. 475, 478. I have no doubt, both from the direct testimony, as well as from the swing of both vessels to starboard, and the cutting of the hawser, that at the time when the Starbuck sheered, probably about a minute or a minute and a half before the collision, the Niagara's bows were already across the line of the course of the Express, and still heading at least a point to the eastward or starboard of the course of the Express, and that, had the Starbuck observed this, and gone to the eastward, as she ought to have done in that situation, there would have been no collision. The small angle of collision, about a point or two only, notwithstanding some starboard swing of the Express in backing, leaves no doubt that had the Starbuck taken that course the Express would easily have passed clear to the westward. Whether the Starbuck was or was not a point to starboard of the Niagara at that time is immaterial. She could easily have gone towards the Brooklyn side. It was then too late for the Express to go to the eastward, and the Starbuck's sheer prevented her going to the westward, and made collision unavoidable. The Express properly reversed to avoid collision if possible; or, if not, to reduce its effects to a minimum.

There was no cause and no necessity for the Niagara to be upon the easterly side of the river. The statutory duty to go in mid-river and pass to the right required her, when nothing was in the way, to keep on the westward side. Her own evidence leaves no doubt that she could have kept there at all times had any serious effort been made to do so. The chart put in evidence shows no reason why, after leaving Ninth street, she should not have hauled out towards the middle of the river anywhere below Eighth street, with a tow drawing but 15 feet. This would have

given her a very easy curve. But, aside from this, her testimony shows that after keeping close to the New York shore until she reached Third or Fourth street, she then hauled to port so as to head for Havemeyer's when abreast of Houston street, thus changing at least three points in going down river about 500 feet, notwithstanding this change was obstructed by the flood-tide on shore. A similar change of three points to starboard, effected from the time when she was off Houston-Street ferry, and outside of the Stanton-Street reef, which extends out only about 300 or 400 feet, would have brought her heading straight down the river, instead of towards the Brooklyn shore, and have kept her all the time within the New York side of the river, and would have been accomplished at least a fifth of a mile above the place of collision, and probably before she was seen by the Express. The sheer of the Starbuck and the Niagara cannot be justified as an error *in extremis*, because the situation, when this error was committed, was a faulty one, for which they were themselves to blame. *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. Rep. 468.

I do not think the speed of the Express was at any time substantially above the statute limit of eight miles an hour, allowing about a knot for the ebb current. If at one time previous it may possibly have been a little above eight miles, which I doubt, it was reduced by stopping her engines at such a considerable distance from the Niagara as not to constitute a proximate cause of the collision. At the time when her last signal was given, she was running, I think, at the rate of less than seven knots, and from that speed she would stop more quickly than the ordinary finer line steamers of the same maximum speed; that is, probably in less than one and a half minutes, and in less than 550 feet. *The Normandie*, 43 Fed. Rep. 151, 160. The Niagara, coming down with a current of about a knot, was probably going at the rate of two and a half or three miles an hour. Though this speed was somewhat checked, there remained sufficient speed to account for the damage done in the case of vessels so large as these. The above rules, as to the navigation of the East river, have been constantly applied in this court, and have been affirmed in the circuit court. See *The Rockaway*, 38 Fed. Rep. 856, affirmed, 43 Fed. Rep. 544; *The Chas. R. Stone*, 18 Fed. Rep. 190; *The Garden City*, 38 Fed. Rep. 862; *The Anglia*, 41 Fed. Rep. 607; *The Britannia*, 42 Fed. Rep. 67. They seem to me to require the Express to be absolved from blame, and the tugs to be held in fault, irrespective of the rule of the starboard hand, which is not necessarily applicable in turning the bends of rivers. *The Velocity*, L. R. 3 P. C. 44; *The John S. Darcy*, 29 Fed. Rep. 644, 647; *The Oceanus*, 5 Ben. 545.

A decree in the second libel may be entered in favor of the owners of the Express for their damages and costs against the two tugs, whose stipulations are sufficient to answer her demands. *The Bordentown*, 40 Fed. Rep. 682. In the first libel, the Express is entitled to a dismissal with costs. In the first suit no relief was demanded by the owners of the Niagara against the tugs. If relief is sought in her favor against them, I will hear further argument on the part of the tugs upon the question

whether upon the evidence the Niagara was such a participant in the navigation as to be chargeable with half the damages. See *The Doris Eckhoff*, 32 Fed. Rep. 555; *The Carrier Dove*, Brown. & L. 113; *The Viobe*, 13 Prob. Div. 55.

THE MYSTIC.

FINCH v. THE LIGHTER MYSTIC.

(District Court, S. D. New York. December 15, 1890.)

COLLISION—PERSONAL INJURIES—MUTUAL FAULT—PART DAMAGES.

While the canal-boat on which the libelant lived lay moored in the slip, the bowsprit of the lighter M. approached the cabin, threatening collision. The libelant ran out to remove her child out of harm's way, and, having done so, put her hand against the end of the bowsprit, to fend it off. Her wrist was caught between the bowsprit and the cabin window frame, and was broken. *Held*, that the libelant, though chargeable with contributory negligence, could recover part of her damages, in accordance with the decision of the supreme court in the case of *The Max Morris*, 11 Sup. Ct. Rep. 29.

In Admiralty.

Hyland & Zabriskie, for libelant.

Alexander Campbell, for claimant.

BROWN, J. The libel states that, while the barge Yonkers, upon which the libelant lived, lay moored along-side the wharf, on the lower side of the slip, between piers 28 and 29, East river, bow in, the lighter Mystic, in going out of the slip, ran her bowsprit into the stern cabin of the Yonkers, and struck and broke the libelant's arm, for which recovery of damages is sought. The answer alleges that while the lighter was stuck fast between two other canal-boats, in endeavoring to get out of the slip, the Yonkers drifted down upon the bowsprit of the Mystic. The weight of proof and of probability is inconsistent with the alleged drifting down of the Yonkers upon the Mystic. All the evidence indicates that the movement of the bow of the lighter was a very gentle movement, and I have no doubt, taking all the evidence together, that it was some swing of the bow of the lighter towards the Yonkers, while her stern was moving in between the other boats, and while the lighter's men were endeavoring to make more room for her, that brought about the collision. While the lighter is therefore responsible, the damages would evidently have been but slight had not the plaintiff herself most improperly and foolishly endeavored to fend off the bowsprit by putting her hand against the end of it as it approached the cabin; the result of which was that her hand was caught between the end of the bowsprit and the frame of the cabin window, and the outer bone of her wrist broken. A few seconds previously she had seen the bowsprit approaching, as she sat in the cabin, and she ran out to rescue her child from danger, who

was playing on the deck. The child was placed out of harm's way before the libellant put her hand on the end of the bowsprit to ward it off; so that this act does not have the justification of any necessity in order to rescue the child. Nor was it such an act as persons of ordinary prudence under such circumstances would have committed. *Collins v. Davidson*, 19 Fed. Rep. 86. It was really the thoughtless, instinctive act of a person seeking to avert a trifling damage, without thinking of the ineffectiveness of the attempt, or its manifest danger to herself. The libellant is therefore chargeable with contributory negligence. In accordance with the recent decision of the supreme court in the case of *The Max Morris*, 11 Sup. Ct. Rep. 29, affirming the judgment of this court, (24 Fed. Rep. 860,) the libellant, though not entitled to full damages, may yet be allowed some compensation for her actual pecuniary loss. She was incapacitated from her usual work for about three months, during which time she was obliged to procure assistance in her family duties, at the expense of board and wages. I charge to herself her pain and suffering and inconvenience, and allow her a decree for \$125. This amount, though small, is much more, it must be remembered, than the ordinary damage from the collision with the Yonkers would have been.

THE NAUTIQUE.¹

THE RELIANCE.

JOSEPH EDWARD DREDGING Co. v. THE NAUTIQUE.

MISSISSIPPI & DOMINION S. S. Co. v. THE RELIANCE.

(District Court, E. D. New York. December 26, 1890.)

COLLISION—STEAM-VESSELS—CHANNEL-WAY—LOOKOUT.

A dredge, employed in deepening the channel of New York bay, on arrival at her dredging ground found her pumps out of order. While repairing them, she made a circuit, and, returning, swung into the channel under the bows of the steam-ship N., which was going to sea. The dredge had no lookout, and the man at the wheel did not see the N. until she was upon him. The place where the collision occurred was buoyed as a place being dredged, and signals were flying on the dredge to show her character. At the time of the collision, an incoming steamer was passing the N., and the attention of the latter's officers was given to her. *Held*, that both vessels were in fault in keeping insufficient lookout.

In Admiralty. Cross-suits for damage by collision.

Sullivan & Cromwell and *Carpenter & Mosher*, for the Reliance.

Butler, Stillman & Hubbard, for the Nautique.

BENEDICT, J. These actions arise out of a collision that occurred in broad daylight in the lower bay of New York, near buoy No 10½, between the steam-ship Nautique and the dredging steamer Reliance, on

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

the 16th day of January, 1888. The *Reliance* was engaged in dredging out a cut on the east side of the main ship channel, and on the morning in question had proceeded to the cut, to begin work. Upon arrival there, she found her pumps out of order, and, while putting them in order, she made a circle around, with the object of coming back to her place in the cut as soon as the difficulty in the pumps was removed. Before she arrived back at her position, upon the completion of her turn, she was struck a glancing blow upon her starboard side by the steamer *Nautique*, then proceeding to sea, and at the time in the act of passing the steam-ship *Umbria*, which was coming up upon the western side of the channel.

The contention of the *Reliance* is that she made her circle within the boundaries of the channel, and within the portion marked off by buoys as the place where she was at work, and it was the duty of the *Nautique* to avoid her. The weight of the evidence upon this point, however, is that, in making her turn, the *Reliance* passed out of the channel to eastward a considerable distance, and then rounded to upon a starboard helm, to regain her position in the cut. She passed from the shoal-water to the east of the channel out into the channel, directly ahead of the *Nautique*, then engaged in passing the *Umbria*, where there was none too much room for that purpose. Considering the situation of the *Umbria*, the *Nautique*, and the *Reliance*, it was, in my opinion, a fault on the part of the *Reliance* to swing herself into the channel under the bows of the *Nautique*, as she did. The reason she did this undoubtedly was because she had no lookout. Her master was below, repairing the pumps, and the man at the wheel did not see the *Nautique* until she was upon him. I hold, therefore, the dredge guilty of fault conducing to the collision in omitting to keep a proper lookout. I also hold the *Nautique* in fault for omitting to keep a proper lookout. The place where she was navigating at the time of the collision was buoyed, as a place being dredged, and the *Reliance* had signals showing that she was a dredging-boat. Had proper lookout been kept on the *Nautique*, the *Reliance* would have been observed to be swinging into the channel in time to have avoided collision by slightly porting on the part of the *Nautique*, or by stopping a little sooner than she did. The reason she omitted these precautions was because her attention was directed to the *Umbria*, and she therefore omitted to watch, as she ought to have done, the movements of the *Reliance*. Both vessels being found guilty of fault, the damages will be apportioned.

UNITED STATES v. DIXON.

(District Court, N. D. California. December 11, 1890.)

FEDERAL COURTS—WASHINGTON DISTRICT COURT—GRAND JURY.

Act Cong. April 5, 1890, entitled "An act to provide for the time and place to hold terms of the United States courts in the state of Washington," provides that "the state of Washington shall constitute one judicial district" uniformly refers to the court as the "district court for the district of Washington," and, though "for the purpose of holding terms by the district court," the district is divided into four specified "divisions," known as "Northern," "Southern," "Eastern," and "Western," the provisions respecting the times and places of holding court refer in terms "to civil suits not of a local character," and no mention is made of criminal offenses." *Held*, that under Const. U. S. Amend. 6, providing that in all criminal prosecutions the accused shall be tried by a jury of the "state and district wherein the crime shall have been committed," an indictment purporting to have been found "by the grand jurors of the United States of America for the northern division of the district of Washington, sworn * * * to inquire of all offenses * * * committed within the northern division of the district of Washington," was void, as the state constitutes but one district, and the jury must be drawn from and have power to inquire into offenses in the whole thereof.

At Law.

Charles A. Garter, U. S. Atty.

William Hoff Cook, for defendant.

HOFFMAN, J., (*orally*.) The defendant having been committed by the commissioner to answer for an offense triable in the district of Washington, application is now made for the usual order of removal to the district where his offense is justiceable. The only evidence tending to show his guilt was a certified copy of an indictment found against him. It purports to have been found "by the grand jurors of the United States of America for the northern division of the district of Washington, sworn and charged to inquire of all offenses against the laws of the United States, committed within the northern division of the district of Washington." It was evidently considered by the pleader that grand jurors should be summoned in and for the body of each of the divisions of the district of Washington which are mentioned in the act of April 5, 1890, and that their inquiries into offenses against the laws of the United States should be limited to offenses committed within the division of the district from which they are summoned. This method of procedure was evidently supposed to be authorized, if not required, by the third section of the act of April 5, 1890. That act is entitled "An act to provide for the time and place to hold terms of the United States courts in the state of Washington." The third section provides "that for the purpose of holding terms by the district court said district shall be divided into four divisions, to be known as the 'Eastern,' 'Southern,' 'Northern,' and 'Western' divisions."¹ It then proceeds to designate the counties of the state which shall constitute each division. On recurring to the other provisions of the act, it will be seen that the intention of congress was to

¹The western division is called the "Western District," evidently a misprint or clerical error.

constitute one district. The first section provides that "the state of Washington shall constitute *one* judicial district." The sixth section provides that the terms of the district court "for the district of Washington" shall be held at four different places mentioned in the section, and specifies the times of holding those terms. One clerk is appointed for the district court "for the district of Washington," and for the circuit court for the same district. But in order to carry out the provisions respecting the times and places of holding those courts in the "divisions" mentioned in the act each clerk is required to appoint a deputy, who shall reside in the division of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers, and perform all the duties, of the clerk within the division for which he shall be appointed. The phrase "District Court for the Northern Division of the State of Washington" nowhere occurs in the act. The court is uniformly named a "District Court for the District of Washington," and the person appointed clerk for the district of Washington acts in the subdivisions of the district by deputy. The terms of the court are described as the terms of the district court, not for the northern or other division of the district of Washington, but for the district of the state of Washington. The provisions of section 4, respecting the places and times of holding court, refer, in the language of the section, "to civil suits not of a local character." No mention is made of criminal offenses. It might seem that the averment in the indictment that the grand jury has been called and summoned for the northern division of the district of Washington may be considered a technical or verbal error; but this view I consider wholly untenable. From the organization of the government, the United States were divided into judicial districts, for each of which a district judge was appointed, and circuits were established comprising several districts in which circuit courts were held in and for each district composing the circuit. The sixth amendment to the constitution provides "that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." It has been shown that the state of Washington, by the terms of the act, constitutes but one judicial district. The right of the accused to be tried by a jury of that district would seem to be incontrovertible, nor can we suppose that congress intended to pass a law restricting that right, and thus in violation of the constitution. The object of the section relied on is apparent. It was merely to regulate the times and places for holding the district court for the district of Washington for the trial of civil cases, but in criminal prosecutions a jury must be drawn from the whole district, and not from any division of it. The limitation of the power of the grand jury to inquire only into offenses committed within the division of the district for which they are called would seem wholly without authority, nor would it be practicable. In all cases where crimes have been committed on board of American vessels, on the high seas, it could not be alleged that the crime was committed within the district or any

division thereof. The jurisdiction attaches "to the first district or circuit court in and for the district in which the offender shall be found, or into which he is first brought," (Rev. St. § 730,) and the jury, to indict or try such an offender, must be drawn from the whole body of the district. I am therefore of opinion that the indictment, a certified copy of which was presented to the commissioner, is invalid, and purports on its face to be found by a body of men not known to or authorized by law. It therefore must be treated as a nullity.

PEOPLE'S NAT. BANK OF CHARLESTON v. EPSTIN *et al.*

(*Circuit Court, D. South Carolina. November 14, 1890.*)

1. WIFE'S POWER TO CHARGE HER SEPARATE ESTATE—MORTGAGES.

A mortgage of her separate estate, given by a married woman to secure the payment of her husband's debts to the mortgagee, is invalid in South Carolina.

2. SAME—SUBROGATION.

Where, however, a part of the money obtained by such mortgage is used to pay off a prior valid mortgage on the estate, the second mortgagee will be subrogated to the rights of the mortgagee under the prior mortgage, and to that extent may enforce his mortgage.

In Equity. On bill to foreclose mortgage.

Samuel W. Melton and John Wingate, for complainant.

J. N. Nathans, for defendants.

BOND, J. This bill was filed by the People's National Bank of Charleston, S. C., against David Epstin and Isabella Epstin, his wife, citizens of the state of Tennessee, to foreclose a mortgage given by the wife on her separate and individual property, to secure a loan made by the complainant to Isabella Epstin, amounting to \$3,200, with interest from the 14th day of December, 1886. The answer of the defendant Isabella Epstin, the husband having died, admits the making of the deed of mortgage set out in the bill upon her own separate estate described therein; but she alleges that at the time of the making thereof her husband and co-defendant, David Epstin, was indebted to the complainant in the sum of \$1,357.05 on a protested bill of exchange, dated the 21st day of May, 1886, drawn by David Epstin on Philip Epstin, in favor of one Kirk Robinson, and indorsed by him to complainant, and that her said husband was likewise indebted to the Central National Bank of Columbia on the 14th of June, 1886, in the sum of \$1,193.85, upon a draft drawn by David Epstin on Philip Epstin, in favor of Kirk Robinson, and indorsed by Robinson to said Central National Bank of Columbia. The answer alleges that the indebtedness and the method of it were known to complainant. A part of the sum of money obtained from the complainant bank was applied to the payment of an antecedent mortgage, created

by the defendant in behalf of her own estate, that there might be no lien on the wife's estate, having priority over the mortgage to the complainant bank.

We think the proof clearly establishes the fact that the transaction of the defendant with the complainant bank was a payment of the husband's debt to it and to the Central National Bank of Columbia, and not a purchase of either bank's claim against the husband; that the money loaned never came into the actual possession of the defendant wife, and that she never had any possession of it for any purpose but to pay his indebtedness to the banks. It appears, also, we think, from the evidence, that the complainant had every reason to know, and did know, if it was not willingly ignorant, that this was the purpose the defendant had in view in mortgaging her separate estate. It also appears that the loan for which the mortgage was given was not made for any purpose relating to the defendant Isabella's separate estate, except so far as it was used to lift a prior mortgage thereon, which prior mortgage is not assailed in these proceedings. These being the facts, there is no difficulty about the law relating to them. The supreme court of South Carolina has so frequently construed its statutes respecting the powers of a married woman over her separate estate that we cannot be at any loss in determining what powers she has. Even so recently as June 30, 1890, in *Salinas v. Turner*, 11 S. E. Rep. 702, a case quite similar to the present one, it was held, as it had been by that court more than a score of times before, that a married woman in South Carolina cannot charge her separate estate for the benefit of her husband, and in that case the learned judge who delivered the opinion made some very healthy remarks, which are worthy of attention from all parties who attempt to do by indirection what the law forbids them to do directly. This court is bound to follow the decisions of the supreme court of a state in its construction of its statutes establishing a rule of property therein.

It appears, however, that a prior mortgage given by the defendant to one Stanley was paid out of the loan obtained from the complainant. Those that ask equity must do equity, and, while the defendant must not be held to pay out of her separate estate any of the indebtedness of the husband to the complainant, the complainant will be subrogated to the rights of the mortgagee under the prior mortgage, and the case will be referred to a master, to ascertain how much is due from the defendant upon that mortgage, and a decree will be given for that amount, each party hereto paying its own costs.

MARVIN v. UNITED STATES.

(Circuit Court, D. Connecticut. December 19, 1890.)

1. CLERK OF COURT—FEES.

Under Act Cong. March 3, 1837, (24 St. 505,) the clerk is entitled, on orders of the court, to pay the accounts of the marshal and officers, other than commissioners, as follows: Entering order, 45 cents; copy, 30 cents; certificate, 15 cents; seal, 20 cents; filing duplicate, 10 cents.

2. SAME.

The statute requires that only one copy of the commissioner's account shall be presented, which is forwarded to the treasury department. *Held*, that a certified copy of the order of court approving it should accompany it, and that the fees should be as follows: Entering the order of approval, 45 cents; filing same, 10 cents; copy, 30 cents; certificate and seal, 35 cents.

3. SAME.

Where blanks furnished by the department for abstracts of payment of witnesses, etc., contain jurats, the clerk is entitled to a fee of 25 cents for each jurat.

4. SAME.

He is also entitled to a fee of 10 cents for filing each separate voucher returned by the marshal with his accounts.

5. SAME.

Under Act Cong. Aug. 4, 1836, (24 St. 253,) providing that none of the money thereby appropriated shall be used to pay clerk's *per diem* for attendance in court except for days when business was actually transacted, the burden is on the clerk to show that business was actually transacted by the court on the days for which he claims his *per diem* for attendance.

6. SAME.

A commissioner is entitled to a *per diem* for time actually spent by him in his judicial character as commissioner on criminal cases after the accused were arrested, though their cases were continued.

7. SAME.

The petitioner is entitled to a commissioner's *per diem* for services performed as such, though he performed services as clerk, and received compensation therefor, on the same day.

8. SAME.

Under Act Cong. June 30, 1879, (21 St. 43,) appointing the clerk a jury commissioner *ex officio*, he is entitled to a jury commissioner's compensation for services performed as such.

9. SAME.

For the annual statement to the attorney general of the judgments, etc., for the preceding year, the clerk is entitled to compensation for the final abstract at 15 cents *per folio*, and not to the regular fees for searches.

10. FEES.

He is entitled to fees for copies of orders to pay jurors, and for seals thereon.

11. SAME.

The clerk's fees for final records in criminal cases should be in accordance with the folios which are contained in the record, and not be limited to four folios. But he is not entitled to a separate fee for entering the oral appearances of attorneys in criminal cases, as this is included in the docket fee.

12. SAME.

Docket and discontinuance fees should be allowed where the commissioner's records are returned to court and docketed, though the case is discontinued before the information is filed.

13. SAME.

Under Rev. St. U. S. § 1091, providing that no interest shall be allowed on any claim up to the time of the rendition of a judgment thereon by the court of claims, unless on a contract expressly stipulating therefor, the circuit court cannot allow interest in a suit therefor brought in such court under 24 St. 505, no contract having stipulated for such interest.

14. SAME.

The commissioner is entitled to a fee for recognizance of record taken by him, where justices of the peace of the state in which the federal court is held have power to take such recognizances.

15. **SAME.**

Where principal and surety enter into such recognizances by separate acknowledgments before the commissioner, he is entitled to a fee for each acknowledgment.

16. **SAME.**

Under the provision of the statute that "copies of the process shall be returned to the clerk's office," fees should be allowed for transcripts of the record.

17. **SAME.**

The provision of Act Cong. Aug. 4, 1886, (24 St. 274,) which is an appropriation bill, that commissioners may be paid the same compensation as is allowed clerks for like services, but "shall not be entitled to any docket fees," applies not merely to that appropriation, but is continuing.

18. **SAME.**

The provision of Rev. St. U. S. § 1030, that no writ is necessary for remanding a prisoner from the court into custody, applies where the accused is in custody under a warrant from the court, and not where he is arrested on the first warrant of the commissioner to arrest and bring before him, and the commissioner is entitled to a fee for a *mittimus* upon the first continuance, if the prisoner is to be held.

19. **SAME.**

The clerk is not entitled to fees as for reports for letters transmitting receipts of the depository for moneys, and stating the nature of the case, as the commissions on such moneys were intended to pay for these services.

20. **SAME.**

The clerk is not entitled to a fee for keeping a list of the names and residences of jurors, as this is part of the jury commissioner's duties.

21. **SAME.**

The commissioner is entitled to fees for affidavit, warrant, etc., in the case of an accused person who was not arrested, having left the state.

At Law.

Edwin E. Marvin, pro se.

Geo. G. Sill, Dist. Atty.

SHIPMAN, J. This is a petition under the act of March 3, 1887, (24 St. 505,) to recover fees and charges of the petitioner as clerk of the district and circuit courts of the United States for this district, as circuit court commissioner, and as jury commissioner *ex officio*, which have been disallowed by the treasury department, and which are specifically and by items set forth in the petition. The earliest item is dated August 1, 1883. The United States denied in fact the petitioner's right to recover, and appeared upon the hearing of the cause by the district attorney for this district. The said cause having been heard, the following facts are found by the court: All the allegations of fact in said petition are found to be true. The services and expenses charged therein, and in the various amendments thereto, were actually rendered and expended. The acts alleged in said petition and amendments to have been done and performed were done and performed, and the time therein alleged to have been spent as clerk, commissioner of the circuit court, and jury commissioner *ex officio*, was spent. The said items mentioned in the petition were included in the petitioner's accounts, which were duly presented to the judge of the district court, were approved, and forwarded to the accounting officer of the treasury, except the item of interest hereinafter mentioned. The liability of the United States depends entirely upon the construction which ought to be given to the statutes pertaining to the subject of fees, and the payment thereof.

1. The first matter in dispute relates to the proper amount of the clerk's fees upon orders of court to pay the accounts of the marshal and

other officers, upon his fees for administering the oaths and subscribing the jurats attached to each one of the marshal's vouchers, and for filing these vouchers. No clerk's fees were paid for a time upon the orders of court which allowed these accounts. I had occasion to examine this subject in *Stanton v. U. S.*, 37 Fed. Rep. 252, and was of opinion that the government was liable for this class of fees. Other judges have been of the same opinion, (*Erwin v. U. S.*, 37 Fed. Rep. 470; *Jones v. U. S.*, 39 Fed. Rep. 410; *Goodrich v. U. S.*, 42 Fed. Rep. 392;) and the present comptroller coincides therewith, but claims that the petitioner's fees are too large. The clerk annexes to both the duplicate accounts an order, signed and sealed, whereas the comptroller allows for an original order, which is retained in the clerk's office, and for a copy thereof annexed to the account which is sent to Washington. The difference in regard to the orders to pay commissioners is that the clerk makes and files a sealed order, whereas the comptroller is willing to allow for a recorded order without seal or filing. The difference upon commissioners' orders is 30 cents per order, and upon orders to pay other officers is 35 cents per order. In regard to the orders upon accounts of officers other than commissioners, the statute (18 St. 333) requires only a single order to be entered of record. "The law requires the account to be made in duplicate, but not the order approving the account. The original account, with a certified copy of the order, is forwarded to the treasury department, and the duplicate account is retained by the clerk, and filed in his office." *Jones v. U. S.*, 39 Fed. Rep. 410. I do not think that it is necessary that this order should be sealed. An order of court signed by the judge is sufficient. It should be said that the clerk was not notified by the first comptroller's office of its desire that a more economical course should be adopted until April, 1889. The charges for these services should be, as now claimed by the comptroller: Entering order, 45 cents; copy, 30 cents; certificate, 15 cents; seal, 20 cents; filing duplicate, 10 cents,—total, \$1.20. The statute requires that only one copy of the commissioner's account should be presented, which is forwarded to the department. A certified copy of the order of court should accompany it. The fees for the service should be as follows: 45 cents for entering the order approving the account; 10 cents for filing the same; 30 cents for copy; 35 cents for certificate and seal,—total, \$1.20.

The next question relates to the propriety of the charge of 25 cents for each jurat affixed to the abstracts of payment of witnesses, jurors, bailiffs, as well as to the accounts current to which they belong. The blanks which were furnished by the treasury department contained these jurats, and indicated the intention of the department that each separate account should be sworn to. Of late, if I am correctly advised, these separate oaths are not required. Inasmuch as they were required, they are to be paid by the government at the rate of 25 cents for each jurat. The government also objects to the charge of 10 cents for filing each voucher returned by the marshal with his accounts. Each voucher is a separate, unattached paper, and both convenience and neatness re-

quire that they should be marked and filed. The charge is allowed by the statute, and is due. It has been allowed in *Goodrich v. U. S.*, 35 Fed. Rep. 193; *Erwin v. U. S.*, *supra*; *Jones v. U. S.*, *supra*.

2. The second subject relates to the "*per diems*" for attendance and services as clerk, as circuit court commissioner, and as jury commissioner *ex officio*.

The first item in dispute is \$80 for 16 days' attendance as clerk in July, 1886, when the minutes do not show what business was done. The appropriation bill of August 4, 1886, (24 St. 253,) provided that no part of the money appropriated by the act should be used in the payment of a *per diem* compensation to a clerk or marshal for attendance in court, except for days when business was actually transacted in court. This means business which belongs to the court, and is transacted by the judge, and places upon the clerk the burden of showing that business of the court was actually transacted on those days. The minutes simply show that the court was opened and adjourned, and, although the petitioner says that doubtless business of the court was transacted, he does not show what it was, within the proper meaning of that language, and I am therefore compelled to disallow the item. For other charges for attendance as clerk and mileage, the government is liable.

The next item under this head relates to commissioner's *per diems*, which were suspended, because, under the construction of the fee-bill which the treasury department adopted, the petitioner was not "hearing and deciding" a criminal case. The time charged was actually spent by the petitioner upon the cases in his judicial character as commissioner, after the accused were arrested and brought before him for trial. The cases were then continued for reasons which were satisfactory to him; one party or the other was not ready for trial. The facts are substantially the same with those in *U. S. v. Jones*, 134 U. S. 486, 10 Sup. Ct. Rep. 615, in which the commissioner's *per diems* were allowed. The same ruling had previously been made in *Rand v. U. S.*, 36 Fed. Rep. 671.

The next item is for commissioner's *per diems*, disallowed because he was allowed a *per diem* fee for the same days as clerk of court. The general question was considered in *U. S. v. Saunders*, 120 U. S. 126, 7 Sup. Ct. Rep. 467, when it was held that, when the functions of two appointments or offices which are held by one person, and to each of which compensation is attached, are separate and distinct, he is, in such case, entitled to recover the two compensations. The particular question was discussed in *Erwin v. U. S.*, *supra*, and I accord with the conclusion of Judge SPEER that the commissioner is entitled to his statutory fee of \$5 for services performed upon any one day, although upon the same day he performs services as clerk, for which he also receives a *per diem*.

The clerk claims compensation for the services performed as jury commissioner *ex officio* from and after 1887, in accordance with the allowance made to jury commissioners in the various annual appropriation acts. The work requires the time that is charged. It devolves upon the clerk simply by virtue of the statute of June 30, 1879, (21 St. 43,)

which in fact made two persons jury commissioners; and the construction, which gives compensation to only one commissioner, and compels the clerk to do the work for nothing, seems to be a narrow one. I think that the clerk is a jury commissioner *ex officio*, and comes within the provisions of the statutes which give compensation to jury commissioners. *Erwin v. U. S.*, *supra*; *Goodrich v. U. S.*, 42 Fed. Rep. 392.

3. The next class relates to fees for records of the proceedings of the court upon its minute book, and fees for annual reports to the attorney general of judgments, discontinuances, etc., for the year. The fees for recording the proceedings of court are now allowed and paid without objection, at the rate of 15 cents per folio, and the charge does not seem to be now contested, so that further discussion of the matter is unnecessary. The unpaid charges are allowed. The attorney general calls for an annual statement of the number of judgments, discontinuances, and other statistics in regard to the cases in court for the preceding year. The work of preparing the material and making the abstract is a considerable one, though at last the tabulated condensed statement is not more than a folio. As the clerk had to search for all judgments, he has charged according to the allowance in the fee-bill for searches. I think this charge inadmissible, and that the petitioner can recover only for the final abstract or report at the rate of 15 cents per folio.

The next item is for copies of orders to pay jurors in the fourth quarter of 1888, which were disallowed. I do not know the reason for the disallowance as a whole. They were previously, and are now, allowed. The charge for seals upon copies of this class of orders is contested. The original order of court is without seal, but a certified copy of an order of court should, as it seems to me, if in proper form, be attested by the seal of the court.

The next question arises upon fees for final records in criminal cases. The treasury department allows for four folios in each case, and rejects the excess above that number. There can be no such arbitrary rule for the payment of records, some of which are necessarily voluminous. The length of the record varies with the nature of the indictment, and there is no propriety in a rule which limits the payment of the recording of 50 folios to 60 cents, the fee for recording 4 folios. An examination shows that the clerk is entitled to \$13.95, instead of \$16.50, as charged. Charges for copies of folios which were furnished either by order of court or by order of the superintendent of the detective service, which have been unpaid, are hereby allowed.

4. This question is whether the clerk is entitled to a fee of 15 cents for entering in the docket the oral appearances of the attorney in criminal cases. I do not think that this entry comes within the provision for "making any record, certificate, return, or report," but it is included within the services which are paid for by the docket fee, and the charge is therefore disallowed.

5. Docket and discontinuance clerk fees were disallowed in two cases, where the commissioner's records were returned to court and docketed, and the cases were then discontinued by the attorney before an informa-

tion was filed. The fees were disallowed upon the ground that, until an information is filed, there is no case in court. This question was considered in *Stanton v. U. S.*, 37 Fed. Rep. 252, wherein it was held that the fees are properly chargeable. A charge of 10 cents each for filing 20 separate exhibits in a criminal case is allowed.

6. Interest at 4 per cent. for 23 months is claimed upon \$635.71, audited in favor of the clerk on December 22, 1886, payment of which amount was withheld until November 10, 1888, for an immaterial reason. The appropriation was not exhausted. The statute under which this petition is brought (24 St. 505) is one enlarging the jurisdiction of the court of claims, and giving a concurrent jurisdiction in the specified cases to the district and circuit courts. In the statute relating to the court of claims (Rev. St. § 1091) it is provided that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest. This provision was held in *Tillson v. U. S.*, 100 U. S. 43, to be imperative against the allowance of interest by the court of claims, unless it is, in some way, expressly provided for. The circuit court has no larger power in regard to interest upon claims which are sued for under this statute than has the court of claims. An item of \$1 for making and filing a report under section 798, at the September term, 1888, of circuit court, was disallowed, but is now allowed under the ordinary custom in regard to such reports.

7. The treasury department disallows a fee of 15 cents upon commissioners' orders fixing bail, holding to bail, and discharging bail, upon the ground that the commissioners' court is not a court of record. There are a number of decisions by federal judges that courts of justices of the peace in their respective states, and commissioners' courts therein, are not courts of record, and are not authorized to take acknowledgment of recognizances for future appearance of the accused, (*Strong v. U. S.*, 34 Fed. Rep. 17,) but that bail for the appearance in the trial court should be by bond; a recognizance being a contract of record, and a part of the records of the court, (*U. S. v. Ambrose*, 7 Fed. Rep. 554.) All these decisions are based upon *U. S. v. Rundlett*, 2 Curt. 41, in which Mr. Justice CURTIS held that it was the intention of congress, in the section of the act in regard to the powers of commissioners, now known as section 1014 of the Revised Statutes—

"To assimilate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings held for similar purposes by the laws of the state where the proceedings should take place, and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace or other examining magistrates have such power."

And if the magistrate in the state has no such power, the commissioner in such state cannot take a recognizance for appearance at a future day before him. Judge WOODRUFF, in *U. S. v. Case*, 8 Blatchf. 250, concurred in this construction, saying that "in a state where the justice of the peace has power to take a recognizance to appear from day to day,

pending the examination of the accused, then a United States commissioner has such power." If the state magistrate has not such power, a commissioner can only take bail for appearance at the proper court, to answer there for the offense charged. How the bail should be taken, whether by bond or recognizance, was not settled. In Connecticut a bond or recognizance for appearance before a justice of the peace from day to day can be taken by the magistrate pending the examination. *Potter v. Kingsbury*, 4 Day, 98. Courts of justices of the peace are courts of record, (*Davidson v. Murphy*, 13 Conn. 213,) and it is the constant practice for justices of the peace to take recognizances. The fees which are charged are proper in this district, and are allowed.

In this connection, items 10 and 11 may properly be considered. Item 10 relates to acknowledgments of the principal in a recognizance, which are objected to because only one acknowledgment of the bond is necessary, and, latterly, a fee for any acknowledgment is objected to upon the ground that an acknowledgment of a written bond is unnecessary, and adds nothing to its validity, which is true. But the recognizances which are taken by commissioners in this district, and other districts where similar statutes exist, are not written bonds, but are obligations entered into before the court, and into which each party, both principal and surety, enters by a separate acknowledgment. No. 11 relates to fees for copies or transcripts of records returned by the commissioner to the clerk's office. The auditor allows, in each case, the sum of 60 cents as ample to furnish a record of the proceedings or for a copy of the "process." The statute provides that "copies of the process shall be returned" to the clerk's office, and the auditor construes this to be a copy merely of the warrant, or perhaps the complaint and warrant. The commissioner makes a copy of the record. If "process" in section 1014 is properly construed to mean simply the papers upon which the accused was arrested, the position of the auditor is correct. But it was expressly held in *U. S. v. Rundlett*, *supra*, that "mode of process" in this section means mode of proceeding, and that the non-appearance of the principal in the recognizance in answer to a call was to be proved by an entry on the minutes of the magistrate, and returned to him as part of the proceedings. The word "process" in like manner does not mean simply the warrant, but is used in the larger sense of "proceedings." The petitioner has followed the uniform course of justices of the peace in this state, who are required by statute to transmit to specified officers of the state court copies of the files and records in "binding over" criminal cases before them. An examination of all the records named in the petition and amendments shows that \$16.80 should be allowed and paid in excess of the sum allowed by the auditor.

8. The next subject is the much-disputed question of a commissioner's right to docket fees under the deficiency appropriation bill of August 4, 1886, (24 St. 274,) which appropriated a sum of money for the payment of commissioners: "provided, that for issuing any warrant or writ and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they

shall not be entitled to any docket fees." Upon the question whether this provision applied merely to that appropriation, or was a continuing statute, and was intended to limit the breadth of section 847, as construed by the supreme court in *U. S. v. Wallace*, 116 U. S. 398, 6 Sup. Ct. Rep. 408, the courts have been much divided. *Bell v. U. S.*, 35 Fed. Rep. 889; *Rand v. U. S.*, 36 Fed. Rep. 671; *Hoynes v. U. S.*, 38 Fed. Rep. 542; and *McDermott v. U. S.*, 40 Fed. Rep. 217, are authorities to the effect that the provision applied merely to that appropriation. *Strong v. U. S.*, 34 Fed. Rep. 17; *Calvert v. U. S.*, 37 Fed. Rep. 762; *McKinstry v. U. S.*, 40 Fed. Rep. 813; *Crawford v. U. S.*, Id. 446; *Goodrich v. U. S.*, 42 Fed. Rep. 392, are *contra*. Notwithstanding the clause is in a deficiency bill, and is a proviso, I think that the history of the legislation, and the positive character of the language, which, repeating the phraseology of the disputed clause of section 847, adds the declaration, "they shall not be entitled to any docket fees," show the legislative intent that docket fees should not thereafter be included within that section; in other words, the reasoning of Judges TOULMIN and PARDEE, with which Mr. Justice LAMAR concurs, seems to me the more forcible and convincing. The item is not allowed.

9. The department declines to allow for a *mittimus* by the commissioners upon the first continuance, upon the ground that section 1030 provides that no writ is necessary for remanding the prisoner from the court into custody. This is applicable where the accused is already in custody by virtue of a warrant from the court. The first warrant of the commissioner is simply to arrest and bring before him; and, when it is executed, it has spent its force. A commitment to jail becomes necessary if the prisoner is to be held. *Ex parte Morrill*, 35 Fed. Rep. 261; *Heyward v. U. S.*, 37 Fed. Rep. 764. In this district, the copy which is required by section 1028 to be left with the jailer is made and certified by the commissioner. The fees for the warrant or *mittimus*, filing the same upon its return, entering the return, the copy, and the certificate, are \$1.80.

12. Fees for five subpoenas were deducted on the ground that they were excessive. The clerk testifies that he never issued a subpoena unless it was called for by the district attorney. I have no reason to suppose that unnecessary papers of this kind are called for or are issued.

13. The clerk charges for reports to the depository, secretary of the treasury, and commissioner of internal revenue of the cases in which moneys are paid to the clerk at 15 cents per folio. These reports are in the nature of letters to the different officials, transmitting the receipts of the depository for these moneys, and stating the case and its nature. I think that the term "reports" is not applicable to them, and that the commissions were intended to cover the services incident to the deposit of the money and the transmission of the information to the department. This item is disallowed.

14. Small deductions of \$1.90 were made for claimed errors in addition, etc., as stated in the fourteenth claim. The amount should not have been deducted.

15. The clerk charges for recording, in a book for that purpose, the names and residences of the jurors who were annually selected, and whose names were put in the boxes. This was not done by order of court, but was a thing very proper and necessary to be done for the orderly management of the business. A list or a record should be kept, so that the names upon the separate slips can be easily ascertained and verified, and that the names of those who have been drawn or who have died or have removed may be checked. This was a part of the business of the jury commissioners, and not of the clerk, as clerk. This item is not allowed.

16. The charges by the plaintiff as United States commissioner of \$2.20 for affidavit, oath, filing, and the warrant in the case of an accused person who was not arrested, having left the state for another country, are allowed. The charges of \$1.30 as clerk, for entering motion to reduce a bond and denial of the same, also of fees for *mittimus* in *Massacott's Case*, and for entering motions and orders appointing guardians *ad litem* of minors, are allowed. The items in regard to entering motions for and orders of leave to file pleas of *nolo contendere*, and for entering payment of fines and costs, are withdrawn.

17. The next item, consisting of charges for copies of bills of costs furnished by the clerk in compromised internal revenue cases, as follows: For copy of costs furnished district attorney in these cases before judgment, 10 cents; a certified copy furnished after judgment, by direction of the internal revenue commissioner, 25 cents. In compromised internal revenue cases, the department requires these copies, and the copy after payment is required to be a certified copy. The fees are included in the expenses to be paid, and are paid to the government by the defendant. The item is allowed.

The amount due to the plaintiff is \$1,279.12, for which let judgment be entered, with costs.

In re STERNBACH et al.

(Circuit Court, S. D. New York. November 24, 1890.)

CUSTOMS DUTIES—RETURN OF BOARD OF GENERAL APPRAISERS.

The return of the board of United States general appraisers, under section 15 of the act of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," should contain, in addition to the record and the evidence taken by them and their decision on the questions of law, a certified statement of the facts involved in the case; and it is the duty of the said board to pass upon the questions of fact raised by the protest of the importer.

At Law. Motion to order and direct the board of United States general appraisers to file a complete and full return in the above-entitled suit or proceeding.

On the 8th day of October, 1890, the petitioners H. Herrman Sternbach & Co. filed a petition or application in the United States circuit court for the southern district of New York, in accordance with the provisions of section 15 of the act of June 10, 1890, setting forth that they were dissatisfied with the decision of said board of United States general appraisers as to the construction of the law and the facts respecting the classification of their imported merchandise, and the rate of duty imposed thereon. The errors of fact complained of were set forth in the protest and petition as follows:

"That the said goods were determined to be woollen cloths instead of manufactures of worsted, as in truth and fact they were; that the secretary has not seen the goods in question, and has never in fact classified them as woollen cloths or otherwise."

The alleged errors of law were as follows: That said goods when valued at above 40 cents per pound, and not exceeding 60 cents per pound, are liable to a duty of only 18 cents per pound and 35 per cent. *ad valorem*; and when valued at over 60 cents per pound, and not exceeding 80 cents per pound, are liable to a duty of only 24 cents per pound, and 35 per cent. *ad valorem*, under Schedule K, Act March 3, 1883. That the act of congress of May 9, 1890, entitled "An act to provide for the classification of worsted cloths as woolens," does not apply, because: (1) Said act was never passed according to law, in this: that no quorum was present in the house of representatives when said bill was certified to have been passed. (2) Said act was never passed according to law, and never became a law, because, when passed, a majority of the members of the house of representatives were not present in the house of representatives when said act was passed, and said bill was never declared to have been passed, or certified to have been passed, when a quorum was present in the house of representatives, and said act was declared by the speaker to have been passed, and was certified to have been passed, when it had not been passed, in violation of section 5 of article 1 of the constitution of the United States. (3) Because said act was not legally enacted, in this: that a quorum of the house of representatives did not vote upon said act. (4) That said act confers no power or authority upon the collector to assess and take duties upon said importations at the rate of 35 cents a pound, and 35 per cent. *ad valorem*. (5) That said act does not repeal any act imposing the pre-existing rate of duty on the importations here in question, nor impose any new duty thereon. (6) That said act does not and cannot operate to change the duty upon manufactures wholly or in part of worsted, and not in part of wool as provided for in the act of March 3, 1883. (7) That whether or not the secretary of the treasury has classified said goods as woollen goods does not alter the fact that they are manufactures of worsted, and dutiable accordingly.

Upon this petition, the court made an order that the board of appraisers return to this court "the record and the evidence heretofore taken by them, together with a certified statement of the facts involved in the case, and their decision thereon." The board of appraisers on November

7, 1890, filed their return in the United States circuit court, in compliance with said order, as follows:

"Pursuant to the order of your honorable court made on the 8th day of October, 1890, in the case above named, heretofore decided by this board, we hereby return to the said court the record in the said case, and the decision of the board made therein. The decision involving questions of law alone no evidence was required or taken by the said board in said cause."

Attached to this return were the documents received by said board from the collector of the port, including the protest of the importer, and a copy of the decision of said board made therein, and delivered to and filed with the collector of customs at the port of New York, as follows:

"Your action in assessing duty at the rate prescribed for woolen cloths on certain so-called worsteds imported in the vessels named, being in accordance with the provisions of Tariff Index, (New.) par. 362, and the act of May 9, 1890, and previous rulings of this board, is hereby affirmed."

After the filing of said return and record, counsel for the importers made a motion before the court that the said board make a further and full return, claiming that said board had not certified any statement of the facts involved in the case, as required by law, and particularly upon the two questions of fact set forth in the protest and petition, to-wit, "that the said goods are manufactures composed wholly or in part of worsted, not composed in part of wool," and "that, as matter of fact, the secretary of the treasury has not seen the goods covered by said entry, and has never in fact classified them for duty." The act of May 9, 1890, entitled "An act providing for the classification of worsted cloths as woollens" reads as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That the secretary of the treasury be and he is hereby authorized and directed to classify, as woolen cloths, all imports of worsted cloth, whether known under the name of worsted cloth, or under the name of worsteds, or diagonals, or otherwise."

Stanley, Clarke & Smith, for the motion.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., *contra*.

LACOMBE, Circuit Judge. It seems to me that it would tend to the best practical interpretation of this statute to hold that the importer may raise issues of fact by his protest. That it is thereupon the duty of the appraisers to determine one way or the other as to the questions of fact thus raised, and, (when called upon to certify their return into court) to certify their decision on those questions of fact, which will thus be the certification of fact called for by the statute. That being so, an order may issue directing the return of this "return" to the board of general appraisers for the purpose of obtaining from them a certificate (1) as to whether the goods here are or are not worsteds; (2) whether the secretary of the treasury did or did not see the goods covered by the entries.

Order entered accordingly.

In pursuance of the foregoing order of the court, and on December 3, 1890, the board of United States general appraisers filed the following amended return:

"To the Honorable Judge of the Circuit Court for the Southern District of New York: The undersigned board of general appraisers, for further return to the order of said court, dated November 24, 1890, do hereby certify as follows: (1) They find that the protests of the several importers in said cases admit the fact that the manufactures in question are composed wholly or in part of worsted, and they assume this fact to be true for the purposes of this case. (2) They find that the goods are imported cloths. (3) There is no evidence before the board tending to prove that the secretary of the treasury ever saw the goods in question, covered by said entries, or that he ever actually or formally announced his judgment upon their classification. The board accordingly assumes as true, for the purposes of this case, that the said secretary never saw the said goods, nor formally classified them, nor otherwise acted in reference to the subject than by issuing the circular of May 13, 1890, contained in Synopsis No. 10,020 of Treasury Decisions, officially published."

Whereupon the importers, claiming the same to be insufficient, moved the court for a further return, because they did not find as to the fact whether the goods in question were or were not manufactures of worsted, and not composed in part of wool, as by said order they were required to do, and their assumption of the fact to be true for the purposes of this case would not authorize this court or the United States supreme court to so assume, and because their return as to the action of the secretary of the treasury was also incomplete and uncertain, and is not helped by their reference to the circular of May 13, 1890. This latter motion came on to be heard before LACOMBE, circuit judge, on December 22, 1890.

It was claimed by counsel for the importer that the return of the board of United States general appraisers furnished no sufficient record for review, either by the United States circuit court or by the United States supreme court, as there were no findings nor a certificate of facts contained in said return. The United States district attorney contended that, as the original return of the board of United States general appraisers certified that no evidence was taken, it was impossible for the board to certify any statement of facts involved in the case further than they had already done; that, when they had delivered their decision in the case to the collector of the port, their jurisdiction over it ended, and they had no power of their own motion to reopen the case and take further testimony, nor had the court any power to compel them to reopen the case to take further testimony; that section 15 of the act of June 10, 1890, provided a remedy for the importer in case he desired further evidence to be taken, by an application to the court to "refer it to one of said general appraisers as an officer of the court to take and return to the court such further evidence as may be offered" under such rules as the court may prescribe, and such further evidence, with the aforesaid returns, shall constitute the record before the circuit court; that the proper remedy for the importer in a case like the one under consideration was

not to ask for a further or amended return, because the board of United States appraisers, not having taken any evidence, could make no further return in regard to the facts than they had already made, but to apply to the court for an order to refer it to one of said general appraisers as an officer of the court to take and return to the court such further evidence as might be offered by the importer, which, with the returns already filed, would then constitute the record upon which the circuit court should proceed to hear and determine the questions involved, as provided for in section 15 of the act of June 10, 1890.

After hearing full argument, the court made the following decision:

LACOMBE, Circuit Judge. The petitioners imported certain woven fabrics into this port, claiming that they were "manufactures composed wholly or in part of worsted, not composed in part of wool." By the tariff act of March 3, 1883, a lower rate of duty was imposed upon such fabrics than upon those composed wholly or in part of wool. The subsequent act of May 9, 1890, authorized and directed the secretary of the treasury to classify as woolen cloths all imports of worsted cloth. The collector liquidated the duty at the rate imposed by the tariff of 1883 upon woolen cloths. Dissatisfied with this decision, the importer filed his protest as provided in the administrative customs law of 1890, c. 407. By this, he claimed, among other things, that his goods were in fact "manufactures composed wholly or in part of worsted, not composed in part of wool;" and also that the secretary of the treasury never saw the goods covered by the entry, and never in fact classified them for duty. The protest, invoice, and other papers being transmitted to the board of general appraisers appointed under section 14 of the administrative act, it became their duty to examine and decide the case thus submitted, and their decision is by the statute made final and conclusive, except in cases where application is made to the circuit court in the manner provided by the act. Upon the case thus submitted, the board decided that "the collector's action in assessing duty at the rate prescribed for woolen cloth on certain so-called 'worsted,' * * * being in accordance with the provisions of Tariff Ind. (New) par. 362, and the act of May 9, 1890, * * * is affirmed."

Application was duly made to this court, under the provisions of section 15, upon proper averments of dissatisfaction with the decision of the board of appraisers as to the construction of the law and the facts respecting the classification of the merchandise, and praying for "a review of the questions of law and fact involved in such decision." A concise statement of the errors of law and fact complained of was filed. In this it was stated that the errors of fact were "that said goods were determined to be woolen cloths, instead of manufactures of worsted, as in truth and fact they were;" and "that the secretary of the treasury has not seen the goods in question, and never in fact classified them as woolen cloths or otherwise." Upon these papers an order was heretofore made by this court directing the board of appraisers to return the record and evidence taken by them, together with a certified statement of the facts involved

in the case and their decision thereon. In response thereto, return was made by the board of appraisers transmitting the record and their decision, *supra*. In lieu of any certified statement of the facts involved in the case, the return contained this clause: "The decision involving questions of law alone, no evidence was required or taken by the board in said cause." Thereupon an order was made by this court that the board of appraisers "make a further and complete return herein in which they shall certify to this court (1) whether the goods in question are or are not manufactures composed wholly or in part of worsted, not composed in part of wool; and (2) whether the secretary of the treasury did or did not see the goods covered by said entries, and whether or not he in fact classified said goods for duties." To this order further return has been made by the board as follows:

"(1) They find that the protests of the several importers in said cases admit the fact that the manufactures in question are composed wholly or in part of worsted, and they assume this fact to be true for the purposes of this case. (2) They find that the goods are imported cloths. (3) There is no evidence before the board tending to prove that the secretary of the treasury ever saw the goods in question, covered by said entries, or that he ever actually or formally announced his judgment upon their classification. The board accordingly assumes as true, for the purposes of this case, that the said secretary never saw the said goods, nor formally classified them, nor otherwise acted in reference to the subject than by issuing the circular of May 13, 1890, contained in Synopsis No. 10,020 of Treasury Decisions, officially published."

Petitioners thereupon have moved for a further return, on the ground that those already made are insufficient, and not in compliance with the requirements of the statute. This contention seems well founded. Under the claim made in the protest, the actual composition of these articles is a "fact involved in the case." Indeed, it is a most important fact, because if they are not worsted cloth the act of May 9th does not apply to them, and, if it should be held for any reason that said act was void, inoperative, or inapplicable, it could not be determined whether the duties were liquidated at the proper rate, unless it were known whether or not they were wholly worsted or wholly or partly wool. It seems to be the scheme of the statute that the board of general appraisers should certify into court not only such facts as it deemed controlling, but generally the "facts involved in the case" submitted to it upon the invoice, protest, and other papers. Sections 14, 15. The action of the secretary of the treasury is also a "fact involved in the case" thus made. If it should be held by the courts that the act of May 9, 1890, requires that officer to make a specific finding in each case after examination of the goods, his action or non-action in that regard might be a controlling fact. Inasmuch as both these questions of fact are brought into the case by the protest, there should be a certified statement thereof and of the decision of the board of appraisers thereon before the court can proceed to take further action, under section 15. Nor does such certification find its equivalent in the statement made by the board that the protests of the importers admit the fact that the manufactures in question are composed wholly or in part of worsted, and that they (the board) assume this fact to

be true for the purposes of this case. Neither the admissions of the importers nor the assumptions of the board bind the collector or the secretary of the treasury, whose decisions, in the absence of any finding either way, will, under a well-settled principle of law, be presumed to be correct. *Rankin v. Hoyt*, 4 How. 328. If the collector's decision that they should pay the higher duty can be sustained only on the theory that the goods are really woolen cloths, they will be presumed to be such, unless the contrary is found as a fact. If an examination of the goods is a necessary prerequisite to classification by the secretary of the treasury, it will be presumed that he made such examination, unless the contrary is found as a fact.

The provision in section 15 for the taking of additional evidence by a single appraiser, under order of the court, is intended, not to secure additional findings by the board, but to enable the importer or collector to controvert or to sustain the certifications of the board as to the facts involved in the case. The board of general appraisers is by the act constituted the tribunal to decide, in the first instance, "as to the construction of the law and facts respecting the classification of [the imported] merchandise," (section 15;) and issues not raised by the protest and decided by the board should not be brought into the case, for the first time, after it reaches the appellate tribunal, whose sole function seems to be "to hear and determine upon the record [*i. e.*, the returns of the board and the additional evidence, if any] the questions of law and fact involved in such decision, respecting the classification of such merchandise, and the rate of duty imposed thereon." Section 15. Therefore, unless the board decides a particular issue of fact, involved in the case presented to it, it might be that the importer or collector would be precluded from arguing the same issue in the appellate tribunal. The petitioner may take order for a completed return.

SEELEY *et al.* v. BRUSH ELECTRIC CO. *et al.*

(Circuit Court, N. D. Illinois. January 5, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—ELECTRIC LIGHTS—FEEDING DEVICES FOR CARBONS.

Letters patent No. 147,827, granted January 24, 1874, to Matthias Day, for an "improvement in electric lamps," were for a device by which the upper and lower carbon holders of an electric lamp, each arranged to carry two or more carbons, are caused to be fed towards each other in such relations that the arc will be established and burn between one pair of carbons for a short interval and then shift to the other pair, so that the arc shifts from one pair to the other until both are consumed; but the carbons carried by each carbon holder move together. *Held*, that this patent is not infringed by letters patent No. 219,208, granted September 2, 1879, to Charles F. Brush, for a device whereby the upper carbons are separated dissimultaneously from the lower, whose holder is fixed, so that the arc is established between the pair last separated, the upper carbon of which is fed towards the lower until they are entirely consumed, and then the arc is established between the other pair, which burns in the same way.

In Equity.

George P. Barton and John R. Bennett, for complainant.

M. D. & L. L. Leggett, for defendants.

BLODGETT, J. In this case complainants seek an injunction and accounting by reason of the alleged infringement by defendants of patent No. 147,827, granted January 24, 1874, to Matthias Day, for an "improvement in electric lamps." The patentee states in the opening paragraph of his specifications the difficulties in the art of electric lighting which his device is intended to overcome, as follows:

"In the use of electric burners the following difficulties are found: *First.* Causing the carbons or points to approach automatically, with a speed commensurate to waste by the current. A greater or less speed breaks the current and extinguishes the light. *Second.* The waste of the point connected with the carbon pole of the battery is greater than that of the other, and, from various causes, is irregularly so. Hence the carbons must approach at unequal, and at consequently varying, speed in order that the point of light may always be stationary in the focus of the lens or mirror. *Third.* Owing to the rapidity of the waste, electric lights have been of short duration, requiring a constant attendant to replace the carbons, during which time the light is of course extinguished."

He then describes his device as consisting of an arrangement by which the upper and lower electrode, or carbon holders, each arranged to carry two or more carbons, are caused, by the action of the electric current and an intermediate automatic device, to be fed towards each other in such relations that the arc will be established and burn between one pair of carbons for a short interval and then shift to the other pair of carbons, whereby each pair of carbons, carried by the carbon holder, will be alternately burned by shifting the arc from one pair to the other pair, at short intervals, until the carbons of all the pairs carried in the carbon holders are consumed, the term "pair of carbons" meaning the upper and lower carbons which are arranged so that their points or ends will meet and form the arc between them. The carbon holders are constructed each with two or more sockets, in which the carbons or electrodes are held; as the specifications say, "preferably arranged in parallel, not touching each other, and those in the upper socket opposite those in the lower;" that is, as I understand the specifications, the sockets of each carbon holder are so arranged as to carry the carbons parallel to each other, but the surfaces of the carbons carried by the holder must not come in contact with each other. An upper and lower carbon holder is shown in the patent, each of which carries two carbons, so that the carbons carried by each carbon holder move together. Infringement is insisted upon only as to the first claim of the patent, which is:

"(1) In an electric light, the combination, with each electrode holder and one electrical circuit, of two or more electrodes, substantially as and for the purposes set forth."

The defenses are (1) that the defendants do not infringe; (2) that the patent is void for want of patentable novelty. I do not, under the proof,

however, think it necessary to consider any question but that of infringement. It is conceded that this claim requires that each electrode holder, that is, the upper and lower holder, shall be arranged to carry at least two carbons or electrodes, and it is necessarily a law of the machine that the same movement to establish the arc and feed the carbons towards each other is imparted to all the carbons at once; that is, the two or more lower carbons move together and alike, and the two or more upper carbons move together and alike. The defendants' lamp, which, complainants contend, infringes their patent, is constructed according to the drawings and specifications of patent No. 219,208, granted September 2, 1879, to Charles F. Brush. It is a double carbon lamp, the distinctive features of which are that the carbons of each pair are dissimultaneously separated to establish the arc between the pair last separated, and the carbons between which the arc is so established are wholly consumed before the other pair of carbons are brought into circuit and lighted, instead of a light which is alternately changing from one pair of carbons to the other, thus burning the carbons of each pair in alternation as in complainant's lamp, and this result in defendants' lamp is secured by a feeding device, actuated by the electric current alone, the lower carbons being stationary, and the feeding device acting only upon the upper carbon of the burning pair, the other pair of carbons being held out of the electric circuit until the pair first lighted is consumed.

It will be seen from this brief statement that the result or operation of the two lamps is widely different; that complainant's lamp burns its carbons by alternate arcs between each pair, necessarily producing a light unsteady and unsatisfactory, and varying in intensity, because the increase of distance between the burning carbons causes the light to weaken, and finally to form the arc between the other pair of carbons to repeat the same process of weakening the light until it shifts back to the first pair, and so on, while in defendants' lamp the light burns steadily until the pair of carbons between which it is first produced are wholly consumed, when it shifts to the other pair and consumes those. This statement of the operation of the two lamps would seem to sufficiently indicate that their operative parts cannot be identical, and an inspection of their mechanism seems to show that the defendants' lamp does not contain the elements of the combination contained in the first claim of complainant's patent. This first claim of the complainant's patent calls for two electrode holders, that is, a holder for the upper and lower electrodes, and that each holder shall carry two or more electrodes. Complainant's expert contends that the lower holder in complainant's patent includes the sockets for the electrodes, and the means for bringing the electrodes into the electrical current, and for moving the electrodes up and down for the purposes of lighting and feeding. The defendants' lamp shows a lower electrode holder, or carbon holder, with sockets for two electrodes, but with no capacity for movement up or down, and all the movements for establishing the arc and feeding are confined to the upper carbons or electrodes in defendants' lamp, while the upper carbons in the defendants' lamp move independently of each other.

I therefore do not find in the defendants' lamp two electrode holders, but find that the defendants have three electrode holders, and while externally there is a constructive or mechanical resemblance between the defendants' lower holder and that of the complainant when the respective parts are at rest, yet, they are functionally so different that this physical resemblance counts for nothing. When we come to the upper carbons of the defendants' lamp, I find them each carried by a separate holder, arranged in such relations to the other parts of the lamp that each carbon has an independent movement entirely unlike that of the carbons in the complainant's upper holder. The effect of this arrangement is that in the defendants' lamp the upper carbons of the burning pair are fed down as fast as the carbons of that pair are consumed, the carbons of the other pair remaining stationary, and out of the circuit, during the burning of the first pair, while in the complainant's lamp both the upper and lower carbons of each pair are fed towards each other simultaneously to compensate for the consumption by burning, and the arc changes alternately, and at short intervals, from one pair of carbons to the other, thus producing a different light from that produced by the defendants' lamp.

In the case of *Brush Electric Co. v. Ft. Wayne Electric-Light Co.*, 40 Fed. Rep. 826, heard before the learned circuit judge of this circuit, the complainant's patent was presented as an anticipation of the defendants' patent now claimed to infringe, and in his opinion the circuit judge said:

"Patent No. 147,827, issued to Matthias Day, Jr., February 24, 1874, is relied on as an anticipation of the first, second, and fourth claims of the patent in suit. This defense is based upon a construction of these claims that gives no effect to the concluding restrictive language, which construction, we have seen, is not authorized. The patent in suit describes mechanism which designedly and positively effects a dissimultaneous separation of the carbons, and Professor Barker, the defendant's expert, testified that the Day lamp was not so constructed, and did not so operate. It is true that the Day patent describes a lamp which contains two or more pairs of carbons, but not such a double carbon lamp as Brush invented. * * * Owing to the constant and frequent shifting of the arc from one pair of carbons to the other in this lamp it produced an irregular and unsatisfactory light. It was unlike the Brush lamp both in construction and mode of operation."

And in the case of *Brush Electric Co. v. Western Electric & Power Co.*, 43 Fed. Rep. 533, tried in the northern district of Ohio, before Judges BROWN and RICKS, the learned judge (BROWN) who delivered the opinion of the court, said:

"The Day patent upon which defendants chiefly rely as an anticipation of the Brush patent, as construed by the complainant's exhibit, is a single carbon lamp, having two carbons, instead of one, attached to each carbon holder, so that in the operation of the lamp both branches of the carbon holder are raised and lowered simultaneously. While the upper and lower carbons are in contact the current is divided between them, but when separated to form the arc, though the separation of both sets occur at the same instant, owing to the difference in resistance of the carbons, only a single arc is formed. When this arc has burned for a few minutes, the arc will shift to the other pair of carbons, remaining until they are so far consumed as to require addi-

tional feeding, when the arc is shifted back to the first pair, and they are thus caused to burn alternately, instead of successively, as in the Brush patent. This alternation is, of course, owing to the fact that both sets of carbons are separated simultaneously, and not in succession, as in the Brush patent, in which one is held in reserve until the first pair is wholly consumed. The Day lamp, however, not only lacks the non-coincidence in the separation of the carbons, which is the prominent feature of the Brush patent, but in practice it never seems to have been a success."

The functions of the electrode holders of the two lamps are so different, and the results of their actions so different, that I do not think the electrode holders of the defendants' lamp can be said to be the same, in function or result, as those of the complainant's combination. I therefore do not find that the defendants are guilty of infringing the complainant's patent. The bill is therefore dismissed for want of equity.

HASKELL v. HOTCHKISS & UPSON Co. et al.

(Circuit Court, D. Connecticut. December 24, 1890.)

PATENTS FOR INVENTIONS—SCREW-MAKING MACHINES—CONSTRUCTION OF CLAIMS—ANTICIPATION.

The specifications for letters patent No. 125,269, granted April 2, 1872, to James M. Carpenter for improvements in machines for cutting gimlet-pointed screws, recite that "the purpose of the present improvement is to cut the gimlet point upon the screw by an operation subsequent to that by which the thread is cut upon the body, so that the strain of the two operations shall not come upon the screw blank at the same time," as had previously been the case; and the specifications further recite that "my first improvement consisted in the combination with the dies which cut the body of the screw of a threaded back rest, which * * * holds the screw after the dies which cut the body have left it, and the pointing tool or tools by which the thread is cut upon the point while the screw is supported by the threaded rest. My second improvement consists in the use of what I call the 'serial cutter or tool,' which is made with a series of cutting edges, * * * and its relation to the pattern or former * * * is such that the several cutting edges will remove successive shavings from the point of the blank." The claims are: "(1) The threaded rest as a device to support the screw already formed, * * * and in connection with the screw to act as a leader to give motion to the tool-carrier. (2) The serial tool, *e*, in combination with a former or guide so related thereto that * * * the several teeth will cut successive shavings" from the blank. *Held*, that the second claim could not be construed to include a threaded rest and screw, with the two elements therein mentioned, but must be limited to a combination of the latter; and, as it was anticipated as so limited by letters patent No. 123,307, granted January 30, 1872, to Cyrus B. F. Tingley, it was void.

In Equity.

Wilmarth H. Thurston, for plaintiff.

John P. Bartlett and Charles E. Mitchell, for defendants.

SHIPMAN, J. This is a bill in equity which alleges infringement by the defendants of letters patent No. 125,269, dated April 2, 1872, to James M. Carpenter, for improvements in machines for cutting gimlet-pointed screws. The bill was filed in May, 1885, and prays for an injunction and an accounting. The plaintiff, in his testimony, sought only to prove infringement of the second claim. For many years blunt,

pointed wood screws were cut either by solid dies or by chasing tools. In cutting by solid dies a machine was employed having a revolving spindle, in the end of which a blank was fixed. A sliding holder held the dies, which consisted of several longitudinal series of teeth encircling the bolt. The dies were rigid, and could only cut a screw of the same diameter throughout its length. The screw-cutting tool of the chasing tool machine had only a single tooth, which traced the spiral around the blank by the control of independent mechanism, which gave motion to the tool-holder. Having only a single tooth, the tool-holder had to repeat its travel during many times before a full thread could be made. When gimlet-pointed screws were introduced, the old methods were inadequate to cut a thread upon the entire screw. A solid die machine could cut only the body, and a single-pointed chasing tool, pushed in a truck parallel with the axis of the screw to be cut, could do no more. At this point Mr. Coleman, the plaintiff's expert, says that "it occurred to an inventor to fasten a single-toothed tool in a vibratory holder, mounted upon a longitudinally traveling carriage, receiving its motion, as before, along the course of the screw blank, from a permanently placed independent feed mechanism. The vibratory holder permitted the cutting tool point to advance towards, and recede from, the axis of the screw blank under the influence of a form fastened to the bed of the machine against which the vibratory holder impinged as it was pushed past upon its carriage by the feed mechanism of the machine. This form was straight along the body of the screw blank, and inclined towards the axis of the blank at the point of the blank, and the tool accordingly cut a shaving from the straight portion of the blank, and was pushed in by the incline of the form as it advanced to cut down the corresponding incline of the screw-blade point. * * * This is the principle and method employed to this date by all the great screw companies for making the celebrated gimlet-pointed wood screws." At this time lag or coach screws began to be made, which were large wood screws, having square heads for wrenches, instead of slotted heads for screw-drivers. When they were made with gimlet-points, the slow chaser tool system, of which I have last spoken, was resorted to, but it was expensive. At this stage of the art Mr. Carpenter, the patentee of the patent in suit, procured letters patent No. 119,916, dated October 17, 1871, for a machine which employed the solid die system for the body and the chaser system for the point, in the same machine, the design being to cut the body and the point simultaneously. The object of the invention is described by the inventor, in his specification, as follows:

"The purpose of my invention is to form a gimlet point on the screw when it is cut in dies, and consists in combining with the dies which cut the body of the screw, made in any of the well-known forms, one or more tools or chasers placed at the back side of the dies, and having a motion towards and from the axis of the screw, and working in suitable guides, which tools are set in such relation to each other and to the thread formed by the dies that they will follow each other with successive cuts, if more than one tool is used in forming the point of the screw, and will also coincide with the thread formed by the dies upon the body of the screw, so that the thread formed on the point

will be a continuation of that formed on the body. By this means the dies act as a rest to hold the body of the screw firmly while the point is being formed by the tools, which have a simultaneous movement towards and from the axis of the screw so graduated to the progressive motion of the dies or screw, as the case may be, that their united action will give to the point the tapering form required at the same time that the dies are cutting the thread upon the body."

The strain upon the screw, which was incident to the simultaneous operation of the dies and the chasing tool, was so great that the blanks twisted. To remedy this defect the patentee made the invention described in the patent in suit, by which the two systems were performed in succession. The invention is thus described in the specification:

"The purpose of the present improvement is to cut the gimlet point upon the screw by an operation subsequent to that by which the thread is cut upon the body, so that the strain of the two operations shall not come upon the screw blank at the same time, while the screw-threads upon each part of the screw shall be made accurately to coincide. My first improvement consists in the combination with the dies which cut the body of the screw of a threaded back rest, which is formed like the segment of a nut, and accurately fits the threads formed upon the body of the screw, and holds the screw after the dies which cut the body have left it, and the pointing tool or tools by which the thread is cut upon the point while the screw is supported by the threaded rest, by which means the rest becomes the support of the screw, and, in connection with the threads already formed upon the screw, the leader, which controls the progressive motion of the tool or tools which cut the threads upon the point. My second improvement consists in the use of what I call the 'serial cutter or tool,' which is made with a series of cutting edges, say four or more, the edges of which are set in a line nearly coinciding with the inclination of the point of the screw, and its relation to the pattern or former, which controls its radial movement, is such that the several cutting edges will remove successive shavings from the point of the blank, so that when they have all passed by the point the thread thereon will be completed. My third improvement consists in the combination of a threaded back rest, which is made to serve as a support to the screw, and as a leader in the operation of forming the threads upon the point, and the series of cutting points or teeth which are moved radially under the control of a pattern or former, as will be described, by which means screws may have gimlet points formed upon them, the bodies of which have been cut by a separate operation, as will be hereafter described, as a modification of my invention."

The claims are as follows:

"(1) The threaded rest, as a device to support the screw already formed, while being operated upon by the pointing or other tools, and, in connection with the screw, to act as a leader to give motion to the tool-carrier, substantially as described. (2) The serial tool, *e*, in combination with a former or guide so related thereto that as the tool is carried past the point of the blank the several teeth will cut successive shavings therefrom and complete the thread, substantially as described. (3) The combination of the threaded rest and pointing tool, substantially as described. (4) The combination of the threaded rest, and the pointing tool or tools, with the dies for cutting the body of the screw, substantially as described."

Both the body and the point are cut in the machine which embodies the first improvement. The point only is cut in the machine which represents the third improvement. The mechanism of the second im-

provement is used in the point-cutting mechanism of either machine. The defendants' machine is described in letters patent No. 300,908, dated June 24, 1884, to F. A. Smith and A. Doll, Jr., and is said to infringe the second claim of the second Carpenter patent. The important point in the case is the proper construction of this claim, for it is substantially conceded that if it is to be construed as a combination of the two elements, which are specifically named, viz., the serial tool and a former or guide in the specified relation to each other, and actuated by some means, (but by what means is immaterial,) the claim, thus broadly stated, was anticipated by the machine described in letters patent No. 123,307, dated January 30, 1872, to Cyrus B. F. Tingley. This was not a machine for cutting the body and completely cutting the point by successive operations, but after they had been cut simultaneously by dies and chasing tools, respectively, the specification says that "a finishing tool, *i*, comes in contact with and moves along the screw towards its point, finishing and rendering the threads smooth and even. The finishing tool, *i*, is similar in shape to the pointing tools, and is secured to the tool block, its edge projecting directly opposite to the pointing tools. * * * The finishing tool, *i*, serves to remove the surplus stock left by the tools *d*, *d*." The plaintiff strenuously and truly insists that a very important part of Carpenter's second invention was to compel the screw-threads upon each part of the screw to coincide accurately, although they were cut by successive operations, and that the important new idea or principle of the machine was to give an already body-threaded screw the capacity to furnish, in its threaded rest, power to completely thread its own point at a subsequent operation. He did this either in a distinct machine from that in which the body thread was cut, or in the same machine. Wherever done, a new function was given to an already body-threaded screw, which was to be gimlet pointed. The plaintiff says, by his expert, that the patent "shows for the first time, so far as I know, a machine for cutting a gimlet point upon a screw which has already a thread cut upon its body, and which screw, of itself, gives motion and pitch control to a vibrating pointing tool to gimlet point the screw itself." The plaintiff, therefore, insists that the proper construction of the second claim is to make the combination of four elements, the two specifically named, viz., the serial tool and a former, and the two whose presence is necessary to make the whole machine operative, viz., a threaded rest and the screw, and that, unless this is done, the invention, which the patentee called his "third improvement," will not be claimed. There is no claim which in terms describes the combination of the pointing tool, former, screw, and threaded rest, but my belief is that the patentee intended that the first claim should describe and include the invention of pointing the screw after the dies had performed their part of the work, and consisted of the combination of threaded rest, already formed body screw, and pointing tools, the threaded rest and screw to act as a leader, to give motion to the tool carrier. This claim was the one which, in his mind, correctly described the mechanism which he had devised to carry into effect the leading, new idea of

the invention, viz., the taking an already body-threaded screw and cutting a point upon it by a subsequent operation, so that both threads shall coincide, this being done by the action of the threaded rest and the screw, as a leader, to impart motion and pitch control to the tool carrier. A guide, which was then a well-known instrumentality, would, in his judgment, be used, as a matter of course, in connection with the pointing tool. This part of the invention is far from being contained in the second claim, which was for the invention, which he characterizes as his "second improvement," and was expressed almost in the language of the descriptive part of his specification. The patentee deemed that a specific part of his invention was the serial tool, made with a series of cutting edges, in connection with a former which so controls the radial movement of the cutter that as it is carried forward by some actuating means successive shavings will be cut from the point of the blank. Inasmuch as this claim is substantially in the language in which the patentee described his second improvement, it would be a strained construction to import into it two omitted parts of mechanism. The patentee regarded his serial tool and the former as a separate and distinct invention, his patent was drawn accordingly, and the phraseology of the third improvement, which was not specifically and in terms used, cannot be pushed into the patent by reading into the claim for the second improvement two unnamed elements. The theory of the plaintiff's case is that the validity of the second claim requires the construction which was given to it. The bill is dismissed.

BURGESS v. CHAPMAN *et al.*

(Circuit Court, D. Massachusetts. December 13, 1890.)

PATENTS FOR INVENTIONS—ILLUSORY STAGE EFFECTS—NOVELTY.

Claims 1 and 2 of letters patent No. 286,709, granted to J. W. Knell, October 16, 1883, for improvements in illusory dramatic effects, for a combination whereby all the incidents of a horse-race may be simulated, are not void for want of novelty, though most of the elements are old, as in no prior device are the elements so combined as to produce the same effect.

In Equity.

Frederick P. Fish and Simonds & Burdett, for complainant.

James H. Lange, for defendants.

COLT, J. This is a motion for a preliminary injunction. The bill sets out two patents granted to J. W. Knell, (who is the same person as the complainant,) for improvements in illusory dramatic effects. The first patent, No. 256,007, dated April 4, 1882, has for its object the production on the theatrical stage of the appearance of a person, animal, or vehicle traveling along a road of considerable length. The second patent, No. 286,709, dated October 16, 1883, consists of an appa-

ratus to determine the position, upon the endless path or road shown in the first patent, of a horse or other moving animal. By means of the devices described in the second patent, as the specification states, "all the incidents of a horse-race may be simulated, the horses alternately gaining and losing ground." This result is accomplished by means of an endless belt or path made sufficiently strong to bear the weight that is put upon it, hung in a suitable frame, and secured below the level of the stage floor; a windlass, mounted upon a suitable stand adapted to be firmly fixed in a position in line with the endless path; a rope or wire, secured at one end to the saddle girth or moving object, and, at the other end, wound about the windlass, and a brake or lever secured to the stage floor, so as to control the revolutions of the rolls upon which the endless path travels. The claims relied upon on this motion are as follows:

(1) In a stage apparatus of the within-described class, the combination of the endless path, *a*, the windlass, *b*, the saddle or saddle-girth, *d*, or other harness part adapted to be secured to a horse or other moving object placed upon the path, and the wire, *e*, connecting said windlass and harness, and constructed to be extended and retracted, all substantially as described. (2) In a stage apparatus, the combination of the moving panoramic scene, *h*, with the endless path, *a*, the windlass, *b*, the saddle-girth, *d*, or other harness part, and the wire, *e*, all substantially as described.

The substantial defense in this case is the want of patentable novelty in the Burgess device in view of the prior state of the art. The affidavits upon this point are voluminous, but they range themselves under three heads: (1) The apparatus produced at Neitsch's Theater, Galveston, Tex., about 1860, in a play called "The Frontier." (2) The apparatus produced at the Walnut Street Theater, Philadelphia, in a play called the "Gross of Lead," in June, 1878. (3) The apparatus produced at the Globe Theater, Boston, in a play called "Si Slocum," in September, 1877. Without entering into a detailed discussion of these prior stage devices, this can be said, that no one before the complainant ever constructed an apparatus to produce the effect of a horse-race upon the stage. While it must be admitted that most of the elements that enter into the Burgess combination are old, still I do not find in any prior device the windlass, wire, saddle-girth, and tread-mill, so combined as to produce the effect described. Upon a careful review of the whole evidence, I shall sustain the first and second claims of patent No. 286,709, and grant the motion for an injunction. Motion granted.

TUBMAN v. WASON MANUF'G Co.

(Circuit Court, D. Massachusetts. December 19, 1890.)

1. PATENTS FOR INVENTIONS—SUITS FOR INFRINGEMENT—PLEADING.

In a suit for infringement of letters patent, complainant will not be allowed to file a supplemental bill, making other persons defendants, in which the principal allegation is a charge of conspiracy between the original defendant and such other persons, to maintain the defense, and which does not allege that such other persons have infringed the patent, where defendant excepts to its filing, and nothing has occurred since the filing of the original bill requiring a supplemental bill.

2. PRACTICE—EXHIBITS.

The court will not compel defendant to file an ink-drawing of an exhibit which is on file in pencil, on complainant's motion.

In Equity.

James H. Mandeville, for complainant.

Benjamin Price and Andrew McCullum, for defendant.

COLT, J. The complainant in this case moves for leave to file a supplemental bill. The original suit was brought by the complainant as the owner of letters patent No. 192,014, granted to George S. Roberts for certain improvements in the construction of railway cars. The bill charged infringement on the part of the defendant, the Wason Manufacturing Company, and contained the usual prayers for an injunction and account. By the proposed supplemental bill, the Boston & Albany Railroad Company, the Boston & Lowell Railroad Company, the Old Colony Railroad Company, and A. A. Folsom are made defendants, and the main allegation of the bill is a charge of conspiracy entered into between the original defendant, the Wason Manufacturing Company, and these other defendants, to maintain the defense of this suit. The bill further alleges that these defendants are members of an association comprising over one hundred railroads, and called the "Eastern Railroad Association," and that the Wason Manufacturing Company handed over to this association the defense and maintenance of this suit. The bill then sets out certain facts in support of the alleged conspiracy between these defendants. The bill prays that an injunction may issue against the Wason Manufacturing Company, restraining it from conspiring with the other defendants, and that it be ordered to take upon itself the defense of this suit; also, that these other defendants may be restrained from intermeddling in or maintaining the defense of this suit; also, that the Wason Manufacturing Company, or the other conspirators, be compelled to pay over to the complainant, by way of damages, all the expenses thus far incurred in the prosecution of this suit.

The allowance of this supplemental bill is not assented to by the defendant, but is excepted to on several grounds, viz.:

(1) By the proposed supplemental bill an entirely new and distinct issue is sought to be raised. (2) Because the suit is not defective, and nothing has occurred since the filing of the original bill which calls for or requires the filing of a supplemental bill. (3) Because the bill complainant proposes to file is not a supplemental bill or continuation of the original suit, and would in

no way affect the decree originally prayed for. (4) Because the new defendants mentioned in said alleged supplemental bill are not thereby made parties to the original suit. (5) Because it is nowhere alleged in said supplemental bill that the parties made defendants thereto have infringed the letters patent granted to Roberts, as set forth in the original bill. (6) Because the decree prayed for by the original bill would not affect the new parties mentioned in said supplemental bill. (7) Because by said alleged supplemental bill the defendants thereto are charged with the crime of conspiracy, the remedy for which is by indictment or information laid by the attorney of the commonwealth, or other public officer, and not by a bill or suit in equity. (8) Because the statutory remedy provided by congress for infringement of letters patent is specific as to what may be charged, and there is no clause in the statute looking to conspiracies. (9) Because said alleged supplemental bill is scandalous and impertinent.

I am of opinion that these exceptions, taken as a whole, are unanswered by anything brought forward in complainant's brief, and that, by the rules of equity practice governing bills of this character, it is clear that the filing of this supplemental bill should not be allowed.

The complainant also moves that the court order the defendant to file an ink-drawing of an exhibit known as "Sketch of the Roebbling Patent." The exhibit on file is in pencil. I do not think it would be proper for the court to make such an order. The counsel for defendant has charge of the putting in of proofs on his side of the case, and he may, at defendant's risk, offer an exhibit in one form or another. If it should turn out that the lines in lead-pencil on this exhibit became indistinct or obliterated, it would seem to be a loss to the defendant, rather than to the complainant. Motions denied.

FEE *et al.* v. ORIENT GUANO MANUF'G Co.

(Circuit Court, E. D. New York. August 19, 1890.)

1. SEAMEN—WRONGFUL DISCHARGE—DAMAGE—FISHING VESSEL.

A master and crew wrongfully discharged by the owner of a fishing vessel from employment under a contract for the entire season, wages to be in the ratio of the quantity of fish caught, may recover damages for such discharge, based on the amount they would have received as wages on the catch of the whole season, less the amount actually paid them, and any wages earned by them during the season, after their discharge.

2. SAME—RELEASE AND DISCHARGE.

A receipt by the master in such case for his wages in full to the time of his discharge is no bar to a libel for wages for the residue of the season, the evidence showing that it was not intended as a settlement for the wrongful discharge.

Affirming 36 Fed. Rep. 509.

In Admiralty. On appeal from district court. 36 Fed. Rep. 509.

Goodrich, Deady & Goodrich, for libelants.

Everts, Choate & Beaman, for claimants.

BLATCHFORD, J. I concur with the district judge in the views expressed by him in his opinion, filed September 24, 1888. I also agree

that the exceptions of the libelants to the commissioner's report must be overruled; that the libelants Field, Clark, Kidney, Corrigan, Collins, McGuirk, Early, and Kruger, respectively, must recover the amounts reported by the commissioner in their favor, with interest from the date of the report, May 18, 1889, but that the libelants John Fee, Page, Mitchell, and Pidgeon, respectively, must recover one-half of the amounts reported by the commissioner in their favor, with interest from the date of the report, May 18, 1889; that the libelants recover their costs in the district court, taxed at \$208.35; and that neither party recover any costs of this court.

THE ALBANY.

(District Court, E. D. Michigan. December 8, 1890.)

1. SALVAGE—LIABILITY OF SALVOR—EMBEZZLEMENT.

A salvor is bound to take such care of the property saved as a prudent person takes of his own property, and is liable for the plundering or embezzlement of such property by his servants or agents.

2. SHIPPING—DUTY OF MASTER—GIFT OF CARGO.

While the master of the stranded vessel may, in case of urgent necessity, throw overboard or otherwise sacrifice his cargo to obtain the release of his vessel, he has no right to give it away. Under such circumstances, the donee takes no title to the property, is liable therefor as bailee, and is bound to surrender it upon the demand of the owner.

3. SALVAGE—EMBEZZLEMENT BY SALVOR.

Libelants, who were the owners of a tug, contracted to render certain services to a stranded propeller for an hourly compensation. During the performance of such services she received on board a part of the cargo of the propeller, which the officers and crew of the tug subsequently embezzled and divided among themselves. *Held*, that libelants were chargeable with the value of the property so embezzled.

4. SAME—NEGLIGENCE—LARCENY BY THIRD PERSONS.

Two lighters which also belonged to libelants were also employed in removing portions of her cargo, and were sent by libelants to a wharf to which the public could obtain access by day or night. While laying there, a party of marauders came during the night, and, by collusion with the men in charge of the lighters, stole a large part of their cargoes. *Held*, that libelants were guilty of negligence in failing to take proper care of the property, and were liable for its value.

5. SAME.

During the performance of these services the officers of the tug entered into a corrupt agreement with the men in charge of two other lighters, in which libelants had no interest, to tow them to the propeller and back for a share in such part of the cargo as they might secure. These lighters were also laden with the cargo of the propeller, all of which was subsequently embezzled or stolen. *Held*, that such agreement was not binding upon the owners of the tug, and that they were not liable for the property so embezzled.

(Syllabus by the Court.)

In Admiralty.

On libel for salvage and cross-libel for embezzlement.

This libel was filed to recover the sum of \$805 for the use by the propeller Albany of libelant's tug Major Dana for 73 hours, from 8 o'clock A. M. of November 28, 1887, at \$10 per hour, and for 3 days' use of 2 lighters, at \$25 per day, during the same period. In support of

their claim, libelants offered in evidence a bill, certified by the master of the Albany, for this amount.

The answer and cross-libel alleged—

"That by said hiring it became and was the duty of the master and crews of said tug and lighters to take all proper care and use all proper skill in such service, and in saving and preserving such part of the cargo as they might receive upon the said tug and lighters from said propeller, for the owners thereof. Respondent denies that they took all proper care and used all proper skill in saving and preserving such cargo; * * * that said services were performed in so careless, negligent, and incompetent a manner that a large amount of property which they undertook to transfer from the said propeller by the said tug and lighters was lost to this respondent by reason of the negligence and incompetency of those in charge of said tug and lighters."

The facts developed by the testimony were substantially as follows:

About 6 o'clock in the evening of Thursday, November 24, 1887, the propeller Albany, of 1,917 tons burden, bound from Chicago to Buffalo, laden with a large and valuable cargo of flour, corn, lard, and merchandise, stranded upon Poe's reef, in the straits of Mackinaw, near Bois Blanc island, and about 7 miles from Cheboygan, during a thick, driving snow-storm. The lateness of the season and the exposure of the locality combined to make the steamer's situation most perilous, and warranted prompt and energetic measures for her speedy release. During the night she sounded alarm whistles, and threw overboard a considerable quantity of her cargo, so that by daylight of November 25th the waters were covered with sacks and barrels of flour, and the shore by Duncan and Cheboygan lined with the abandoned property. About 7 o'clock in the morning of Friday, November 25th, her mate was sent to Cheboygan, the nearest port, for assistance, and upon the way met respondent's tug, Major Dana, under charge of William Elliot, libelant's general agent and manager, who, hearing the signals of distress from the Albany, had taken the tug, and was then upon his way to her assistance. There was also on board one Harry Roberts, foreman and manager of libelant's machine-shops at Cheboygan. The Major Dana proceeded to the Albany, and on her arrival there Capt. Frank Williams, master of the Albany, and Elliot, master of the tug, agreed upon terms for the use of the tug at \$10 an hour. Capt. Williams also agreed to pay \$25 a day each for lighters which Elliot agreed to provide for the salvage of the Albany's cargo. At the same time the captain of the Albany requested Elliot to bring him out a gang of men to help unload his boat. The tug left the Albany, returned to Cheboygan, obtained two lighters and a number of laborers to work in handling the cargo, and about 11 o'clock returned to the Albany under the command of Capt. Charles Robinson, her regular master, and with William Elliot still on board. The lighters were at once made fast on the port side of the Albany, and were promptly laden by the men brought out from Cheboygan, who were hired for, paid by, and worked for, the Albany, and were not in the employ of the libelants in such service, or subject to their orders or control. One Todd, who never seems to have been in libelant's employ, was selected by Capt. Williams as time-keeper. While the lighters were being loaded on the port side of the propeller, the Albany's crew were throwing flour overboard on the starboard side. On one of the lighters was put all the lard in the cargo, 50 tierces, and a large quantity of flour in 140 and 280 pound sacks and barrels. The other lighter was loaded wholly with flour. Capt. Williams' instructions were that the flour and lard should be taken to Cheboygan and warehoused. Seeing the flour thrown overboard from the Albany, Capt.

Robinson asked Capt. Williams to throw some of it on his tug. The latter told him to bring her along-side, and he did so, and they did throw upon the deck of the tug, around the pilot-house and in her cabin, 30 to 40 sacks and 10 or 12 barrels of flour.

The tug then proceeded to Cheboygan with dispatches, and while there the flour, except the portion in the cabin, was unloaded upon McArthur's dock. Robinson claimed that he supposed that the property had been abandoned by the Albany, and that it belonged to him, and told the man in charge of the dock that when he got time he would come and take care of it. But when afterwards he went for it he was informed by the man in charge of the dock that it had been put with and shipped in another load. The tug returned to the Albany with dispatches, and found the two lighters loaded, when they were taken in tow by the tug to Cheboygan. The captain of the Albany had instructed Todd to put a gang of men on the lighters, with a man in charge, take them ashore and unload the stuff in the Michigan Central warehouse. In obedience to these instructions, Todd selected a gang of 15 or 20 men to go upon the lighters, and one John Knox to take charge of them. These men were selected from those unloading the Albany. This man, Knox, did not seem to have been in the employ of libelants at this time, although he had been prior to that. The lighters, with the men on board and in charge of Knox, left for Cheboygan about 1 o'clock in tow of the tug, and as soon as they got away from the Albany her master gave orders to throw the cargo overboard, and they rolled it into the water as fast as they could from both sides. When the tug left the Albany with these lighters, her master was instructed by the captain of the Albany not to bring back any more lighters; that he would not try to save any more, and he told the captain of the Saugatuck the same thing. The two lighters were taken to Cheboygan, and application made to the railroad for a warehouse. The agent replied that it would be necessary to get permission from the head office at Bay City. While the lighters were lying at the Michigan Central Railroad dock, the men on board them were stealing the stuff, and throwing it overboard so that they could better steal it. Owing to the excitement caused by the great sacrifice of property by the Albany, libelants concluded it would be unsafe to leave the lighters there with the loads upon them overnight, and decided to take them to their private dock at Duncan city for greater security. The property at Duncan was the sole property of the libelants, the neighborhood being sparsely settled. It was situated about a mile and a half from Cheboygan, and libelants had repeatedly left lighters loaded with flour at their docks there without loss. The public had no access to said docks without permission, and by going through libelants' private grounds. As the tug was proceeding with the lighters from Cheboygan to Duncan, her captain was hailed by men upon two other empty lighters, known as the Nelson and Bob Robinson lighters, who wanted to know if they were throwing stuff overboard from the Albany, and requested him to give them a tow out there. In answer to this request, Elliot said to the master of the tug: "If the boys can pick up some flour, you can take them out; we have nothing to do with it." The two empty lighters were taken out as far as the dummy, and left there, while the two loaded ones were taken to libelants' dock at Duncan city, tied up, and left in charge of John Knox, who, for part of that day, had been working upon the Albany. The tug then returned, picked up the empty lighters, and took them out to the Albany, reaching her after dark, between 7 and 8 o'clock P. M., when they were laden that night with flour and corn, and towed to the Nelson and Cass House docks at Cheboygan by the Major Dana. Later in the evening, at Knox's request for some one to help him pump the lighters, one Leischman, whose day's work for the libelants was ended, was requested to go to the light-

ers and assist Knox. When the tug with the empty lighters arrived at the Albany, the failure to get the warehouse was reported to her master, and he was informed that the two first lighters had been taken to Duncan city and laid up for the night. He asked if Knox had been left in charge of them, and, upon being informed of the fact, replied: "All right, take them to Cheboygan next morning, and unload them." When the tug returned to the Albany with the empty lighters, the men were still throwing corn and flour overboard. The men in charge of the lighters sought to obtain some of the stuff so being abandoned, and placed one lighter on each side of the Albany. One Clark, in charge of the lighter Nelson, claimed to have bought from the mate about 30 to 40 bushels of corn and about 30 barrels of flour for a merely nominal sum. The Bob Robinson was loaded in substantially the same way, and no account was kept of what went on either of them by any one on the Albany, although the Bob Robinson is said to have had a full load, and her capacity was estimated by some of the witnesses as being between 300 to 400 barrels. The flour and corn were about the same time being sold off the Albany to other parties. While the two lighters were being loaded, there was rolled upon the tug off one of them, by some of the men, for themselves, from 10 to 14 barrels of flour. The tug then took the two lighters back to Cheboygan, and left them there late Friday evening. Her master, Robinson, left her there, and went to his home in Cheboygan for the night, and Elliot took the tug to her dock at Duncan. From the cargoes of the first two lighters left at Duncan city, there were stolen that night 21 tierces of lard and a large quantity of flour, estimated at about 211 barrels. The flour and corn which composed the loads of the second two lighters, the Nelson and Bob Robinson lighters, which were towed by the Major Dana into the Cheboygan river, and there unladen, was *all* stolen, and divided among the men on board of them. Not a sack or barrel of flour or a bushel of corn was spared. When the tug reached Duncan, after leaving the Nelson and Bob Robinson lighters at Cheboygan, the flour on her, which had been procured by Capt. Robinson in the morning, and not left at McArthur's dock, and that put upon it by Campbell and others in the evening, was divided between the men. Some of it was left on the dock at Duncan, and afterwards put on one of the lighters, taken to Cheboygan, put into the warehouse, and shipped, with the rest, to the transportation company.

H. C. Wisner and W. S. Humphrey, for libelants.

H. H. Swan, for claimant.

Brown, J., (*after stating the facts as above.*) The real question in this case is whether the libelants are responsible for the wholesale plunder of the property placed upon the tug and these lighters, and the answer to this practically depends upon the further question whether the men in charge of such tug and lighters were employed by the libelants or by the Albany, or were merely marauders acting upon their own responsibility.

There is no doubt of the general proposition that salvors are bound to take such care of the property saved as a prudent person takes of his own property; that they are liable for the consequences of their own negligence or misconduct; and that, in case of a gross breach of trust or embezzlement of the property, the court may decree an entire forfeiture of their claim upon the same principle that a seaman's right to wages may be forfeited by his misconduct. *Mason v. The Blaireau*, 2 Cranch, 240; *The Senator*, Brown, Adm. 372; *Jones*, Salv. c. 7.

With regard to the responsibility of a principal for the willful or criminal acts of his agents and servants, the general rule is still as laid down in *McManus v. Crickett*, 1 East, 106; *Foster v. Bank*, 17 Mass. 479; and *Mali v. Lord*, 39 N. Y. 381,—that the master is not liable for the willful acts of his servants, committed without his express or implied authority, unless, at least, they are done strictly within the scope of their employment; but there is no doubt that in the case of inn-keepers, common carriers, and ship-owners, they are, upon grounds of public policy, liable for the embezzlement of their servants and agents, (*Schiefelin v. Harvey*, 6 Johns. 170; *King v. Shepherd*, 3 Story, 349; *The Niagara*, 21 How. 7; *Nugent v. Smith*, 1 C. P. Div. 33; *The William Taber*, 2 Ben. 329; *The E. M. McChesney*, 8 Ben. 150.) Thus in *The Amiable Nancy*, 3 Wheat. 558, the owners of a privateer were held civilly liable for the acts of her crew in plundering a neutral vessel; Mr. Justice STORY observing that—

“This is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them. * * * They are innocent of the demerit of this transaction, having neither directed it nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants; that they are not bound to the extent of vindictive damages.”

See, also, *The Anna Maria*, 2 Wheat. 327. In *Taylor v. Brigham*, 3 Woods, 377, it is said that—

“The law treats the captain of a boat as in some sort a subrogated principal, or qualified owner of the ship, possessing authority in the nature of exorbitant power for the time being, and his liability, founded upon this consideration, extends not merely to his contracts, but to his own negligences, malfeasances, and misfeasances, as well as to those of his officers and crew. * * * The owners are even liable for the willful and malicious acts of the master, done in the course and within the scope of his employment.”

How far the liability of the owner of a salving vessel extends for the misconduct of his officers and crew may admit of some doubt. The authorities upon this point are not altogether in harmony, and perhaps the prevailing rule cannot be better stated than by saying that the owner is not liable for the secret and independent acts of his crew; but it would be a singular anomaly to allow them a claim for salvage when the very purpose for which the service had been undertaken had been defeated by a wholesale plunder of the property saved. In the case of *The Boston*, 1 Sum. 328, 341, Mr. Justice STORY says:

“In cases of salvage, the party founds himself upon a meritorious service, and upon an implied understanding that he brings before the court, for its final award, all the property saved, with entire good faith, and he asks a compensation for the restitution of it uninjured and unembezzled by him. The merit is not in saving the property alone, but it is in saving and restoring it to the owners. However meritorious the act of saving may have been, if the property is subsequently lost, and never reaches the owner, no compensation can be claimed or decreed. * * * What claim could be more ex-

traordinary than an enunciation by a salvor in a court of justice that he had saved the property, and had perpetrated a gross fraud or theft upon the owner, for the purpose of withdrawing the property from him, and then to ask, in the same breath, for a compensation for his labor, notwithstanding his iniquity?"

In the case of *The Island City*, 1 Black, 121, a barque in distress had been taken in tow by a steamer and brought into port; but while "in possession of the steamer the officers and crew of the latter broke open the chests of the master and seamen of the barque, robbed them of their clothes, watches, and money, carried away the quadrants and barometers of the ship, rifled trunks on freight, and this pillage was committed extensively, and upon a plan of general plunder, by the mate and many of the seamen, without opposition from any of them." It was held that all the salvage apportioned to the crew should be forfeited on account of their misconduct, but that the owners of the steamer were entitled to their proportion.

In the light of these authorities, let us consider the relations of these parties to the libelants and to each other. Libelants owned the tug and first two lighters. They were also largely engaged in lumbering and machine-shop business, and a general store; owned docks, mills, and shops at Duncan city, and employed several hundred men, who lived in the neighborhood, and who, when the mills were shut down, took employment where they could find it. Witness Elliot was the "general outside foreman" of libelants; had "the general oversight of all the outside work," having full control and authority over the hiring and employment of the tug. He made the bargain for the use of the tug and lighters in this instance, and accompanied the tug upon all her trips to the Albany. How far he shared in the plunder of this property may admit of some doubt, though the testimony tends to show that a portion of it was left at his house, at least without his dissent, and that he was standing upon the dock while the flour was being taken away from the tug, and must have known what was being done with it. He seems even to have directed a part of it to be sent to Roberts, his brother-in-law, who was foreman of the machine-shops, though it is but just to him to say that he made restitution of one tierce of lard that he had received, after keeping it for about three months, and paid for most of the flour. Robinson was the master of the tug, and commanded her throughout the day, except upon her first trip, when the bargain was made. He was not only privy to the conspiracy, but received a portion of the plunder, though he seems to have afterwards lost it. Roberts was libellant's foreman, was actually engaged with the others in the plunder, receiving a tierce of lard and four and a half barrels of flour. McDougall, the engineer of the tug, admits receiving eight or nine sacks of flour. George Smith, the fireman, also received several barrels, while the rest was divided up among the crew.

I do not see how it is possible for libelants to escape liability for the loss of the property laden upon the tug. It was claimed with respect to

this that the flour was only rolled upon it to save it from being thrown into the lake, and that it was virtually a gift from the captain to the men upon the tug; but, as the lighters had been hired for the express purpose of saving the cargo, it is very improbable that the captain should have intended to give away that portion of it which went upon the tug. Aside from the improbability of his doing this, Capt. Williams had no right to sacrifice property in this way. It was not within the scope of his authority to give away property which could possibly be saved, and the crew of the tug were bound to know this, and were bound to deal with the property as salvors. A man cannot give away that to which he has no title. The master of a vessel has possession of the cargo for the purposes of transportation and delivery, and he has no more right to give it away to another than he has to sell it, and put the money in his own pocket. A gift under such circumstances conveys no title, and the donee is chargeable for the conversion of it as for embezzlement.

With regard to the property on the first two lighters, the case is not essentially different. Under instructions to take them to Cheboygan and put their cargoes in warehouse, the lighters were towed to Cheboygan, and libelants, failing to obtain the use of the Michigan Central warehouse, sent them to Duncan city, where it was their clear duty to see that they were kept in safety until they were unladen. They were left in charge of one Knox, a man who had been employed for several seasons by libelants, but who had been paid off the Wednesday night previous. He had been taken off with a gang of men to the Albany, worked on her eight hours, for which Todd, who had been recommended by Capt. Robinson of the tug to Capt. Williams of the Albany as a time-keeper, allowed him \$60. Knox says his time with libelants "went right on" under an arrangement with Roberts, and for this generosity he allowed a charge of \$10 to be placed against his account for Roberts' benefit. Knox was put in charge of the lighters at Duncan city, apparently by the orders of Robinson and Roberts, and perhaps with the consent of Capt. Williams of the Albany, under whose pay he was at the time. He exhibited his faithfulness to his trust by getting drunk, going to sleep, permitting the cargoes of the lighters to be looted by a gang of marauders during the night, and sharing in the plunder. Leischman, who was sent by Roberts to go down to the lighters, stay with Knox, and help him pump them out, had not been to the Albany at all, but was an employe of libelants, and had been working in their shop, running the bolt-machine. He says that no instructions were given to him about taking care of the property, and gives this as an excuse for offering no opposition to the raid that was made upon the lighters that night, and for receiving his share of the plunder. Indeed, both Knox and Leischman, instead of protecting the property, as it was their duty to do, seem to have been the aiders and abettors of a gang of thieves, who came to the dock that night with such wagons as they could obtain, and carried away all their vehicles would hold. In the morning, the lighters were careened so much to one side that they had to be straightened up

before they could be taken back to Cheboygan to unload. In all, some 14 or 15 persons participated in this spoliation.

Conceding that libelants did not stand in the position of a common carrier with respect to these cargoes, they at least were bound to take reasonable and proper care of them, and to make good losses occasioned by the negligence of their servants. *Brind v. Dale*, 8 Car. & P. 207.

The defense that Knox was hired by the master of the Albany to take care of this property; that it was intrusted to him by the expressed direction of Capt. Williams, and that libelants are not chargeable for his breach of trust, is plausible, but not altogether sound. Granting that Knox had been or was in the pay of the Albany, the evidence is clear that Capt. Williams instructed Todd to take the lighters, and unload them in the Michigan Central warehouse at Cheboygan; that, failing to obtain this warehouse, libelants assumed charge of the lighters for the night, and sent them to Duncan city as a safe place for them to remain. It is scarcely necessary to say that sending them to a dock which was accessible to the public by day and night—so easy of access, indeed, that the amount of the loss was only measured by the capacity of the vehicles that were driven there to take it away—is not such care as a prudent man would take of his own property. Irrespective of the question whether Knox was in the employ of the Albany or not, we think that libelants are chargeable with gross negligence, under the circumstances, and, with the excitement then prevailing in that neighborhood, in suffering the barges to lie at a wharf open to the public, and apparently without any protection.

The case, so far as concerns the Nelson and Bob Robinson lighters, is governed by different considerations. These lighters were not owned by libelants. They had no interest in them, and no personal knowledge that they had been towed to the Albany. While there is abundant evidence of a corrupt agreement between Elliot, Robinson, and the masters of these lighters to tow them to the Albany and back for a share of their plunder, such agreement was entirely outside the scope of their agency and employment, and bound only the parties to it. It is true that Capt. Williams may have supposed that these lighters belonged to libelants, but no representation of that kind seems to have been made to him, and such was not the fact. Libelants appear to have been entirely innocent of any complicity in this entire transaction, and it is unjust that they should be held responsible for the acts of strangers, or even of their employes, when they clearly exceeded their authority. It is no part of the duty of the manager or master of a tug to permit her to be engaged in a marauding expedition of this kind, and is so far outside the scope of their employment that the owners are not bound by it.

The evidence in this case discloses a very singular misapprehension upon the part of a certain class of people with regard to the duties of the public towards vessels in distress, and with regard to the ownership of property thrown overboard or unladen from them. So far from being moved by the misfortunes of the Albany to extend to her such assistance

as was in their power, her signals of distress seemed to have been interpreted as an invitation to everybody to help himself to whatever he could lay his hands upon belonging to the cargo. Indeed there is a medieval flavor about the conduct of the men engaged in this wrecking expedition, which intuitively recalls to the student of maritime law the customs of the Gauls, as stated by Judge PETERS in his observations upon the laws of Oleron, who were in the habit of seizing upon the cargoes of vessels stranded upon their coasts, and confiscating them to the use of the lords of the soil, and of either selling their crews into slavery, or sacrificing them as an offering to their gods. Happily, the crew of the Albany were preserved from this fate, as she succeeded in extricating herself from the reef, and steaming to a port of safety.

There must be a decree for the libelants for the amount of their bill, and a decree for the cross-libelants for the value of the property taken from the tug and the first two lighters, less the amounts received in settlement and payment for the same, and a final decree for the party in whose favor a balance is found to be due. The case will be referred to a commissioner to report this amount, upon the testimony already taken and such further testimony as may be offered, within 20 days from this date.

BRADY v. THE BENDO AND THE SAMPSON.

(District Court, E. D. Virginia. December 20, 1890.)

COLLISION—STEAMERS—LOSS OF STEERAGE WAY.

Where a steam-ship, while in relations to a steam-tug and her tow described by rules of navigation 19 and 23, in stopping for the purpose of coming to anchor, loses her steerage way, and disables herself from complying with those rules by keeping out of the tug's way, and a collision ensues, *held*, that the steam-ship was in fault, and must pay the damages.

(Syllabus by the Court.)

In Admiralty. Libel for damages from collision.

Harmanson & Heath, for libellant.

Whitehurst & Hughes, for the Sampson.

Sharp & Hughes, for the Bendo.

HUGHES, J. The libellant was owner and master of the barge *Kate Brady*, that was sunk in the entrance to Hampton Roads, between Old Point Comfort and the Rip Raps, in contact with the English steamer *Bendo*, at about half past 9 on the night of September 1, 1890, which was a clear, moonlight night. No vessel was anchored in this channel on the occasion except the steamer *Waddy*, which lay about a quarter mile off from Old Point, very near the point of collision. The channel here is a mile wide and its depth of water full 50 feet. A strong flood-

tide was coming into the Roads at the time. The barge Kate Brady was in tow of the steam-tug Sampson, upon a hawser 80 fathoms in length, and was lashed abreast of two other barges, she being on the port side. The tug and barges were coming in from across Chesapeake bay, *en route* for Norfolk. When the Sampson and her tow were about half-way between Thimble and Old Point lights, the steamer Bendo, which was coming from Baltimore bound for Norfolk, rounded Thimble light, and followed the Sampson on a course some distance southward, on the Sampson's port side, until the steamer and tug were nearly abreast of each other off Old Point light. The collision occurred while the Bendo was making ready and endeavoring to anchor. Capt. Masingo, master of the tug, gives the following account of what transpired in respect to the collision:

"I was in the pilot-house and on deck at different times; was on watch at the time. After we passed the Thimble light coming up the Roads, we were steering for Pig Point light S. W., $\frac{1}{2}$ W., and we discovered a steamer coming up astern of us, and running nearly parallel, as near as I could judge. When we got up abreast of Old Point light, or near about, the steamer had drawn up ahead of us nearly, and I ordered my man to port his wheel, and keep S. W. by W. half a point, so as not to crowd him too much. That order was obeyed. I went into the pilot-house again, and a few moments afterwards, when nearly abreast of Old Point wharf, I looked out of the door and saw the steamer approaching us at about an angle of thirty or forty degrees, and commenced to sing out something. I went to the pilot-house, and he said, 'Keep clear of me.' I ordered the wheel a-port again, and told the man to keep her a-port; and she [meaning the tug] was heading directly for the steamer Waddy, [or Wally,] which was lying to anchor on our starboard side; and he did so, and I told him to steady. I suppose he was going W. by S., $\frac{1}{2}$ S., as near as I can come to it. He [meaning the tug] veered off, and continued that until he got just close enough not to run into the Waddy, when the Bendo cleared my stern, so as he would not hit me. I stopped my engine, and remained so until after the collision. We passed I suppose within thirty or forty feet, possibly forty, from the Waddy, and after the collision occurred I had my wheel to starboard, and came ahead, so as to pull the tow clear of the Waddy. The tow then passed very close to the Waddy. I understood the one who sang out on the Bendo to say that his steering gear was out of order. When they sang out to me to keep clear, I said, 'Why can't you wait until I get by?' and they answered that their steering gear was out of order, or something to that effect; that was what I understood."

Testimony of the Bendo's witnesses shows that what was really said was that the Bendo had been getting ready to anchor, and had no steerage way. Capt. Masingo further says that the Waddy was lying not over a quarter mile from Old Point wharf; that he was abreast of her when the collision of Bendo and barge occurred; and that at the time the Sampson was not over 30 or 40 feet from the Waddy. George Young, wheelsman on the Sampson, testifies:

"We were about entering Hampton Roads off Old Point light, and I saw a steamer come up on our port side. The captain sang out about the same time, and asked if it was an English tramp, and I said, 'Yes.' He said, 'Give way to him,' and I gave way, until he told me to steady her. We were both going in about one direction at that time. We lost sight of him then, and a

few minutes afterwards I saw him again, and this time the captain said, 'Give way, or port the wheel,' and I ported again. I was then heading right for another steamer, anchored on our starboard bow. The captain opened the door and said, 'Look out for that other steamer.' Of course I could not see what occurred astern. We passed within about forty feet of the vessel on our starboard bow. * * * The last I saw of the Bendo she was almost at right angles, going ahead. * * * There was no order to starboard the helm before the collision. That order was after the collision. We had stopped the Sampson before that order."

Higgins, the engineer of the Sampson, testifies:

"The engine room is flush with the deck. I was on deck on the port side. The steamer came until her bow was about our fore-rigging; then she apparently took a sheer, and closed in on us, and got within something like thirty or forty yards. I could hear the men hallooing, but could not tell what they were saying. I am a little deaf. I ran into the engine room to stand by the engine, as I saw there would be a collision. I thought she would hit the Sampson; her bow was coming towards the Sampson. Our boat sheered off a little, and then, on the starboard bow, there was another steamer anchored. There was a strong flood-tide. I did not take account of the distance, but we were not far from the anchored ship, and did not have room to get off on the other side. Directly after I got in the engine room, our ship came close by the [anchored] steamer's bow, and I slowed down and stopped the engine."

The masters of two of the barges were examined on behalf of the Sampson. They testify that the Sampson moved off to starboard when the Bendo hailed, and kept that course up to the moment of collision. They say that the Bendo was moving forward, and ran into the barge.

No witness, of the seven or eight examined in behalf of the Bendo, has given, in narrative form, an account of the collision, and the circumstances under which it occurred. All of the testimony is in the form of question and answer; most of the interrogatories elaborate, most of the answers brief. This defect in testimony puts the court at the disadvantage of having to sift out, from very short statements of witnesses, in voluminous depositions, the theory of the litigant's case. I will state their substance as well as I can: The witnesses for the Bendo all concur in saying that the Bendo moved up, on a course nearly parallel with that of the Sampson, from Thimble light till nearly abreast of Old Point light, at a distance, one course from the other, of 140 to 150 fathoms. They say that then the Bendo stopped her engine for coming to anchor, and reversed her engine to back. They say that in a few minutes thereafter the Bendo began to move backwards, and was so moving when the collision occurred. They say that, before the time the Bendo stopped her engine to anchor, the Sampson had changed her course more southwardly, which had brought the steamer and tug within 40 or 50 yards of each other when the Bendo stopped to anchor. They say that the Sampson continued that course, and approached so near the Bendo as to cause the latter's men to cry out to keep off, but that the warning had no effect; so that, although the Sampson herself cleared the Bendo, yet the barges in tow of her were drawn into collision, in which the barge on the port side was sunk. They say that, when the Bendo slackened up to anchor, she had got up rather more than abreast of the Sampson,

which was two or three points abaft the Bendo's beam. They say, in proof that the Bendo was moving backwards at the time of collision, that the backwater from her propeller had reached to mid-ships of the Bendo. They say that the barge ran into the Bendo. They say that the course of the Sampson for a few minutes before the collision was in the form of a curve, which took her around on the port side of the Bendo, and that by taking this course she drew the barges against the bow of the Bendo, and brought on the collision. Such is the substance of the testimony of all the Bendo's witnesses. In respect to a few controverted particulars, I will copy some special testimony. Capt. Amlot, master of the Bendo, says, in answer to interrogatories which I omit:

"At ten or twelve minutes before the collision, the Sampson was three points on our starboard quarter, and 160 fathoms abaft our starboard beam. We got up abreast of the tug, but did not pass her. The pilot hailed the tug to keep off, as she was about to come to anchor. In the ten minutes, and shortly before the collision, the tug was approaching the steamer, and she continued to come closer, which caused our pilot to hail the tug to keep off, as we were about to come to anchor. She was then thirty or forty fathoms off. The tug took no notice of our request, and proceeded to cross our bows. The tow line was made curvilinear by that movement. The Bendo did not at any time while in Hampton Roads go ahead of the Sampson, or at any time pass her bow."

Edward Ramsey, the second officer of the Bendo, in charge of the after-deck, testifies that ten or twelve minutes before the collision the Bendo, having stopped her engine, signaled to the tug to keep off; that he heard both master and pilot call to keep clear, as they were coming to anchor, and had lost steerage way; "could not say whether we were passing the Sampson or not."

Such is the tenor, and I think the substance, of all the testimony offered for the Bendo. I come now to decide upon testimony as conflicting as was ever offered in a collision case. All parties agree that damages are due the libellant, and must be paid by the owners either of the Bendo or Sampson. As the channel in which the tug and steamer were moving was a mile wide, and as the steamer Waddy was anchored within a quarter of a mile of its northern or Old Point side, leaving three-quarters of a mile of clear channel on the southern side, it was natural that the Sampson, incumbered with a tow, at the end of a long hawser, moving in advance of the Bendo, should make for the wider part of the channel, leaving the anchored steamer to starboard. The tug had a right to choose this side of the channel. The result showed that the tug took no more than was necessary of this part of the channel, and did actually pass within 50 feet of the Waddy. The barges in tow of her indeed cleared the Waddy by only four or five feet. Here is an undisputed fact, that a steam-tug coming from Thimble light to Old Point, in a channel clear for three-quarters of a mile, took her course through so little of this channel on her port side for three-quarters of a mile that she passed within 50 feet of the anchored steamer on her starboard, and her tow within five feet. From the course thus pursued by the Sampson from Thimble light into the Roads, the testimony of the tug shows

that she changed only so far, at the call of the Bendo, as to port her helm, and to bring herself nearer to the Waddy than she had intended to pass. Notwithstanding the strenuous insistence of the witnesses of the Bendo that the tug must have starboarded her helm, and thereby brought herself to port of her original course, and down upon the Bendo, I am constrained to believe that the Sampson did not change her course to port, or change it at all, except, at the request of the Bendo, by bearing off to starboard under a ported helm. I am constrained to believe that the Bendo having imprudently chosen the time for anchoring, having lost her steerage way, and her bow having begun to swing to starboard, those on board of her, being strangers in these waters, and it being in the night-time, were unable to form any correct judgment of courses or points of the compass, and were mistaken in thinking that the tug was going to port, when she was really veering to starboard. Nor can I bring myself to think that the Bendo had got to moving backward. That her propeller was backing vigorously, I have no doubt, and I have no right to doubt that the backwater from it had run as far along the Bendo as amidships; but I do not accept this latter fact as proof that the steamer had yet obtained a backward movement. It was a very strong flood-tide, and such a tide could itself have carried backwater as far as mid-ships even if the ship had been moving forward at a slow speed, and even though the ship were, like the Bendo, 345 feet in length, with 43 feet of beam. At any rate the backwater was not proof of backward movement, and we have the testimony of the men on the barges positively declaring that the Bendo was still moving forward when she ran into the Kate Brady. What, then, is the state of the case in respect to the laws of navigation? Rule 19 requires any steam-vessel in risk of collision with another steam-vessel, which she has on her own starboard side, to keep out of that other's way. Rule 22 requires every vessel overtaking another to keep out of the other's way, and rule 23 requires the vessel which is not required by rule 19 and 22 to keep out of another's way to keep on in her own course. Whether considered as a vessel approaching the Sampson, or as a steam-vessel having the Sampson, another steam-vessel, on her starboard side, it was the duty of the Bendo to keep out of the Sampson's way. Instead of doing so, the Bendo chose a time for coming to anchor unfavorable to doing so consistently with her duty of keeping out of the Sampson's way. In coming to anchor, she lost her steerage way just when she absolutely needed it for the purpose of keeping out of the tug's way. She had a right to anchor wherever she might have chosen to do so in that spacious roadstead; but in coming to anchor it was her duty to so contrive as to keep out of the way of the vessel on her starboard side, which she had been overtaking. In failing to do so, and in giving up her power of steerage way just when it was essential to her performance of imperative duty, she committed the fault which rendered the collision unavoidable. She confessed her fault when she sang out to the Sampson that it must keep off, and that she had lost her steerage way. That confession is as

undeniable as it is fatal to her case. In losing her steerage way at that moment, of all others, she was fatally at fault.

It is claimed in behalf of the Bendo that, although she was the overtaking vessel before she reached the vicinity of the collision, yet for a little while anterior she was abreast of the Sampson, and even more than abreast, and had the Sampson two or three points abaft her beam. Yet her captain expressly says that he had not passed the Sampson. But whether he had passed or not is immaterial in the present case. She had come up into the vicinity of the collision as the overtaking vessel, and could not then and there throw off the responsibility of that character by getting slightly ahead of the other ship. If a dog in chasing an ox runs forward and tries to seize the ox's nose, he does not thereby convert the ox into the chasing animal. If the Bendo had followed up the barge, and, instead of running into her stern, pushed ahead; turned, and made for the bow of the barge, sinking her, it would be converting a great and wise rule of navigation into a deception and snare to hold that the barge was the overtaking vessel. Besides all this, the Bendo had the Sampson on her starboard side throughout the adventure, and was bound to keep out of the way of both tug and tow.

As to the point made in behalf of the Bendo, that the tug had no lookout, and that it was through this fault that the collision occurred, it is to be answered that Capt. Masingo states that he was on watch on the upper deck and in the pilot-house of the Sampson at, and for some time before, the moment of collision. The proper place for a lookout on any vessel is that point from which he can best see objects and obstructions. The courts do not undertake to determine the proper place by any general ruling. A good place on the deck of one vessel may not be the proper place on another vessel of different conformation. The pilot-house deck of a steam-tug is the most elevated place on the tug; and the pilot-house itself, having windows on every side, is not an improper place for a lookout to enter occasionally in performing his observations. If he be a lookout in fact, giving his whole attention to that duty, and is not also acting as wheelsman, engineer, or in other exacting capacity at the same time, it is enough. The vessel is not in fault if he be capable and vigilant, though he be on the pilot-house deck or occasionally in the pilot-house itself. Capt. Masingo was on that deck, and I do not think the Sampson was in fault as to her lookout.

Let the damages sustained by the owner of the Kate Brady be ascertained by a commissioner, and I will sign a decree requiring their payment by the owners of the Bendo.

THE JAMES IVES.¹

THE NEWPORT.

EASTON v. THE JAMES IVES AND THE NEWPORT.

(District Court, S. D. New York. December 16, 1890.)

COLLISION—STEAMER AND SAIL VESSEL—PARALLEL COURSES—CHANGE OF COURSE.

The tug N., with libellant's canal-boat on her port side, and projecting ahead of her, was on her way from Columbia stores, Brooklyn, to a point near Ellis island, in the harbor of New York. The schooner J. I. came down the East river in tow, was cast off opposite the Battery, and, with a fresh N. N. W. wind, shaped her course to go between Ellis and Bedloe's islands, starting from a position on the tug's starboard hand, and some 300-400 feet distant, and moving parallel with, and a little faster than, the tug. Owing to her greater leeway also, she was continually drawing nearer. When about a third of a mile east of Bedloe's island, the schooner suddenly put up her helm, and attempted to cross the bow of the tow, but collided with the canal-boat. Her excuse was that she was obliged to so maneuver to clear a ship anchored between Ellis and Bedloe's islands. The weight of evidence was that there was no vessel so anchored as to embarrass the movements of either vessel. *Held*, that the schooner's change of course was unjustifiable, and was the cause of the collision.

In Admiralty. Suit to recover damages caused by collision.

Hyland & Zabriskie, for libellant.

Robinson, Bright, Biddle & Ward, for the Newport.

Goodrich, Deady & Goodrich, for the James Ives.

BROWN, J. Towards evening on the 28th of May, 1890, as the libellant's canal-boat Charles J. Rowe, while on the port side of the steam-tug Newport, and projecting ahead of her, was being towed from the East river, bound for the scow permanently anchored as a landing place near Ellis island, she was run into by the schooner James Ives, bound from the battery down the bay, and sustained damages, to recover which the above libel was filed. There is much conflict in the evidence as to the place of collision, whether it was near Bedloe's island, or at least a quarter of a mile above it; whether an anchored ship was in the way, so as to compel the schooner to change her course; and also as to the relative position of the two vessels as they came out of the East river. The weight of probability, as well as of the direct evidence, is that the collision was not so near Bedloe's island as most of the libellant's witnesses state, but much above Bedloe's island, and at least half way up to Ellis island, and probably at least a third of a mile eastward of a line joining the two. The tug was bound from Columbia stores, Brooklyn, for the scow above referred to, and had come along the northerly side of Governor's island. The schooner had been towed by a tug down the East

¹Reported by Edward G. Benedict, Esq., of the New York bar.

river, and was cast off about in mid-river, when opposite the Battery. When cast off, most of her sails were set, and, with a fresh wind from the N. N. W., she was soon under way, at a speed of 9 or 10 knots, heading between Ellis and Bedloe's islands. According to the testimony of her master, when she got under way the tug's bow was lapping the schooner's stern, and only about 75 feet distant. His answer so states, and says that their courses were converging by an angle of three points. The two proceeded for nearly a mile, he says, until they came so near to a ship anchored between Ellis and Bedloe's islands that the schooner could not come about, but, in order to avoid collision with the ship, he was forced to bear off towards the tug, and thus came into collision with the libelant's boat; the tug not having stopped and backed early enough to keep out of the way. The tug's witnesses assert, and in this they are corroborated by the libelant, that there was no ship at anchor in the immediate vicinity of the collision, or so situated as to embarrass the navigation of the schooner, or to prevent her continuing further on her course. Examination and comparison of the testimony compel me to accept in general the version of the collision given by the libelant and the tug's witnesses, rather than that given by the schooner. It is impossible that the schooner could have been navigated in such a manner, and in such relative positions to the tug, as her master claims. He says the tug was only about 75 feet away from him when he got under way; that he kept his first course for about three minutes, then luffed in all about two points, and thereafter continued on about a parallel course with the tug, until he was forced to bear away at the time of collision. The libel states that at first their courses were crossing by three points. If this were correct, and the boats were but 75 feet apart at the start, there would have been a collision in less than 15 seconds; if, on the start, their headings had varied a point only, and they were then only 75 feet apart, at a speed of 9 knots, there would have been a collision in less than half a minute. I have no doubt that the tug's witnesses are correct in estimating their distance apart as at least 300 or 400 feet; and, considering the uncertainty of estimates on the water, and the subsequent navigation, the distance was probably at least 600 feet, and possibly more. If the position of the tug was that indicated by some of her witnesses by the letter G on the chart, she must have been even twice that distance from the schooner. If they were 600 feet apart when the schooner started under sail, and their courses converged two points, as seems probable from the testimony, they would have approached within 200 feet in going about 1,000 feet, that is, in a little over a minute. In fact, both proceeded nearly a statute mile before the collision, *i. e.*, for about seven minutes, and I have no doubt that the luff referred to was much less than a minute after the start, and when they were at least 200 or 300 feet apart. It is improbable that at any time while the vessels were proceeding upon nearly parallel courses, and before the schooner bore away to cross the bow of the tug, they were so near each other as 100 feet. The schooner was gaining slightly on

the tug, but at no time got fully ahead of her. They were undoubtedly gradually approaching each other sideways, through the greater leeway made by the schooner, although their headings were no doubt about the same, viz., about west.

The libellant's witnesses confirm those of the tug also as to the fact that the schooner was astern of the tug at the start. The master of the schooner says that soon after the start the bows of the tug were abreast of his cat-head; but if at any time the tug was apparently astern of the schooner, I am satisfied that it was while her sails were shaking, and before she had filled away. The mate says that when they started under sail they were about 100 yards west of a line running from Fort William to the Battery. At that time the tug was at least that distance to the westward of the fort, and probably more, and, being at least 400 or 500 feet away, there was no difficulty, so far as I can perceive, in the schooner's going astern of the tug at the start, with a fair wind, and a direct course down the bay. By not doing so, and by assuming, within a minute after starting, a course nearly parallel with the tug, the pilot of the tug was naturally misled as to the schooner's destination, and supposed that she was going to anchorage ground on the western shore. There is no doubt that it was the duty of the tug to keep out of the way of the schooner if their courses were crossing; but, from the fact that the schooner, at the start, did not take a course astern of the tug, as she might have done, and, irrespective of that, from the further fact that very soon after starting—so soon as scarcely to be distinguishable from coming up to the wind after first filling away—she took a heading not at all crossing that of the tug, but, if anything, rather more to the northward than the tug's heading, (as must necessarily be found from the long distance run almost side by side, as well as by the tug's testimony,) it is not a case of crossing courses at all, since the pilot of the tug did not know the schooner's destination, and was not chargeable with any knowledge that she desired to go to the southward. He was not called on to give way until he had notice of her intention, or her proximity became dangerous. The schooner by the same rule was required to keep her course. Instead of doing so, she filled away suddenly, and ran across the bows of the tug. This was the immediate and the proximate cause of the collision. If the anchored vessel was at that time so near as to force the schooner to a change of course, it must have been equally in the way of the tug; but from the other testimony I am satisfied that the schooner's change of course was not made in the immediate vicinity of any anchored ship. This case has no resemblance to that of a necessary tack by a sailing vessel when she has approached as nearly as is safe the side of a river, or some other obstruction, where a steamer must know that the change of course is necessary. If the anchored ship had been so near as to require such a maneuver by the schooner, its position moreover must have been seen in abundant time for the schooner to hail the tug, and to signify her intention to go to the southward. They had proceeded for some time within easy hailing distance, and yet no hail

or signal of any kind was given, and the schooner filled away without warning, thus immediately bringing on collision. This, in any view of the case, whether the anchored ship was where it was claimed to be by the captain of the schooner or not, was inexcusable and reckless; and, as it was the immediate cause of the collision, the schooner must be held to blame.

I do not find in the evidence any indication that the tug did not do all in her power to avoid collision from the time the intention of the schooner was made known. She had given several blasts of the whistle previously, because they were approaching near to each other, and, as soon as the schooner changed her course, the tug stopped and backed strong, thus very nearly avoiding collision. When the schooner changed, they were probably from 100 to 200 feet apart. Upon the evidence as above stated the case stands as that of vessels proceeding upon parallel courses, when the schooner, without previous notice of her intention, suddenly bore away across the bows of the tug without justification, and without any such evident or pressing necessity as the tug should have perceived without notice. Upon such facts the schooner is alone in fault. Decree for the libellant against the schooner, with costs, and dismissing the libel as to the Newport.

LOOKOUT MOUNTAIN R. Co. *et al.* v. HOUSTON *et al.*

(Circuit Court, E. D. Tennessee, S. D. December 2, 1890.)

1. REMOVAL OF CAUSES—RES ADJUDICATA.

Where a suit is removed to a federal court after the state supreme court has passed upon a demurrer filed in the suit, the decision on such demurrer is binding on the federal court.

2. CONTRACT—EVIDENCE.

In a suit upon an alleged parol agreement by railroad contractors to assume the debts of the railroad company, the defendants denied making the agreement, and two of the company's directors, who were present at the meeting at which said agreement was alleged to have been made, corroborated their testimony. Two other directors and the secretary of the company testified that the agreement was made. Shortly after said meeting, one of the defendants wrote a letter to the secretary of the company, in which he questioned the correctness of a statement of the company's debts, and promised to refer it to defendants' agent, but did not deny their liability for the debts. *Held*, that the evidence was sufficient to establish the contract.

In Equity.

C. P. Goree and Richmond & Chambers, for complainants.

Clark & Brown, for defendants.

KEY, J. About the year 1880, the complainant railroad undertook to build a line of road from Chattanooga, Tenn., to Rome, Ga. The contract for the building of the road was first made with J. C. Stanton & Co., but, before much work was done, J. C. Stanton & Co. surrendered their contract, and it was canceled, and a new contract was made with the defendants. They were to complete the road ready for the rolling stock within a year, and were to be paid per mile \$8,000 of the paid-up capital stock, and \$22,000 in the first-class mortgage bonds of the company. The bonds and stocks were to be issued, as needed, at the request of the defendants. This contract was reduced to writing, and executed by the parties. There is no dispute as to this contract, which was written, but complainants alleged that there was an oral understanding and agreement made at the same time, that the defendants would pay all the debts of the railroad and also the debts and expenditures made by J. C. Stanton & Co. under their contract. Defendants deny that there was any such oral contract, and insist that it would not be binding. Complainants filed their bill, alleging that the debts mentioned in their bill were to be paid under this agreement. The cause began and was for some time prosecuted in the state court.

Our attention must first be directed to a demurrer which was disposed of in the supreme court of the state. Defendants' counsel insists that the judgment of the court upon the demurrer was erroneous upon principle and upon authority, is not conclusively binding on this court, and should be disregarded. In *Duncan v. Gegan*, 101 U. S. 812, the court held that—

"The transfer of the suit from the state court to the United States court did not vacate what had been done in the state court previous to the removal. The circuit court, when a transfer has been effected, takes the case in the con-

dition it was when the state court was deprived of its jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained therein. It takes the case up where the state court left it off."

Section 721, Rev. St., provides that the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. It has been said:

"This court does not claim any supervisory or appellate power over the state court or judge. It merely entertains jurisdiction of this suit because of the citizenship of the plaintiff, and, being thus called on to administer a law of the state of Georgia, it will, if possible, follow the decision of the state judge. A state statute, when it appertains to rights and titles in things having a permanent locality, and a construction is placed upon it by the highest state court, becomes a rule of decision in the federal courts; but the rule does not apply to contracts." *Guano Co. v. Morrison*, 2 Woods, 395-406.

Justice CLIFFORD states the matter thus:

"'Infinite mischief would ensue,' says MARSHALL, C. J., 'should this court observe a different rule in construing the statutes of a state from that established by the judicial authority of the state. *McKeen v. Delancy's Lessee*, 5 Cranch, 22. In cases depending on the statutes of a state, the federal courts adopt the construction given to the statute by the highest court of the state, where that construction is settled, and can be ascertained. *Polk v. Wendal*, 9 Cranch, 98; *Elmendorf v. Taylor*, 10 Wheat. 157.'" *Merrill v. City of Portland*, 4 Cliff. 138-147.

The supreme court of the United States announces this doctrine:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the constructions of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But, even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the questions seem to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts." *Burgess v. Seligman*, 107 U. S. 34, 35, 2 Sup. Ct. Rep. 10.

The doctrine asserted in this case is sustained and declared in *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358, and in many other cases, but it applies to cases that are alike in their principles and features, but yet different cases for decision, and having been determined by the state and federal tribunals, each forum deciding its case for itself; and the question is how far the federal court in its case is to follow the decision of a state in a like case. Whether or not a state court is followed in its decision in the federal court has no effect upon the suit decided by the state court. The decision stands as the law of the case. The last decisions referred to have no application to the case on trial. This case was brought in the state court. The defendants came into that court, and filed a demurrer to the bill. The chancellor sustained the demurrer, and ordered the bill dismissed. From that decree complainants appealed to the supreme court of the state, its highest judicial tribunal. The supreme court reversed the action of the chancellor, overruled the demurrer, and sent the case back for answer to the merits. It is now insisted that the action of the supreme court was erroneous and the action of the chancellor right, and this court, it is insisted, should so determine, or, at least, disregard the decision of the supreme court as not binding on this court. After the case was sent back to the chancery court, the defendants removed it to this court upon the ground that, because of local prejudice or influence, they could not obtain justice in the state courts. The state courts had lawful and complete jurisdiction of the case until it was removed to this court. The chancellor had authority, and it was his duty, to hear and decide upon the matters raised by the demurrer, and the supreme court had authority, and it was its duty, to pass upon the action of the chancellor, and affirm or reverse it. When the cause came to this court, it came bodily. None of it remained in the state court. It came here the same case that it was in the state court, and in precisely the condition the state court left it when this court took it in hand. Under the twenty-fifth section of the judiciary act, as modified by an act approved February 5, 1867, (14 St. at Large, 385,) where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where there is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or of the constitution, or of a treaty or statute or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the constitution, treaty, statute, or commission,—the final judgment or decree of the highest court of the state may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error as from a circuit court of the United States. A district or circuit court of the United States has no appellate or supervisory authority over any decision, decree, or judgment of a state court; nor does the supreme court of the United States have such, except as provided

for in the twenty-fifth section of the judiciary act, referred to, and the act of 1867.

Besides the decisions mentioned, there are numerous decisions of the federal courts—an unbroken line—to the effect that the judgments and decrees of state courts cannot be reviewed or supervised by the federal courts except where a writ of error lies, as above indicated. This court is bound to respect the decision of the supreme court of the state in its judgment in regard to the demurrer, and regard it as a determination binding upon this court, even though it might be erroneous. The decision of the state supreme court in this case is found in 85 Tenn. 224-226, 2 S. W. Rep. 36. It says:

"Houston & Co. interpose a demurrer upon several grounds, the only one of which that was pressed in the court below or in this court is that the bill shows a promise, not in writing, to pay the debt of another, and, as such, is void under the statute of frauds and perjuries. The demurrer was sustained by the chancellor, and complainants have appealed. In this we think there is manifest error. The verbal promise or agreement by Houston & Co. to pay these debts was the consideration for which Stanton & Co. surrendered their contract, and for which the railroad company canceled that contract, and entered into a less advantageous one with the defendants. The contract of Houston & Co. to pay such debts is 'a new and original undertaking,' upon a valid consideration passing at the time, and does not fall within the statute."

All that the court decides is that the undertaking to pay complainants' debts was not within the statute of frauds, and therefore need not be in writing; but that much it did decide. This case is not like that of *Battle v. Street*, 85 Tenn. 291, 2 S. W. Rep. 384. In this last case there was a demurrer which was sustained by the chancellor, but, on appeal, was overruled by the supreme court. After the case was sent back, it was insisted that the overruling of the demurrer was equivalent to an adjudication of the several questions arising upon the state of facts stated in the bill. The court said:

"It is to be particularly noticed that the decree overruling the demurrer assigns no ground for the action of the court. No opinion was filed by the court from which we can determine the precise ground upon which the court thought the demurrer bad. * * * Such a decree, overruling in general terms a demurrer, adjudicates nothing but that there is sufficient equity upon the face of the bill to require an answer."

In the case in hand we do have an opinion of the court giving the reasons for the action of the court. It determines, however, but one question, and that is that the promise to pay the debts alleged in the bill, as therein alleged, need not be in writing. Every other question of law, or fact, or equity is left undetermined. It is insisted that oral testimony cannot be admitted to enlarge or add additional obligations to the written agreement, and the proposition is generally true as to such matters; but in this case, if the parol agreement be proven at all, it must be admitted that the testimony which establishes it also proves a state of facts which makes the contract an exception to the general rule; for it would make it appear that it was not included in the written contract at the request of the defendants, and for their advantage and benefit.

The great question which confronts us is, was there any such oral agreement? There is strong testimony on both sides. Gentlemen of high standing and excellent reputation differ widely as to the facts. It is no easy matter to come to a satisfactory conclusion as to what is established. It does not appear that defendants did any work, or that the railroad company issued any certificates of stock, or executed any mortgage, or issued any bonds. The work of building the road has long since been abandoned, so that, if any vitality remains in this corporation, or anything survives for it or its creditors, it is the obligation arising from this parol contract on the part of the defendants to pay the debts of the railroad company existing when the contract was made, and the debts and expenditures of J. C. Stanton & Co. under their contract. The agreement between the parties died in all other respects. The defendants did nothing, and its whole project failed. At first blush it would seem that the railroad company did so little—slept so deeply in the execution of its enterprise—that it would have justified the contractors in regarding the contract as abandoned. The subscriptions to its stock were never collected. It had no treasury, or, if it did have it, there was nothing in it. It executed no mortgage. It issued no bonds. It was certainly as lifeless as a living thing could be. It paid its officers nothing, and they are now among the complainants, asking the defendants to pay their salaries earned prior to the contract asserted. The defendants were never paid anything. The written agreement is remarkable in its terms and stipulations. The company promised to pay the contractors in securities; that is, in paid-up capital stock and in first mortgage bonds. There were to be issued a series of 1,800 bonds, of \$1,000 each. The capital stock was to be \$750,000, and the consent of the defendants in writing should be necessary before it could be increased. The railroad, at any time the defendants were to so request in writing, was to issue bonds or stock, or both, with which the defendants were to purchase material and iron for the construction of the road. The railroad company could not make any other contract or sell either bonds or stock without the written consent and permission of the defendants, and the defendants were at all times to have the right and option to sell and dispose of all the bonds embraced in the series of 1,800. The railroad company was to assist the defendants in negotiating and selling their securities, and to use its influence in keeping up their price. The defendants were to have full and sole control and management of the railroad until completed, and the work on said road and its manner of execution. Under this agreement, there was little for the railroad company to do but to obey the behests of the defendants; so that the great responsibility of the failure and abandonment of the enterprise would rest in a larger degree upon defendants than upon the railroad company. We go back to the testimony in regard to the alleged parol contract.

There were present at the time the contract was made with the defendants four of the directors of the railroad company. Two of these (one of them its president, who presided at the meeting which agreed to the contract) testify that no such contract was made, as the oral one alleged

in the bill; that the written contract embraces the entire agreement between the parties. One of these directors is asked if Mr. Goree did not inquire of him, immediately after the adjournment of the meeting, if provision had been made for the creditors of the railroad, and if this director did not reply that provision had been made, and stated that the defendants had agreed to pay the debts of the railroad. In reply he states that he has no recollection of such conversation. Mr. Goree testifies positively, and with convincing particularity, that such a conversation did occur. The director's statement to Goree is not evidence of the contract, but the contradiction of his material statement weakens the value of his recollection.

In addition to the testimony of the two directors mentioned in regard to the parol contract, the three defendants swear positively that no such contract was made, or even discussed. Two of them, Houston and Kinsey, were present during the entire meeting, they say. Neely says that he did not come to the meeting until a short time before it adjourned. On the other hand, two of the directors who were present swear that such a contract as is alleged was not only made, but was discussed; that the amount of the debts was estimated at from \$8,000 to \$10,000; that one of the directors stated that he would withdraw, and leave the meeting without a quorum, if provisions were not made for the payment of these debts; that thereupon the defendants agreed to pay them, one of the directors says, to the amount of \$8,000. They both say that it was proposed to embody this provision in the written contract, but the defendants insisted that it should not be done, because, as one of these directors says, if such a stipulation was placed where every one could read it, it would injuriously affect the negotiability of the bonds. The other director says that they said it would prevent a favorable compromise of the debts. The secretary of the railroad company, who was present at the meeting, corroborates these last directors distinctly, explicitly, and in quite a forcible statement of the entire transaction. The defendants say that if the payment of these debts had been required of them, they would never have undertaken to build the road. It appears from their own statements, or at least of one of them, that they were bidders for a lease of the Cincinnati Southern Railroad, which had just been completed, and that the hope of obtaining this lease was the inducement for entering into this contract. They agreed with J. C. Stanton that, in the event he would surrender his contract, he might become a member of their firm, and they would allow him a credit for the work he had done, provided their track should be located upon his track, as worked. They purchased of Hardin his stock in the railroad, which was worth nothing at all, as not one dollar had ever been paid upon it, for which they paid him \$1,000 in money, and agreed to pay him \$4,000 in bonds of the road. They say they did this to get him out of the way, so that he might not give trouble about the charter to the railroad, to which he laid some claim. These transactions indicate an anxiety upon their part to secure the contract for building the road, which might not have been overcome by an additional obligation

to pay not more than \$8,000. The proof justifies the conclusion that all interest and anxiety in connection with the building of the road ceased when defendants failed to obtain a lease of the Cincinnati Southern Railroad, and that from that time they desired to escape from their obligation.

The secretary of the railroad company gives much testimony in regard to what is contained in its books, and in relation to the correspondence between him and the defendants, that is properly excepted to by defendants; but there is sufficient competent testimony to show that, very soon after the contract of May 11, 1880, had been made, there was a general conclusion on the part of the creditors of the railroad company that these debts were to be paid, and they made a simultaneous movement to have them paid. The secretary wrote to some of the defendants in relation to the payment of these debts, and sent him a list of them. The most powerful evidence sustaining and corroborating the testimony of complainants' witnesses is a letter, written, evidently, on July 6, 1880, by defendant Kinsey, and addressed to the secretary. In this letter he says:

"I have yours of 3d with claims that I have never heard of before except the \$950 for paying the printing of bonds. Mr. Stanton has some vouchers which he paid, not to exceed \$1,000, which I have written to him for. Perhaps they may cover some of the items you sent. I have referred your letter to Mr. C. G. Samuels at Rome, who is the responsible party in such matters."

There is no word of denial of the liability of the defendant for the valid and unpaid debts of the railroad. The whole scope of the letter is a tacit admission of such liability. In this connection it may as well be stated that Samuels acted for the defendants in the purchase of Hardin's stock, and that he tendered his resignation as director May 13, 1880, that he might "accept a position in the syndicate with R. G. Houston & Co." It is possible, but it seems hardly probable, that the defendants and their witnesses might have forgotten all about this parol contract. It is certain that the witnesses for the complainants could not detail the facts they do, and as they do, without being guilty of swearing falsely, if the facts stated by them are not true. They deal with affirmative, positive matters, that they say did take place. The testimony of defendants and their witnesses is not strictly negative testimony, but it is such as, in its nature, is negative. It has been held by the supreme court of the United States that it is a rule of evidence that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative; because he who testifies to a negative may have forgotten, while it is impossible to remember what never happened. *Stitt v. Huidekopers*, 17 Wall. 384.

The conclusion arrived at is that the parol contract was made as alleged by complainants, and that they are liable thereon to an amount in the aggregate of \$8,000 should the debts foot up so much. The clerk, as special master, will report what debts of the complainants were due from the railroad company on the 11th of May, 1880, or before, their amount, and to whom payable. Vance's claim will not be reported. Such officers of the railroad company as may have such debts will not

be allowed interest thereon. It appears that no salaries had been fixed by their company; that it had an empty treasury, and was not collecting, or attempting to collect, its stock subscribed, except to a very limited extent, and that it was largely an experimental and inflated enterprise, which they must have known, so that the principal is a full satisfaction for debts of so little merit. Interest will be allowed to the other creditors. The clerk may look to the competent testimony on file, and take such other as he deems necessary and proper in his investigation.

CHATTANOOGA, R. & C. R. Co. v. CINCINNATI, N. O. & T. P. RY. Co. et al.

(Circuit Court, E. D. Tennessee, S. D. December 26, 1890.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—PRESUMPTION.

Under Act Cong. Aug. 13, 1883, c. 866, § 3, which provides that, when a proper bond and petition for removal are filed, "it shall be the duty of the state court to accept said petition and bond, and proceed no further in the case," where the record as certified shows that such bond and petition were filed, it will be presumed, on motion to remand, that they were duly accepted by the state court, though no order of removal was entered.

2. SAME—SEPARABLE CONTROVERSY.

Under section 2, Id., which provides that where there is in any removable suit a controversy wholly between citizens of different states, and which can be determined as between them, either one or more of the defendants actually interested therein may remove the suit, a suit in which the only controversy is between the complainant and one of the defendants may be removed by such defendant, though other persons, who have no interest in the suit, have been improperly joined as parties defendant.

3. CARRIERS—TRAFFIC CONTRACT—RESCISSION.

A contract between railroad companies by which one company allows the other to use its freight depot and tracks in consideration of rent at a fixed rate per ton and per car, without any provision as to the length of time the contract is to remain in force, may be rescinded by either party at any time, on reasonable notice.

In Equity. On motion to remand and on motion to dissolve injunction.

McAdoo & Barr and Clark & Brown, for complainant.

Lewis Shepherd, for defendants.

KEY, J. This suit was commenced in the chancery court of the state, and arises from a contract made by complainant and defendant Cincinnati, New Orleans & Texas Pacific Railway Company, June 28, 1888. The second paragraph of said contract says:

"For the use of the freight depot of the Cincinnati, New Orleans & Texas Pacific Company, the Chattanooga, Rome & Columbus Company will pay at the rate of 25 cents per ton for all freight received and delivered at the depot; this payment to include all services for unloading, delivering, and way-billing, and collecting the freight charges on merchandise of the Chattanooga, Rome & Columbus Company passing through the freight-house of the Cincinnati, New Orleans & Texas Pacific Company. For the use of the Cincinnati, New Orleans & Texas Pacific tracks for bulk freight, the Chattanooga, Rome & Columbus Company will pay the sum of 75 cents per car on all freights delivered on the bulk tracks of the Cincinnati, New Orleans & Texas Pacific Company."

On the 10th of September, 1890, the Cincinnati, New Orleans & Texas Pacific Railway Company gave a written notice to complainant that, "commencing Monday, October 13, 1890, the foregoing contract should cease and determine." On the last-mentioned day a bill was filed, asking to enjoin the said defendant from terminating this contract by refusing to comply with its terms, for the reason, as is alleged, that the contract is a permanent one and can only be dissolved or ended by mutual consent of the parties thereto. A temporary injunction was granted, and the Cincinnati, New Orleans & Texas Pacific Railway Company filed its petition, affidavit, and bond in the state court for removal into this court, and the cause is before us upon a motion to remand upon the part of complainant's solicitors, and the motion to dissolve the injunction on behalf of defendants.

The motion to remand is predicated upon two grounds: *First*, because the bond and petition filed for removing the cause were not accepted, and no order for transferring the cause to this court was made by the state court; *second*, because the cause is not removable, and this court has no jurisdiction because it is not a separable controversy. There appears in the record of the case filed here no order of the state court in respect to the removal of the cause. Section 3, c. 866, Act Aug. 13, 1888, (St. at Large, 1888-89, p. 435,) provides that, whenever any party entitled to remove a suit, except in certain cases, of which this suit is not one, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court, for the removal of such suit into the circuit court, and shall make and file therewith the bond required. "It shall then be the duty of the state court to accept said petition and bond, and proceed no further in the case." The state court has but two things to do. Those are to accept the bond and petition, and to take no further step in the case. There is nothing in the law requiring the state court to make an order of removal. Its only affirmative act is to accept the petition and bond. We find in this record, as certified from the state court, a copy of the petition and bond for the removal of the cause, and that they were filed in said court October 22, 1890. The presumption of law is, under this state of the record, that the state court did its duty, and accepted the petition and bond. An order of the state court would not remove the cause if it be not removable, nor would it prevent its removal if the petition shows it to be removable.

The other question upon this branch of the controversy is whether this is a case that can be removed. The complainant is a corporation created and existing by authority of the state of Georgia. The defendants are the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation of the state of Ohio; the Alabama Great Southern Railroad Company, a corporation of the state of Alabama; the Cincinnati Southern Railway, an alleged corporation of Ohio; and the East Tennessee, Virginia & Georgia Railway Company, a corporation of Tennessee. There are no parties to this contract in controversy but complainant and the Cincinnati, New Orleans & Texas Pacific Railway Company.

The Cincinnati Southern, as the bill shows, has not the slightest interest in it or control over it. It is not a proper party to the suit, and there can appear no reason for making it a party, unless the purpose was to prevent the jurisdiction of the court. So far as the other parties to the suit are concerned, they are all corporations of different states, and of states different from the Cincinnati, New Orleans & Texas Pacific Railway Company. The second section of the act of August 13, 1888, already referred to, says:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The real and only controversy here is between the complainant and the Cincinnati, New Orleans & Texas Pacific Railway Company. None of the other defendants have any interest in the litigation. They are not proper parties, and are improperly joined as such.

The question as to whether there be a separable controversy does not arise, and cannot arise, because the controversy is between but two parties. The motion to remand is overruled.

This brings us to the motion of the defendant Cincinnati, New Orleans & Texas Pacific Railway Company to dissolve the injunction. This depends upon the construction to be given the contract. Complainant insists that the contract is permanent and perpetual, and can only be terminated by the mutual consent of the parties; or, if it be not such a contract, it is one running from year to year. The question has recently been settled by Judge JACKSON of this circuit, in the case of *Baltimore & Ohio R. Co. v. Ohio & M. R. Co.*, in the southern district of Ohio, (no opinion filed.) The Baltimore & Ohio Company did an express business. On the 29th day of September, 1884, it made an agreement with the Ohio & Mississippi Company that the last-named company should furnish to the other company cars and other facilities for the conducting and carrying on the express business on the lines of the Ohio & Mississippi Company. The contract made no provision as to how long it should continue, or how it should be terminated. In this respect it was like the one in controversy here. There was the following marked difference, however: The tenth paragraph of the contract between the parties in the Ohio suit stipulated that—

"The said Ohio & Mississippi Railway Company, in consideration of the covenants and conditions herein contained, doth further agree with the said Baltimore & Ohio Railroad Company, so far as it lawfully may, that it will not make any contract relative to the forwarding of express matter over its said road with any other railroad or express company, but that the said Baltimore & Ohio Railroad Company shall have the exclusive right to forward express matter over the said railroad of the party of the second part."

After the foregoing contract had been in operation some years, and the express company of the Baltimore & Ohio Railroad Company had established and opened offices all along the lines of the Ohio & Missis-

issippi Company, the latter company threatened to terminate the contract, and took action to that end. The Baltimore & Ohio Company filed a bill to enjoin the other company from disregarding and terminating its said contract by withdrawing its cars and other facilities from the complainant in that bill, and giving the express matter to some other company. There is no clause in the contract under our consideration similar or equivalent to the paragraph quoted from the Ohio case, and yet that bill, presenting a stronger case than the one here, was dismissed upon demurrer after able and elaborate argument. If that bill could not be sustained, certainly this cannot be, unless it be, as maintained on complainant's behalf, that this contract gives an interest in realty by allowing the use of the depot and tracks. It is clear that the contract gives no such interest. Complainant under it has no possession of the depot or control of the tracks.

I conclude, therefore, that the injunction should be dissolved; but, in order that complainant may have opportunity to meet the exigencies of its situation, this dissolution will not go into effect until the 1st day of March next, at which date the dissolution will become absolute.

LOVETT *et al.* v. PRENTICE.

(Circuit Court, D. Minnesota. December 24, 1890.)

QUIETING TITLE—JURISDICTION—AMOUNT IN CONTROVERSY.

In a suit by the owners of separate lots, who derive title from a common grantor, to quiet their title as against a defendant who claims to own all the lots, the amount in controversy is the value of all the lots owned by the complainants, and not the value of separate lots of each.

In Equity.

The complainants, Charles E. Lovett, Frank R. Webber, C. A. Stewart, and R. T. Lewis, allege that they are severally the owners in fee of certain tracts of land situate in St. Louis county, state of Minnesota, in Duluth proper, third division, according to the recorded plat thereof. The particular lot owned by each plaintiff is given, and it is further stated that the lands described are a part of a certain tract described according to the government survey, which had been laid out into town lots, which are owned by 700 different persons. That an undivided one-half interest of each of the said lots is claimed and owned in severalty under conveyances from John M. Gilman, as a common source of title. That Gilman acquired title to the said undivided one-half interest under a deed from Benjamin Armstrong and wife, dated August 30, 1864. That Armstrong and wife, September 11, 1856, executed and delivered a deed to the defendant, Frederick Prentice, which was duly recorded, of certain real estate described and bounded as follows:

"One undivided $\frac{1}{2}$ of all the following described piece or parcel of land, situate in the county of St. Louis, and territory of Minnesota, and known and

described as follows, to-wit: Beginning at a large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota point; commencing at said rock, and running east one mile, north one mile, west one mile, south one mile, to the place of beginning, and being the land set off to the Indian chief Buffalo at the Indian treaty of September 30, A. D. 1854, and which was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents."

That none of the plaintiffs' lands are included in or intended to be described in the Prentice deed, and that Prentice wrongfully claims that the plaintiffs' lots are included in the land described in the Armstrong deed to him. It is further charged that defendant claims ownership, and has brought ejectment suits against several persons other than the plaintiffs above specifically named, and alleges that this suit is brought, not only on their own behalf, but in behalf of others claiming any interest in any of the lands which has been derived or claimed from J. M. Gilman, as aforesaid, and to whose said interest an adverse claim of title is set up by said defendant as against the Gilman title, and who may come in to be made parties plaintiff to this action. The relief claimed is a judgment adjudging that Gilman owned an undivided one-half of the land described in the Armstrong deed to him August 31, 1864, and that said title be quieted and settled as against the adverse claim of the defendant, Prentice, and that he be perpetually enjoined from claiming or asserting, in law or equity, any right, title, or interest adversely to the Gilman title as against the plaintiffs and others similarly situated, and for such other and further relief as to the court may seem just, etc. An answer is filed asserting that the defendant is the owner in fee-simple of an undivided one-half of all the lands in said complaint described, and praying judgment "(1) that plaintiffs take nothing by this action; (2) that defendant is the owner of an undivided $\frac{1}{2}$ of the land, and that he have possession," etc. A stipulation is filed and signed by the parties that the amount in dispute between the complainant Lewis and defendant is less than \$2,000, and so, also, between the complainant Stewart and defendant; and a plea in abatement is filed based upon the stipulation, and it is urged the criterion of jurisdiction of the federal court is the value of the particular lot owned by Lewis or by Webber. This case is removed from the state court to the United States circuit court.

W. W. Billson, for complainants.

Kitchel, Cohen & Shaw, for defendant.

NELSON, J., (*after stating the facts as above.*) Sufficient appears to show that this suit belongs to a class over which equity has jurisdiction, although the bill of complaint is framed with reference to the provisions of the statute of the state of Minnesota, (section 4, c. 75, Gen. St. Minn. 1878.) The action upon principles of equity is permitted in order to avoid a multiplicity of suits, and the determination of the motion to remand depends upon whether the amount in controversy in the suit is sufficient to give this court jurisdiction, and entitle the defendants to remove the same. The suit is instituted to determine the title to the entire tract of land, and settle the disputed claim of the defendant. He

is a common adversary, and complainants have a common source of title. While they respectively claim to own separate and specific lots, divided out of the large tract described in the complaint, (and so far their interests may be separate and distinct,) yet the controversy is in regard to a common title, in which the several complainants are collectively interested, and in which they have a community of interest. The relief asked is to establish the Gilman title and also the right of each individual complainant to the specific tract claimed. The suit belongs to that class where a person claims a right against a great number of individuals claiming under the same general right. Equity then interferes by obliging the party to abide by the event of a single issue. Or where a number of persons claim distinct rights in the same subject, and there must necessarily be a multiplicity of suits, a bill is filed to put an end to the controversy by a single suit; or, as better expressed by Mr. Pomeroy, (see 1 Pom. Eq. Jur. § 245 and following,—

“Where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing in behalf of the others, or even by one person suing for himself alone.”

The complainants here have an identity of interest,—a common title,—and the value of the matter in dispute is measured by the value of all the land represented and claimed by the complainants whose title is denied, and not by the value of the separate lots of each. The amount of all the lots represented by the complainants is sufficient to give the right of removal, and the motion to remand is denied. It is so ordered.

GUILD v. PHILLIPS *et al.*

(Circuit Court, N. D. Georgia. October, 1898.)

1. JUDGMENT—BILL TO SET ASIDE—FRAUD.

Where a bill in equity alleges that complainant's consent to a compromise decree in former litigation between same parties was obtained by a fraudulent withholding by defendants of important and material facts, well known to them, and unknown to complainants, which facts would probably have controlled the case in complainant's favor, the facts being here fully stated, and prays a decree setting aside the former decree, and demurrer is filed, *held*, demurrer will be overruled.

2. SAME—EVIDENCE OF FRAUD.

G. conveyed land to his wife and children. Subsequently suit was brought against G. on a promissory note by his sister, Mrs. P. Judgment was obtained, and execution issued on the judgment levied on land conveyed to wife and children. They filed bill alleging collusion in obtaining judgment between G. and Mrs. P., and that there was no real indebtedness on note, which was the foundation of suit. G. and Mrs. P. filed sworn answers to bill, claiming *bona fide* indebtedness. There was compromise decree, making part of land subject to Mrs. P.'s execution. Subsequently, during his last sickness, and shortly before his death, G. informed Mrs. G. that “he and his sister had wronged her; that the papers they fixed up were a fraud.” After his death she found in his papers a release from Mrs. P. to G. from all liability on the note. Other statements and circumstances are corroborative, and all taken together show collusion and fraud between Mrs. P. and G.

In Equity.*Simmons & Corrigan*, for complainant.*Broyles & Broyles* and *P. H. Bell*, for respondents.

NEWMAN, J. This case is a bill filed to set aside a compromise decree heretofore taken in this court. The case in which the decree, now attacked was rendered grew out of this state of facts: Mrs. L. C. Guild was the wife of L. A. Guild. L. A. Guild purchased a tract of land in De Kalb county, Ga., taking a bond for title in his own name. When purchase money was paid, a deed to the land was made to Mrs. L. C. Guild. Subsequently it is stated that the property was conveyed by deed from Mrs. Guild to L. A. Guild. This conveyance is said to have been void under section 1785, Code Ga., no order of court having been taken approving the conveyance from wife to husband. Subsequently, however, an instrument was executed by Mrs. Guild, with the approval of the superior court, as required by the statute, by which she created in the land a life-estate for herself and her husband, L. A. Guild, with remainder to their children, five in number. It further appears that differences had arisen between husband and wife, and that in the year 1884 they were living apart. L. A. Guild had a sister, Mrs. E. L. Phillips, a resident of the state of Rhode Island. In 1884 Mrs. Phillips brought suit in this court, and obtained a judgment against her brother on a promissory note for \$1,153.74. Execution issued on this judgment, which was levied on the tract of land named; the contention of the plaintiff as to her right to subject the land having been, as I understand it, that this land was originally bought by L. A. Guild, the husband, and paid for by him, and that subsequent conveyances or changes in title were void as against Mrs. Phillips, the same having been without consideration, and she being a creditor at the time of the original purchase. After the levy of the execution, Mrs. Guild filed her bill in this court for herself and as next friend for her children, seeking to enjoin the sale of this land under said execution upon various grounds, among others, that there was no real indebtedness between L. A. Guild and his sister, and that the claim of indebtedness was mere pretense, for the purpose of selling the land, and enabling said L. A. Guild, by sale of same collusively, through his sister, to get title and possession away from his wife and children. Bill was answered by Mrs. Phillips and L. A. Guild, their answer being sworn to, in both of which it was claimed that the debt was a *bona fide* existing debt, and that the amount claimed was justly due by said L. A. Guild to Mrs. Phillips. While the bill was pending, and before a hearing, a controversy arose between Guild and his wife as to the possession of two of the children. It had been agreed when they separated that the husband should keep two of the children and the wife three; it being further agreed that they both should keep the children in De Kalb county, so that the children kept by each could be seen by the other when desired. Mrs. Guild, in her belief that her husband intended to remove the two children in his charge to his sister's, Mrs. Phillips', in Rhode Island, took out a writ of *habeas corpus* for their posses-

sion. Before this writ was had, and while in the court-house with a view to a hearing, certain propositions of compromise were made, and negotiations ensued which resulted in giving the possession of the children to Mrs. Guild, and in a consent decree in the case in this court in relation to the land. The consent decree provided for a division of the land by commissioners, to be selected by agreement. One-half should be the property of Mrs. Guild, and one-half should be subject to the execution. This decree was carried into effect, and division was made in accordance therewith. The present bill proceeds to state that subsequently, something over two years thereafter, L. A. Guild became sick. During his sickness he was taken by Mrs. Guild to her home, and there nursed by her until he died. She says in her bill that before he died he said to her, in speaking of the sale of said land, that "he and his sister had wronged her; that the papers they fixed up were a fraud." After the death of L. A. Guild she says that in looking over his papers she found in his trunk an instrument written by L. A. Guild, and signed by his sister, a copy of which is as follows:

"GREENVILLE, R. I., July 19, 1884.

"Whereas my brother, Lewis A. Guild, did, on the 17th of August, A. D. 1875, make and give to me, in the city of Atlanta, state of Georgia, his promissory note for valuable consideration, for the sum of \$1,153.74 dollars, now, for valuable consideration and the love I bear my said brother, and divers good causes, I do hereby give, release, and forever discharge the said Lewis A. Guild from all debt, liability, and injury in consequence of said note.

[Signed]

"E. L. PHILLIPS."

She says this writing was wholly unknown to her until she discovered it after her husband's death, during the present year, and shortly before the present bill was filed. She now asks that the compromise decree alluded to be set aside upon the ground of the concealment from her by her husband and Mrs. Phillips of the existence of this paper, and their false representations under oath of the existence of a *bona fide* indebtedness by the former to the latter, which she says is negated by the discovery of this paper; and also upon the ground of coercion and undue influence in the effort to remove her children to the state of Rhode Island. To this bill a demurrer has been filed, the real grounds of demurrer insisted upon being, *first*, that, as to coercion and undue influence claimed to have been used to bring about the compromise decree, the bill is filed too late. There is much force in this objection, and, if the ground stood alone, it would probably control the case adversely to the complainant. She knew of any coercion brought to bear on her as well in November, 1885, when the settlement was made and decree taken, as she did in June, 1888, about two and a half years thereafter, when she filed this bill. It seems that a longer period had elapsed than should be allowed her to set up this ground of attack on the decree, especially after the death of L. A. Guild had intervened. As to the other ground of attack upon the decree, it is said by the defendant that the question of the *bona fides* of the indebtedness of L. A. Guild to Mrs. Phillips was made in the former litigation; that the bill then filed by Mrs. Guild asserted that there was

no real indebtedness, and that the answers denied this, and that the question was settled with the settlement and decision in that case. They also say that the mere withholding of facts in their knowledge by the defendants will not justify reopening the case; that they were not compelled to disclose the existence of this paper. I cannot agree with them in this position. The existence of this release or discharge was a prominent, material, and, if complainant's averments in this case be true, a controlling physical fact, known to them and unknown to complainant. Good faith required them to disclose it. Moreover, it was not a mere concealment of a fact, if the allegations in this bill are true, but it was a misstatement, willfully, knowingly, and falsely made, and that under oath. This release bears date July, 1884, and suit on the note was brought in August, 1884. A court of equity will not countenance such concealment and gross misrepresentation as is here shown, taking the allegations to be true, as I must on this demurrer. The demurrer must be overruled.

ON FINAL HEARING.

(October Term, 1890.)

There has been a final hearing in this case, and I have held it up for consideration until the present term. It must be taken as an established fact, notwithstanding Mrs. Phillips' denial, that she executed the release to Dr. Guild, alluded to and copied in the foregoing opinion. The fact of the execution of this release, and of its existence, was concealed by both Mrs. Phillips and Dr. Guild in their answers filed in the former suit in equity in this court. Not only was the existence of this release concealed, but the statement made by both under oath in their answers was that there was *bona fide* existing indebtedness on the note alluded to by Dr. Guild to Mrs. Phillips. It was, of course, an important and material issue in the former litigation whether or not there was real existing indebtedness from Dr. Guild to Mrs. Phillips, or whether, as contended there by Mrs. Guild, there was no real indebtedness, and the judgment the result of collusion between Mrs. Phillips and Dr. Guild. Now, as has been before stated, the existence of that release was an exceedingly important fact on that issue. This was withheld, and, in effect, the existence of any such instrument denied. This, of itself, might make a case for setting aside the former decree, which was taken by consent. But this is not the only evidence here which bears strongly against the good faith and proper conduct of the parties in the other case, and in this whole transaction. There are several statements and admissions by Dr. Guild in reference to the purpose of the suit and judgment on the promissory note offered in evidence. These statements and admissions are objected to on the ground that, even if a *prima facie* case of conspiracy is made out, such as to justify the admissions of Dr. Guild against Mrs. Phillips, his co-conspirator, yet defendant says that these admissions are not contemporaneous with the precise transaction, which is attacked here, nor a part of that transaction, so as to be admissible in

evidence under the law on that subject. It may be proper to add here that Mrs. Phillips' execution was levied on that part of the land set apart to Dr. Guild by the consent decree, and at the marshal's sale of the same in January, 1886, the land was bid off for Mrs. Phillips, and that shortly thereafter, under a power of attorney executed by Mrs. Phillips, Dr. Guild, as her attorney in fact, went into possession and control of the land. Several statements and admissions by Dr. Guild are offered, made after the execution of this power of attorney, and while he was in possession of the land in controversy. The objection to this testimony is twofold: *First*, the objection just alluded to, that it was after the conspiracy, if any existed, was consummated; *second*, that they go to disparage and prejudice the title of his principal, and in fact his landlord. I have not considered any of the evidence fairly subject to this objection, there being at least grave doubt of its admissibility. It may be proper to state further that in July, in 1884, Dr. Guild visited his sister in Rhode Island, and certain statements made by him before, and while on his way to make this visit, are offered in evidence. These statements are objected to upon the ground that they were made before Mrs. Phillips had in any way, so far as the evidence showed, indicated her willingness to become a party to the conspiracy. I have not considered these statements.

There is other evidence, however, in favor of complainant, which is admissible here. George K. Pettis testified for complainant in this case. His evidence is as follows:

"I reside in West End, Ga. I did reside on Dr. Guild's plantation in De Kalb county, Ga., in the year 1885. Nursery business. Dr. L. A. Guild was my partner. I formed the partnership the 1st of February, 1885, for a term of five years, for the purpose of carrying on a general nursery and fruit business. We had some trouble about the title. The United States marshal made a levy on the farm that I was living on, and I was somewhat vexed about it, and went to Dr. Guild and asked him what it meant, and stated to him that he told me before we traded that he owned the property, and that it seemed we were going to be put out, and Dr. Guild took me into his office and told me that I need not be alarmed; that the suit was only a form; that it was only an arrangement between he and his sister to get the land. He said that he had been east the summer before, and fixed it with his sister. He charged me specially not to say anything about what he said to me. He stated that he had arranged with his sister to bring the suit in the United States court against him in order to get the property. I asked him if that was not a prison offense, and he replied that no one would ever find it out. He mentioned the subject to me three or four times. He stated that as soon as he got possession of the property he would go on and do a big nursery business. The scheme was with Mrs. Phillips, and was as I have already stated."

These statements, made by Dr. Guild, as testified to by Pettis, it will be perceived, were made at the time the execution was levied on the land, and before the sale. These statements are contemporaneous with the transaction which is attacked. They were made to a person interested in the matter, and were explanatory of what the transaction really was. The levy of the execution and the sale of the land was certainly a part of the unlawful scheme, and without which the whole proceeding

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would have been ineffectual. If a *prima facie* case of conspiracy had been established by proof of the execution of the release, and its concealment in the former proceeding, then this evidence seems clearly admissible. There is no attempt to discredit Pettis as a witness, and his testimony is therefore strongly corroborative of the other evidence in the case, which has been mentioned. In addition to this the power of attorney given by Mrs. Phillips to Dr. Guild is in evidence. It was given after the land in controversy was conveyed to Mrs. Phillips by the United States marshal, and it not only authorized Dr. Guild to sell the land in question, but authorized him, in Mrs. Phillips' name—

"To offer for sale, bargain, sell, and convey, or lease, or rent, or borrow money and secure said money, and execute all mortgages or deeds of trust that may be necessary to or upon any tract or parts of land that I may now have, or that I may hereafter acquire to myself, in any town, city, or county in the state of Georgia."

She also authorized Dr. Guild, as her attorney, to fix the price of the land in his own discretion. It further appears from the testimony that, although Mrs. Phillips says in her evidence that she sued her brother on the note because she needed the money, that from the time of the sale of the land, in January, 1886, to the 10th of June, 1888, when Dr. Guild died, she made no effort to obtain any money from the sale of the land, but, on the contrary, she seems to have allowed Dr. Guild to use it, to sell part of it, and retain the proceeds, and this without any protest or complaint whatever from her, but apparently with her entire acquiescence. This whole transaction was remarkable, and looks wrong upon its face. It is unusual for a sister, fond of a brother, as Mrs. Phillips unquestionably was of Dr. Guild, to press him on a debt of this character, and as old as this was. It is hard to believe that this suit was brought with the intention on the part of Mrs. Phillips to force the payment of this old debt from her brother. Of course this view of the subject was as apparent in the former case as it is now, but when the facts and occurrences above alluded to, and which were not then known, some of which have since transpired, are added to the unusual and unreasonable appearance of the transaction, it makes unquestionably a very strong case, and one that manifestly requires the interposition of a court of equity. It would be wholly inequitable, in view of what is now established as to the withholding by defendant, willfully and knowingly, in the former suit, of facts material therein and important to complainant there and here, to allow that decree to stand. It cannot be believed that, if Mrs. Guild had been aware of the facts disclosed here, and not then known, she would have consented to that decree. The court is of the opinion, therefore, that complainants are entitled to a decree.

The court has not considered whether this decree should be granted on the terms or with the conditions incorporated therein, requested by counsel for defendant, but will hear suggestions on the subject, and argument, if necessary to a proper determination of it.

COMER v. TABLER *et al.*

(Circuit Court, E. D. Tennessee, S. D. November 29, 1890.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

A deed of assignment which is voidable because the accompanying schedules are defective is good as to the assignor until attacked by creditors, and a second deed from him before the first one has been attacked passes no title, even though the assignee has not taken possession of the property.

2. SAME—PREFERENCES.

Under the Tennessee statute, which declares that "preferences of creditors in general assignments of all a debtor's property shall be illegal and void," an assignment containing preferences is only voidable.

3. SAME—RIGHTS OF CREDITORS.

The preferred creditors are entitled to their ratable share of the assigned property, in spite of the illegal preference.

4. SAME—POWER OF ASSIGNEE.

Where an assignee does not accept the trust, a conveyance by him of the assigned property, contrary to the terms of the assignment, passes no title.

In Equity.

F. S. Yager and Young & Bogle, for complainant.

Robt. P. Woodard, for defendants.

KEY, J. The determination of this case depends upon the effect to be given to certain deeds which have been given in evidence. D. G. Crudup and J. H. Tabler were the members of a firm styled "D. G. Crudup & Co." and of another firm styled "Tabler, Crudup & Co." They were also the owners of the capital stock of a corporation known as the "Tabler-Crudup Coal & Coke Company." On the 30th of July, 1887, all these concerns executed a deed to W. E. Baskette and T. H. Ewing, as trustees, conveying—

"All the property we own, of every kind, character, and description, both firm and individual property, except that exempt from execution under the exemption and homestead laws of Tennessee, including all our personalty, stocks, bonds, choses in action, realty, and interest in realty."

The Tabler-Crudup Coal & Coke Company conveyed to said trustees all of its property of every character and description. The—

"Conveyance is made for the following uses and trusts, and none other; that is to say, the said bargainors, D. G. Crudup & Co., Tabler, Crudup & Co., and the Tabler-Crudup Coal & Coke Company, are largely indebted. Therefore, to secure to their creditors an equal distribution of their assets, and to enable all the creditors to be paid the full amount, they, the said bargainors, desire to make and do hereby make to said trustees or the survivor of them, or the one qualifying as such, all their property as a general a sgment for the benefit of their creditors, to be equally shared between them in proportion to the amounts of their respective debts. The property belonging to the Tabler-Crudup Coal & Coke Company will be applied to the payment of the debts of said company, and the assets and property of D. G. Crudup & Co. and Tabler, Crudup & Co. will first be applied to the payment of the creditors of these two firms and the individual indebtedness of J. H. Tabler and D. G. Crudup, and where they are indorsers for the Tabler-Crudup Coal & Coke Co.; and, if the property of the said Coal & Coke Company fails to pay and satisfy the creditors of said coke company, the property of said Crudup & Co. and Tab-

ler-Crudup Company shall be sold to satisfy the creditors of said Coal & Coke Company."

The deed gives a description of the property conveyed, and has attached to it lists of said property and of the debts secured; and on the date of the execution of the deed, T. H. Ewing, one of the trustees named, agreed to accept the trust created. On the 22d of October, 1887, J. H. Tabler and D. G. Crudup executed another deed, which purports to convey to R. P. Woodard a part of the property embraced in the other deed. The new deed assumes "that neither of the assignees has taken charge of the property assigned to them, nor assumed to execute the trusts; and it is the intention of Tabler & Crudup to arrange with their creditors to save expense, and avoid the execution of said assignment." This deed provides that the proceeds of the property shall be, to a considerable extent, differently applied than under the terms of the first deed. It is admitted that the benefits of the new deed extended almost exclusively to the mercantile creditors of the bargainors therein. The first deed, admitting that its schedules of property and lists of debts, and the affidavits thereto, are defective to the extent insisted upon by complainants, is not absolutely void, so as to allow the bargainors therein, or any of them, to disregard its provisions. It is voidable only, at the most, and, if no creditor places himself in a position of positive and direct antagonism to the terms of assignment, its provisions may be carried out. The debtors, having parted with the title to their property for the benefit of their creditors, cannot resume that title at their pleasure without the assent of those for whose benefit the conveyance was made, since they are presumed to have accepted the assignment. The death of the trustee, or his refusal to accept the trust, does not change or defeat the deed. The trust remains, whether there be a trustee or not; and a court of equity may execute the trust, or appoint a trustee who can and will. It is clear that the second deed and the deed supplemental thereto were executed without power in the bargainors to execute them, and that both are void to all intents and for all purposes. The deed of assignment, however, is not void, but voidable, at most. The statute of the state declares "that preferences of creditors in general assignments of all a debtor's property shall be illegal and void;" but this does not necessarily make the assignment invalid. Any mortgage, deed in trust, or other conveyance of a portion of a debtor's property for the benefit of any particular creditor or creditors, made within three months preceding a general assignment, and in contemplation thereof, shall be void should a general assignment be made within three months; yet in both cases the conveyances would be operative against the bargainor unless some creditors, or trustee or assignee for the creditors, institute appropriate proceedings to have them declared void.

The question arises, then, in this case, have we a proceeding which authorizes the court to declare the general assignment void? The complainant has not put himself in a position of antagonism to the deed. He seeks no relief other than he can have under the deed, or other than other creditors may have under it. If the assignment be declared void,

he would have only the relief he will have should it be sustained. He is an objector, not an antagonist. He has no attachment or other lien,—no position dissimilar to the other creditors in the assignment. The assignment provides that the assets and property of D. G. Crudup & Co. and Tabler, Crudup & Co., and the individual property of Tabler and Crudup, shall be applied to their individual and firm debts, and to the debts of the coal and coke company which the firms of Tabler and Crudup have indorsed, and thus became liable for; and not until all such debts are satisfied, do any of the proceeds of their property go to the payment of the coal and coke company.

It is insisted that complainant can have no relief because he seeks to set aside the deed. It is true that, when one beneficiary interested under an assignment, mortgage, or deed of trust attempts to set aside the conveyance, he is not entitled to take anything under it, because he has declined to accept its provisions. But, as already stated, complainant has not instituted proceedings to invalidate the deed. If it were to be held that he could not take under the assignment, the same argument would exclude the creditors embraced in the conveyance to Woodard. They do not claim under the deed of assignment. They do not accept its provisions, but they claim under the deed to Woodard, which they insist supersedes and abrogates, so far, at least, as they are concerned, the deed of assignment. However, under the decision of the supreme court in the case of *White v. Cotzhausen*, 129 U. S. 345, 9 Sup. Ct. Rep. 309, the creditors provided for in the deed of trust, whose debts are included in the general assignment, are entitled to their ratable share in the distribution of the funds under the assignment. In the decision referred to it is said:

"The circuit court proceeded upon the ground that the conveyances, bill of sale, confessions of judgment, and transfers by Alexander White, Jr., were made without adequate consideration, and with intent to hinder, delay, and defraud the appellee. Upon these grounds it gave him a prior right in the distribution of the property. We are not able to assent to this determination of the rights of the parties, for the mother, sisters, and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended by the statute to give priority of right to the creditors who were not preferred."

This adjudication was made in a suit which arose under the voluntary assignment act of the state of Illinois, which is, in its provisions generally, similar to the Tennessee statute. The complainant and the creditors in the trust-deed, who are provided for by the deed of assignment, are alike entitled to their ratable share of the proceeds of the property included in the assignment. The execution of the deed by Baskette did not change or have any effect upon the title to the property. He had never accepted the trust. On the contrary, he repudiates any acceptance of it in his deed. Hence he had no authority to execute the paper.

If, however, his office or trust had any vitality as to him, it was such only as the deed of assignment gave him, and that was to execute the trust and to effectuate its terms. No authority, express or implied, was given him to nullify or destroy the instrument that created him. To do so would be a species of legal suicide.

The conclusion is that the deed of general assignment is not void or avoided; but that it is in force; that under it the creditors of Crudup, Tabler, and their two firms, including those who hold debts upon which they, or either of them, are sureties or indorsers, are entitled to a *pro rata* distribution of the proceeds of the property sold, after deducting the money paid in the discharge of prior liens and incumbrances upon the property, including taxes thereon, and a compensation of \$350 to Woodard as receiver,—one-half of this compensation to be paid out of the money in his hands, or which may first come to his hands, and the other half out of the funds which may last come to his hands. The costs of the case will be paid out of the funds. The clerk, as special master, will hear proof, and report what debts are provided for, as indicated herein, to whom they are due, and the respective amounts due. He will also report whether there is any other property or assets embraced in the general assignment available, the proceeds of which may be applied to the aforesaid debts. If so, give a description thereof. He may bring before him as witnesses Crudup, Tabler, and any other persons he may deem proper. He may also report as to the amount due complainant, and the credits thereon. The receiver, Woodard, will be required to make but two payments in the distribution of the proceeds of the property sold by him,—one when the amount of the debts are ascertained, and to whom due, the other, when all the funds have been collected.

CINCINNATI SOUTH. R. Co. *et al.* v. CHATTANOOGA ELECTRIC STREET-RAILWAY Co.

WESTERN & A. R. Co. v. SAME.

(Circuit Court, E. D. Tennessee, S. D. December 24, 1890.)

RAILROAD COMPANIES—CROSSINGS—INJUNCTION—HIGHWAYS.

Where a county court declares a road to be open as soon as certain fences are set and other conditions complied with, and the proposed road is left with railroad tracks, fences, and embankments crossing it for 11 years thereafter, and there is no proof that any of the said conditions were ever fulfilled, the county authorities have no right to grant a street-car company permission to lay its track along such road without the consent of the railroad company, and the laying of such track may be enjoined at suit of the railroad company.

In Equity. Bill for injunction.

Lewis Shepherd, for complainants.

Clark & Brown, for defendant.

KEY, J. The railroads owned by complainants run parallel for several miles; that is, from Chattanooga to Boyce. To a stranger, their tracks would appear to be a double track belonging to the same road. The defendant is attempting to lay its track across these roads, at a point between Chattanooga and Boyce, and the bills are filed to enjoin and prevent this.

The defendant has taken no steps looking to a condemnation of the property of complainants so far as defendant's use of it is concerned; nor has it offered, nor does it admit that it is liable, to make any compensation for its appropriation. The point of crossing is beyond the city limits, but within the county, and the defendant insists that it has, according to the requirements of law, authority to cross complainants' roads, by reason of the action of the county court of the county, without the consent of complainants, and in opposition to their will. The contention of the defendant is that the Harrison Avenue road which, it is said, crosses the railroads at the point at which defendant proposes to cross them, is a public road duly established by the county court, and that the county court has given authority to defendant to cross them. Unquestionably the county court has the jurisdiction to lay out and establish public roads. It also has power to consent that the defendant may run along the public roads of the county, but in each case the law imposes legal methods and limitations. All must be done in compliance with the law. Is there such a public road at the place of the proposed crossing as authorizes the county court to allow the defendant to use complainants' road-bed and right of way without their consent or compensation? The complainants were here first. They purchased and paid for the lands they have. They graded their road-beds, laid their tracks, and had equipped and operated their roads before defendant had an existence. The complainants allege that the business of their railroads has so increased that it is necessary, in order to properly handle their freights and freight-cars, to build sidings, switches, etc., between Boyce and Chattanooga, upon the lands they own along their tracks; that some sidings and switches have already been built, and that they will proceed to build others. Defendant denies this, but which is the court to believe? And if it should turn out that this point has been determined upon as one where these sidings, switches, etc., are to be used and built, it would very seriously interfere with the operations of all parties to allow defendant's track to cross through complainants' switch-yards, and thus destroy or seriously burden and impair the use to which the property had been, or even might be, conveniently appropriated, especially when no compensation is offered, and liability therefor is denied. The legal maxim is, "So use your own as not to injure your neighbor." In the case under consideration; however, the defendant would be allowed to use the property of its neighbor in such a way as to injure that neighbor.

But admit that all this might be done under the law, has it been done? The defendant insists that there was a public road at this crossing many years ago, and introduces affidavits in support of that position.

The action of the county court and subsequent events overthrow that idea. There was occasionally some use of it, but no such use is proven as would justify the inference that there had been a dedication of this property to its use as a public road, and the fact that the county court appointed a jury of view to report upon the laying out of the road is opposed to the theory that it had previously established such a road, or that it already existed. The county court, at its October term, 1879, ordered—

"That Robert Simpson, L. B. Headrick, Patrick Gamble, Jacob Kunz, H. H. Knox, and E. B. Edwards, or any five of them, be appointed a jury of view to report upon the discontinuance of the old road described in the pleading, and to lay off a new road designated in the petition until it intersects the present Shallow Ford road, intersecting McCallie street in the city of Chattanooga."

At the January term, 1880, of the county court, this jury reported, recommending that the new road be opened up as soon as the land-owners, who have consented to open same free of charge to the county, set in their fences, and when Manz shall have made a road round his southwest corner, and down his and Ruobs' line to old Shallow Ford road, then Shallow Ford road shall be discontinued as a road through his land; and when said Headrick and Henderson's heirs shall have opened a road along their western line to Bird's Mill, or McCallie-Street road, then said old Shallow Ford road shall be discontinued through their land. The court adopted the report, and ordered it spread upon record; and "that the road be declared open as soon as the conditions in said report be complied with." Whether this was declaring the road open when the conditions should be complied with, or was an order of promise of the court that the court would declare it open after the conditions were performed, is not material. The order did not open the road absolutely, but conditionally; and the road could not be open in law or in fact until the conditions became accomplished facts. We have no evidence of such a result, but the contrary appears. The action of the county court occurred in the latter part of 1879, and first of 1880. Blackford, in his affidavit, says that he thinks that the first train of the Cincinnati Railroad arrived here in the latter part of 1879. It must be that the action of the county court and the building and opening of that railroad to business were contemporary events. The railroad raised such an embankment at the place in controversy that defendant has to build trestles so as to reach the grade of the tracks of the railroads. The Cincinnati Southern road built a wire fence along the line of its right of way, and no effort for many years was made to open the way by indictment or otherwise, but these obstructions have been allowed to remain. The road to this good day, 11 years after the action of the county court, has not been opened. There is no road graded for or by the public over this proposed cross-way. The law does not intend that a city or county may declare a street or road open, and, without opening it in fact, give a street railroad authority to use it, and to that end open it. The county must have a road, not only established, but opened for the use of the

public, before it can give the right to a street railway to use it. It is the road, not the place where the road may be made, which is the thing dealt with. If a city or county may declare a street or road open, and then, without actually building the street or road, grant permission to a street railroad to use it, and if this should authorize the street railroad to open and use it, it might never be used, in fact, as a street or road by the public, but simply as a street railroad, without the easements costing it a dollar. The city or county would pay for the right of way. Suppose the city of Chattanooga should declare a new street open across all the tracks of the switch-yards of the various railroads that come within the city, and then, without opening the street in fact, should permit a street railroad to use the street, it would hardly be insisted that authority so granted would confer absolute power upon the street railway to open up and use such street. It will hardly be contended that a court of equity might not interpose to prevent such an injury to the railroads as would result, and danger to the public as would necessarily follow. This is an extreme case, to be sure, but sometimes extreme cases illustrate a principle.

The conclusion reached is: *First.* The county has not established and opened the road which, it is claimed, crosses at the point defendant proposes to build its track over the railroad tracks. *Second.* That if the road had been opened and established by the county court, defendant would not be allowed to cross and use complainants' road-beds and rights of way without compensation to complainants. Therefore an injunction is granted, as prayed for, as to Harrison Avenue road, but not as to East End avenue. It has not been deemed necessary to pass upon the other questions raised, and so ably argued by counsel, at this stage of the case.

MARTHA WASHINGTON CREAMERY BUTTERED FLOUR Co. OF UNITED STATES, Limited, v. MARTIEN.

(Circuit Court, E. D. Pennsylvania. December 16, 1890.)

1. TRADE-MARKS—INFRINGEMENT—INJUNCTION—DEFENSES.

In a suit to restrain infringement of plaintiff's trade-mark it is no defense that defendant had a license for its use, where the contract for the license requires defendant to keep books, make returns, and pay royalties or forfeit the license, and it is shown that defendant failed to perform these conditions, and that plaintiff notified him that the license was terminated.

2. SAME—COMPENSATION.

Nor is it any defense that compensation may be made, for plaintiff is not seeking to enforce a forfeiture, but insists that the license is terminated by the terms of the contract.

3. SAME—PURCHASE OF MACHINES.

Nor is it any defense that defendant had purchased machines constructed on plaintiff's order for the manufacture of the article under the license, where such machines were not made by plaintiff, and he derived no advantage from their construction or purchase.

In Equity. On final hearing. For statement of facts see 37 Fed. Rep. 797.

Walter D. Edmonds, for complainant, cited:

Astor v. Turner, 11 Paige, 436; *Mitchell v. Bartlett*, 51 N. Y. 447; *Argall v. Pitts*, 78 N. Y. 289; *Thomas, Mortg.* § 896; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. Rep. 420; *Young v. Iron Co.*, 13 Fed. Rep. 806; *Dow v. Railroad Co.*, 20 Fed. Rep. 768; *Blanchard v. Sprague*, 1 Cliff. 297; *Seibert, etc., Oil-Cup Co. v. Detroit Lubricator Co.*, 34 Fed. Rep. 221; *Railway Co. v. Dubois*, 12 Wall. 64; *Hill v. Epley*, 31 Pa. St. 334; *Patterson v. Lytle*, 11 Pa. St. 53; *McMillin v. Barclay*, 5 Fish. Pat. Cas. 201; *Singer-Manuf'g Co. v. June Manuf'g Co.*, 41 Fed. Rep. 208; *Waterman v. Shipman*, 39 O. G. 892; *Manufacturing Co. v. Stanage*, 6 Fed. Rep. 279; *Manufacturing Co. v. Riley*, 11 Fed. Rep. 706; *Galley v. Manufacturing Co.*, 30 Fed. Rep. 122.

Horace Pettit, for defendant, cited:

Insurance Co. v. Norton, 96 U. S. 234; *Bisp. Eq. p.* 236, § 181; *Hughes v. Directors, etc.*, L. R. 2 App. Cas. 439; *McNeil v. Amey*, 2 Wkly. Notes Cas. 65; *Oil Creek R. Co. v. Atlantic, etc., R. Co.*, 57 Pa. St. 65; *Jeremy, Eq. Jur.* 425, 471; *Adams, Eq.* 77, note; 2 Story, *Eq. Jur.* §§ 742, 750, 1319, 1323; *Steedman v. Cook*, 13 Serg. & R. 172; *Funk v. Haldeman*, 53 Pa. St. 239; *Wilson v. Lewis*, 2 Yeates, 466; *Kemble v. Graff*, 6 Phila. 402; *Ewart v. Irwin*, 1 Phila. 78; *Haverstick v. Gas Co.*, 29 Pa. St. 254; *Snow v. Alley*, 144 Mass. 546, 11 N. E. Rep. 764; *Brooks v. Stolley*, 3 McLean, 523; *Goodyear v. Rubber Co.*, 3 Blatchf. 149; *Buckley v. Manufacturing Co.*, 2 McCrary, 350, 7 Fed. Rep. 358; *White v. Lee*, 3 Fed. Rep. 222; *Hartell v. Tilghman*, 99 U. S. 547; *Wilson v. Sandford*, 10 How. 99; *Hartshorn v. Day*, 19 How. 211; *Goodyear v. Rubber Co.*, 4 Blatchf. 63; *Blanchard v. Sprague*, 1 Cliff. 288; *Merzerole v. Collar Co.*, 6 Blatchf. 356; *Chaffee v. Bolting Co.*, 22 How. 217; *Bloomer v. McQueenan*, 14 How. 539; *Wilson v. Rousseau*, 4 How. 646; *Wilson v. Simpson*, 9 How. 109; *Hammond v. Organ Co.*, 92 U. S. 724.

BUTLER, J. The suit is brought to recover damages for infringing the plaintiff's trade-mark, and for an injunction against further infringement. The only defenses urged on the argument (and none other will be considered) were—*First*, a license, and, *second*, the purchase of machines which carried the right to use the mark on flour made by them. Neither defense is sustained by the proofs. The contract on which the license depends contains a clause for its expiration on failure to keep books, make returns, pay royalties, and to comply with other provisions. In neither of the respects specified did the defendant comply.

Not only do the proofs show this failure, but the defendant's letters distinctly and unequivocally admit it. After earnest but ineffectual effort to induce compliance the plaintiff notified defendant that the termination of the license was insisted upon. The subsequent offer to comply is unimportant. Conceding that the non-payment was excused while the ownership of royalties was in controversy, the defendant is not excusable for the period which elapsed after the controversy terminated. In the face of his written admissions the excuses now urged for the failure during this period are entitled to no weight. The argument that it is inequitable to hold the defendant to his contract; that compensation may be made for his failure; and the authorities cited in support of it,—are inapplicable to the case. The plaintiff is not appealing to equity to declare a forfeiture, nor to assist in obtaining its fruits. He stands on his trade-mark alone, and when the defendant sets up the contract of

license, he simply points to the fact that it has terminated. His right to insist on the provision from which this result flows is as sacred as that of the defendant, arising from other provisions. The purchase of machines was not made from the plaintiff. They were constructed by others, on the defendant's order, to be used in the manufacture of flour under the license. The plaintiff derived no advantage from their construction or purchase. The allegations of the answer in this respect are not sustained by the proofs. The plaintiff is entitled to a decree for an account, and an injunction.

UNITED STATES v. LALONE *et al.*

(Circuit Court, E. D. Wisconsin. December, 1890.)

PENSIONS—ESTOPPEL—COMMISSIONER'S RULINGS.

The commissioner of pensions is not a judicial officer, and his rulings in granting a pension upon improper or fraudulent testimony do not estop the government from recovering back moneys paid thereunder.

At Law.

Elihu Coleman, for the United States.

J. E. Mulone and *E. S. Bragg*, for defendant.

Before GRESHAM and JENKINS, JJ.

GRESHAM, J., (*orally*.) Joseph Lalone was mustered into the military service of the United States as a private soldier late in the summer or during the fall of 1864, and sent to the first Wisconsin Heavy Artillery, which was then stationed somewhere on the Potomac river, where he contracted ague. He was discharged in the summer of 1865, and went to his home in Wisconsin, still suffering from that disease. In 1888, on an application filed in 1880, Lalone obtained a pension on the ground that after his discharge he was paralyzed, the paralysis resulting from the ague contracted in the service. This suit was brought to recover money paid to Lalone as a pensioner, on the theory that the pension was obtained by fraud. The evidence shows that a year or more after his discharge Lalone was thrown or pitched from a wagon and injured, and subsequently became paralyzed; and the government insists that the paralysis resulted from that injury, and not from the disease which he contracted in the service.

We are satisfied, after fairly weighing the evidence, that this contention is correct. Several witnesses testified that they saw Lalone thrown from the wagon, and that he was injured thereby. It is claimed, however, that there was ill feeling existing between the Lalone family and those witnesses, growing out of a controversy in regard to the laying out of a highway. Lalone himself did not testify that there was any such ill feeling. His wife was the only witness who testified that there was

an unfriendly feeling between her husband and some of the government witnesses. We do not think the positive testimony of the persons who saw Lalone thrown from the wagon has been discredited. That accident reasonably accounts for the subsequent paralysis, while the defendant's theory as to the cause of his disability is highly improbable.

We have carefully considered the testimony of Dr. Halleck, one of Lalone's witnesses, and do not think it entitled to much weight. His statements indicate that he was strongly partisan, and willing to sustain the pension whether Lalone was entitled to it or not.

On the whole case, we are satisfied that the government has a preponderance of the evidence, that the pension was obtained fraudulently, and that the money paid on it should be recovered.

General Bragg. I should like the court to pass directly upon the proposition as to whether the government is not bound by the acts of its executive officers.

The Court. It is not. The commissioner of pensions is not a judicial officer, and his rulings do not conclude the government in a case like this. If he grants a pension upon improper or fraudulent testimony, and the government subsequently pays money on that pension, it may be recovered. It seems rather remarkable that a pension should be granted to a soldier for paralysis resulting from ague.

DAVIDSON v. SOUTHERN PAC. CO.

(Circuit Court, W. D. Texas, San Antonio Division. November 24, 1890.)

1. LIMITATION OF ACTIONS—SUSPENSION OF STATUTE.

In Texas the filing of a petition in court is a commencement of the action, so as to stop the running of the statute of limitations; and, as the laws of the state require the clerk upon the filing of the petition to issue citation, any delay in the issuance of process to affect the running of the statute must result from the instructions or request of plaintiff or his authorized attorney.

2. MASTER AND SERVANT—NEGLIGENCE OF MASTER.

Employers are bound to provide machinery reasonably safe and suitable for the use of their employe's, and are liable for injuries caused by defects in such machinery which are or ought to be known to them, and which are unknown to the servant.

3. SAME—ASSUMPTION OF RISKS.

A servant who remains in the service, knowing of a defect in the machinery used by him, without giving notice thereof, assumes the risk of injury therefrom.

4. SAME.

A servant will be presumed to know of defects which are obvious and open to observation.

5. MEASURE OF DAMAGES FOR TORTS.

In estimating damages for personal injuries, the jury may consider (1) such special expenses as were incurred by plaintiff by reason of the injuries; (2) the value of the time lost by him from his usual occupation by reason thereof; (3) fair compensation for mental and physical suffering; (4) the probable future effect of the injuries on his health; and (5) any diminution of his power to labor and pursue the course of life he might otherwise have done.

At Law.

McLeary & Fleming, for plaintiff.

Upson & Bergstrom, for defendant.

MAXEY, J., (*charging jury*.) The plaintiff, who was employed in the service of the defendant in the capacity of brakeman on a freight train on the 11th day of November, 1887, brings suit against the defendant to recover damages for personal injuries alleged to have been received by him while performing his proper duties at Seco siding, Medina county, on the date above mentioned. To give you a more complete and intelligent statement of the cause of action, I will read several extracts from the petition, as follows:

"And plaintiff would further represent that, while thus discharging his duties, as aforesaid, and after coupling the cars, as he was required to do, he attempted to mount upon one of the cars in the train, and in so doing, on account of the defective condition of the track, and especially of a ditch, drain, or depression which was then and there existing, having been constructed in a negligent and improper manner, so as to be dangerous to the employes of the said defendant, his foot was caught in the said ditch, drain, or depression, and he was thrown violently to the ground, falling upon the railroad track, whereby his right hand was mashed by the wheels of the moving cars, and rendered entirely and utterly useless."

Further, it is alleged that it was the duty of the defendant to furnish the plaintiff and its other employes a safe and well-constructed track whereon to operate its trains, and to maintain the same in good condition, so as to be safe in the running and operation of trains thereon; but it is claimed by the plaintiff that the defendant "failed to furnish a good, safe, and perfect track whereon to operate its trains, and caused the ditch or depression aforesaid to be so constructed that it was very dangerous to pass over it."

And, further, it is alleged—

"That the railroad track, at the Seco siding, and over and along the ditch, drain, or depression aforesaid, was so overgrown with grass as to be entirely hidden from view, and no person, without a very strict examination, could ascertain the existence of the ditch, drain, or depression, but to all appearances the track passed over ordinary ground at that point, and not over a dangerous and defective ditch, drain, or depression, as was really the case."

And plaintiff further alleges—

"That the proximate cause of the injury which he sustained at the time aforesaid was the defective track and the dangerous ditch, drain, or depression, overgrown with grass, which, by reason of the negligence of the defendant, was furnished to him, the said plaintiff, in violation of the obligation which the law places upon employers for the benefit of their employes."

In its answer the defendant interposes (1) a general denial; (2) a special denial, in which it is averred that the "defendant specially denies that the ditch, drain, or depression complained of by plaintiff was defective, or caused his injuries;" (3) a plea of contributory negligence, as follows:

"Defendant avers that the proximate cause of plaintiff's alleged injuries was his own carelessness and negligence in thoughtlessly and carelessly walking along and outside of said railroad track, and stumbling and falling upon

one of the rails of said track, by reason of not exercising proper care and caution, whereby, in the injuries alleged to have been received by plaintiff, he was guilty of contributory negligence, for which the defendant is in no manner liable;"

—and (4) a plea of the statute of limitations hereinafter set forth.

Your attention will be first directed to the defense of limitation set up by the defendant. Upon this point the following averment is embodied in the answer:

"Defendant says that plaintiff's alleged cause of action accrued November 11, 1887; that plaintiff abandoned, failed, and refused to prosecute his suit against this defendant in his alleged original cause of action until Oct. 14, 1889, more than one year, and nearly two years, after said cause of action accrued; wherefore the same is barred by the statute of limitations of one year, which is here pleaded in bar of plaintiff's right of recovery."

The plea of limitations assumes that the plaintiff abandoned, as against this defendant, his original cause of action, as set forth in a petition filed in the district court of the state on March 24, 1888. That petition made the defendant herein, the Southern Pacific Company, and the Galveston, Harrisburg & San Antonio Railway Company parties to the suit. The plaintiff received his injuries on the 11th day of November, 1887. On July 25, 1889, citation issued to the Galveston, Harrisburg & San Antonio Railway Company, and on the 12th day of December, 1889, the suit was dismissed as to that company. On October 14, 1889, a supplemental petition was filed by the plaintiff, in which the issuance and service of process are prayed as to the defendant the Southern Pacific Company. Citation was duly issued to the defendant on the 16th of October, 1889, and served upon its agent on the 25th of the same month. The plaintiff's cause of action accrued on the 11th day of November, 1887, the date of his injury, and the bar of the statute would be complete unless suit was commenced and prosecuted within one year thereafter. It is insisted by the defendant that, although the suit was instituted in time, to-wit, March 24, 1888, it was not prosecuted, but abandoned by the plaintiff until the 14th day of October, 1889, and therefore it is assumed that the statute of limitations applies, and plaintiff is barred of a recovery.

If I correctly comprehend the decisions of the supreme court of this state, the filing of a petition in the district court is a commencement of the suit, and stops the running of the statute of limitations. The laws of this state make it the duty of the clerk, upon filing the petition, to issue citation to the defendant; and the statute, being suspended by filing the petition, is not put in motion, unless the delay in the issuance of process by the clerk results from the request or instructions of the plaintiff, or his duly-authorized agent or attorney, not to issue. *Tribby v. Wokee*, 74 Tex. 143, 11 S. W. Rep. 1089; *Kinney v. Lee*, 10 Tex. 157; *Maddox v. Humphries*, 30 Tex. 496, 497. In this case no witness has testified that any one, either the plaintiff, his attorney, or other agent, or any other person, requested or instructed the clerk to withhold cita-

tion as to the defendant until the 25th day of July, 1889, when, according to the testimony of Mr. Dashiell, the clerk, a supplemental petition, praying for process against the Galveston, Harrisburg & San Antonio Railway Company, was handed him, with instructions not to issue process for the defendant. The clerk was unable to remember who delivered the paper to him, with the instructions mentioned, nor does the testimony in the case disclose the identity of that person; but in my view of the law it becomes immaterial to inquire whether the instructions to the clerk emanated from an authorized or unauthorized person. It may be assumed that the plaintiff or an agent with proper authority gave to the clerk the instructions indicated, and still the defendant would not be benefited. For, as I understand the law, the statute of limitations, upon filing the suit, was suspended until July 25, 1889; the testimony clearly failing to show any request or directions to the clerk not to issue process before that date, and, as citation was duly issued to the defendant within less than three months thereafter, the cause of action would not be within the bar of the statute. Therefore, gentlemen, you are instructed, that, upon this branch of the case, the law is with the plaintiff, and the suit is not barred by limitation, as claimed in the plea of the defendant. You will therefore pass over that defense, and turn your attention to the other important and material issues in the cause.

You observe that plaintiff charges negligence against the defendant,—negligence in respect to the construction and maintenance of the track and a certain ditch, drain, or depression thereunder, at Seco siding; and it is incumbent upon him to establish the negligence, as alleged, to your satisfaction, before he would be entitled to a recovery. The general principles of law by which the liability of an employer for injuries to an employe, growing out of defective machinery, track, road-bed, and other appliances, are said by the supreme court to be well settled. In the case of *Railroad Co. v. McDade*, the supreme court says, and you are so instructed:

“Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him, and was unknown to the employe or servant. But if the employe knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And, further, if the employe himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through

the negligence of the employer." 135 U. S. 570, 10 Sup. Ct. Rep. 1044; *Tuttle v. Railway Co.*, 122 U. S. 195, 196, 7 Sup. Ct. Rep. 1166.

The servant or employe, on entering the service of the employer, does not undertake to assume the safety of machinery, or of a railway track, or a ditch or drain under the track, unless he knows of the defective and dangerous condition of the same, or unless the defects and danger are so obvious that he will be presumed to have knowledge of them. 135 U. S. 573, 10 Sup. Ct. Rep. 1044; *Railway Co. v. Bradford*, 66 Tex. 735, 2 S. W. Rep. 595. The plaintiff, therefore, did not, by virtue of his contract of employment, assume any risk incidental to the use of a defective track, or defectively constructed ditch or drain thereunder, of which defect he was ignorant, unless the imperfections and defects were obvious,—open to observation,—in which case he would be presumed to know them; and it was the duty of the defendant, in employing plaintiff as a brakeman, to see that its side track at Seco, and the ditch, drain, or depression thereunder, were constructed in a reasonably safe manner, and to maintain them in a reasonably safe condition. If the track and ditch or drain thereunder, although originally constructed in a safe manner, became unsafe and dangerous from any cause subsequently occurring, and the unsafe and dangerous condition of the same was unknown to plaintiff, and was not obvious and open to observation, then it did not devolve upon the plaintiff to examine and inspect the road, to ascertain any existing defects and imperfections, but he had the right to presume that the defendant had performed its duty in respect to maintaining the track and ditch or drain in a reasonably safe condition.

In what has been said in regard to the track and ditch or drain, and the defendant's duty touching their construction and maintenance, it was not my purpose to say or intimate to you that they were unsafe or defectively constructed, or that they were the cause of plaintiff's injuries; nor was it my purpose to give any expression of my own views as to how the accident to plaintiff occurred. For, in regard to those matters, they being questions of fact, you are the judges, and your conclusions thereon in reference to them must be based upon the testimony of witnesses, and not arise from mere conjecture and speculation. Bearing in mind the foregoing principles of law, you will carefully look into and examine the testimony with the view of reaching a determination as to the liability of defendant to respond in damages to the plaintiff. If you believe from the testimony that the track of the Seco siding and ditch or drain thereunder were so constructed and maintained as to be in a reasonably safe condition for the use of defendant's employes at the time plaintiff was injured, then he (the plaintiff) would not be entitled to recover, and your verdict in that event should be in favor of the defendant. Nor would the plaintiff be entitled to a recovery if you are satisfied from the testimony that, by his own want of reasonable care and prudence,—that is, such care and prudence as a person would ordinarily exercise under similar circumstances,—he brought his injuries upon himself; for in such case his own negligence was the cause of his injuries, and he has no legal cause of complaint against the defendant on account of the mis-

fortune which befell him. *Railroad Co. v. Herbert*, 116 U. S. 655, 6 Sup. Ct. Rep. 590. The law requires a man to take reasonable and ordinary care of himself, and, if his own negligence or want of ordinary care contributes to an injury which he may receive, he will not be heard to complain, but must bear the consequences of his own careless conduct.

You are further instructed that, if the track and ditch or drain were defective and unsafe, and the plaintiff knew of the defects and danger, or they were so obvious and open to observation that he should have discovered them, and he, notwithstanding, remained in the service of defendant without giving notice thereof to the defendant, then he is not entitled to recover, and your verdict should be for the defendant. And to authorize a verdict against the defendant for an unsafe track, etc., you must believe from the testimony that defendant knew, or should have known by the use of reasonable care and prudence, of its unsafe condition. If, however, you believe from the testimony that defendant's track at Seco siding and the ditch or drain thereunder were not in a reasonably safe condition for use by the employes whose duties required them to work about the same at the time plaintiff was hurt, and defendant knew, or might have known, by the exercise of reasonable care and prudence, of their defective and unsafe condition, and that the plaintiff, at the time he received his injuries, was exercising reasonable and ordinary care for his own safety, and that he had no knowledge of the defect and danger, either actually or presumptively, as hereinbefore charged; and if you further believe that his injuries resulted from the unsafe and defective condition of the track, ditch, or drain,—then he is entitled to recover, and you will return a verdict in his favor for such amount of actual damages as will compensate him for the injuries he has sustained.

In reference to the question of damages, you are instructed that the law furnishes no fixed or defined standard for the guidance of the jury in awarding compensation in cases of this kind for the injuries sustained by the injured party, and the amount of damages to be awarded must be left, in view of the testimony, to the sense of right and justice of the jury. The plaintiff, if your finding be in his favor, should be fairly and justly compensated for the injuries he has sustained. In making your estimate of such damages, you are authorized to consider (1) such special expenses as may be shown by the testimony to have been incurred by the plaintiff by reason of his injuries during the period of his disability, while confined; (2) the value of the time lost by him during the period in which he was disabled, from his injuries, to work and labor, taking into consideration the nature of his business, and the value of his services in conducting the same; (3) fair compensation for the mental and physical suffering caused by the injury; and (4) the probable effect of the injury in future upon his health, and the use of his injured hand, and his ability to labor and attend to his affairs, and, generally, any reduction of his power and capacity to labor and earn money, and pursue the course of life which he might otherwise have done. *Railway Co. v. Randall*, 50 Tex. 260, 261. You are the exclusive judges of the credi-

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bility of the witnesses and of the weight to be attached to their testimony; and in civil suits, such as the present one, you may predicate your finding upon a preponderance of evidence.

It is now your duty, gentlemen of the jury, to render such a verdict as will be just and right, in view of the testimony, and the law as embodied in these instructions.

In re KROJANKER et al.

(Circuit Court, S. D. New York. November 11, 1890.)

EXTRADITION—FOREIGN DEPOSITIONS—AUTHENTICATION—CERTIFICATE.

Act Cong. Aug. 3, 1882, § 5, provides that depositions taken in a foreign country to be used in extradition proceedings "shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunal of the foreign country from which the accused party shall have escaped," and that the certificate of the principal diplomatic or consular officer of the United States in such foreign country shall be proof that they are so authenticated. *Held*, that such certificate is sufficient where it follows the words of the statute.

Habeas Corpus in Extradition Proceedings.

Act Cong. Aug. 3, 1882, § 5, provides that "in all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case, under title 66, Rev. St., such depositions," etc., "shall be received and admitted as evidence on such hearing, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any depositions so offered are authenticated in the manner required by the act."

The copies of the depositions of witnesses taken in Germany were certified by the judge of investigation, attached to the German court, as being copies, and, as such, valid "pieces of evidence," under the legal provisions prevailing in Prussia, in which state of the German empire the crimes were committed. The signature of the judge of investigation was certified by the president of the court, and the latter's signature by the minister of justice. Then followed the certificate of the foreign office, consisting of the one word "Certified." The final certificate was that of Mr. Phelps, envoy extraordinary and minister plenipotentiary of the United States at Berlin, in the words following:

"LEGATION OF THE UNITED STATES OF AMERICA AT BERLIN.

"I, William Walter Phelps, envoy extraordinary and minister plenipotentiary of the United States of America at Berlin, being the principal diplomatic officer of the United States of America resident in Prussia, do hereby certify that Hellwig is, and was at the date of his certificate to the foregoing document, a director in the imperial foreign office, and a privy counselor of lega-

tion, and to said documents, by him so certified, full faith and credit ought to be given, and that the signature of the said Hellwig is genuine; and I further certify that the foregoing documents, which are intended to be offered in evidence upon the hearing within the United States of an application for the extradition of Julius and Simon Krojanker, under title sixty-six of the Revised Statutes of the said United States, and for all the purposes of such hearing, are properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of Prussia.

"In testimony whereof I have hereunto set my hand and seal of office at Berlin, Germany, this 4th day of August, A. D. 1890.

"WM. WALTER PHELPS."

Hellwig, whose signature was certified by Mr. Phelps, is the officer who signed the certificate of the foreign office.

A. J. Dittenhoefer, in support.

Adolph Dulon, in opposition.

LACOMBE, Circuit Judge. The objections to the form of certificate seem to be sufficiently answered in the opinion of this court in *Re Behrendt*, 23 Blatchf. 40, 22 Fed. Rep. 699. The case against Simon seems reasonably clear. As against Julius, it is very weak, and it may be doubtful whether the evidence submitted fairly warrants the conclusion arrived at by the commissioner. The question, however, is one not as to the competency of the evidence, but as to its weight, and his decision thereon is not reviewable. *In re Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031. Let the writs be discharged.

UNITED STATES v. STEWART.

(District Court, E. D. South Carolina. January 7, 1891.)

CRIMINAL LAW—WITNESSES FOR INDIGENT PERSON.

Rev. St. U. S. § 878, authorizing a judge to order witnesses to be subpoenaed in behalf of an indicted indigent person, gives no authority to order subpoenas for one against whom a bill of indictment is pending before a grand jury.

Indictment.

Samuel J. Lee, for motion.

SIMONTON, J. This is an application for witnesses on behalf of Stewart, under section 878, Rev. St., as an indigent person. It appears that an indictment has been given out against Stewart, which is now in the hands of the grand jury. The grand jury have not acted on it. The section (878) permits a judge, upon proper affidavit, to order witnesses to be subpoenaed in behalf of a person indicted; that is to say, after indictment found. If a case be not given to the grand jury, or if they find no bill, the person is not indicted. The section does not apply, and the judge has no authority to order subpoenas at the expense of the United States. Motion refused.

AMERICAN CABLE RY. Co. v. CITIZENS' RY. Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. January 3, 1891.)

PATENTS FOR INVENTIONS—EQUITY JURISDICTION—DAMAGES.

A bill for infringement filed on the day before complainant's patent expires, and which asks no injunction or other special form of equitable relief, is obviously intended to obtain damages and profits only, and cannot be maintained, since the proper remedy is at law.

In Equity.

Samuel N. Holliday and *Henry L. Dawes, Jr.*, for complainant.
Frank, Dawson & Garvin, for defendants.

THAYER, J., (*orally*.) The bill in this case was filed September 30, 1889, the day before the patent in suit expired; it having been issued October 1, 1872. The bill made no case for an injunction *pendente lite*, as the patent would expire on the day after it was filed; nor was one applied for. It was obviously filed to obtain a decree for damages and profits only. The demurrer must be sustained, following the rule announced in *Root v. Railway Co.*, 105 U. S. 189, that equity only takes jurisdiction of suits for infringement when the bill shows that complainant is or may be entitled to an injunction, or some other special form of equitable relief. In the case at bar it is apparent that complainant was not entitled, when the complaint was filed, to any species of equitable relief. Its remedy was solely at law. Judge BLODGETT has adopted the same view in the case of *American C. Ry. Co. v. Chicago C. Ry. Co.*, 41 Fed. Rep. 522, and this court had occasion to consider and decide a kindred question in *Washburn, etc., Manufg Co. v. Freeman Wire Co.*, Id. 410.

The demurrer is sustained, and the bill dismissed.

BOWERS *et al.* v. THE EUROPEAN, *etc.*

(District Court, S. D. Florida. December, 1890.)

SALVAGE—FIREMEN EXTINGUISHING FIRE ON SHIP.

Where a steam-ship with a cargo of cotton on fire came into port, and, in the absence of any private means, the fire department, consisting of volunteer fire companies, who receive no compensation from the city, were called upon, and an understanding had that they would be paid for their services, and on account of their presence the steam-ship was permitted to come to the wharf, and the firemen, with two steam fire-engines, were engaged five and a half days putting out fire and discharging burning cotton, a salvage of \$12,000 on a value of about \$300,000, giving the firemen about \$65 apiece, was given. The Case of *The Mary Frost*, 2 Wood, 306, examined and compared.

(Syllabus by the Court.)

In Admiralty.

L. W. Bethel, for libelants.

G. Boune Patterson, for claimant.

LOCKE, J. This steam-ship, laden with about 6,000 bales of cotton and 24,000 bushels of corn, bound from New Orleans to Bremerhaven, when about 60 or 70 miles to the north-eastward of this port, Key West, was discovered to have fire in the cargo in the forward hold. The master did everything in his power, but could not extinguish the fire, and turned back to port, where he arrived at about 4 or 5 o'clock in the afternoon of the 3d of November. He made application to his vice-consul, and to Lloyd's agent, who assisted him in procuring the only steam-pump, available, belonging to private parties, and chartered two schooners, one to take the pump off to his steamer, and the other to receive cargo. But it was soon found that it was impossible to get the fire under control with the pump procured, and at about 2 o'clock the next morning it was decided to make application to the fire department of the city of Key West for aid. It had been found impossible to obtain permission to come to a wharf on account of the fire, and the steamer was lying off in the harbor. The consul and Lloyd's agent, upon the request, and in behalf, of the master, called up the chairman of the fire committee of the city government, and inquired if the services of the city engines and fire department could be procured to aid in extinguishing the fire. It appears that the board of city commissioners had been in session at the time of the arrival of the vessel in the port, and had resolved that, in event the services of the fire-engines were necessary and requested, the request might be granted, if private means could not be obtained; and the matter was left in the hands of the chairman of the committee on fire matters, to whom application was now made. In soliciting the aid of the fire department, it was asked upon what terms the firemen would work, and the reply was, "Upon the same terms as was paid in the case of *The San Juan*." That was a dollar an hour for the firemen that worked. The reply was that that was perfectly satisfactory, and it was requested that the engines and firemen be called out as quickly as possible. Upon condition that the fire department should be on hand to prevent further danger, the ship was permitted to come to the wharf. An alarm was rung, two steam fire-engines and nearly the entire force of firemen came to the wharf, to which the ship soon came, when they commenced work at about 4 o'clock in the morning of the 4th of November, 1890. They cut eight holes in the deck, and commenced pouring in eight streams of water, but after some five hours decided that the water had found channels through the cotton to the bilge of the ship, and was doing no further good, when the hatches were removed, streams played upon the burning cotton, and the firemen commenced discharging cargo. They continued unceasingly, discharging cargo and playing water upon the bales as they came out, for five and a half days, or until 4 o'clock Sunday afternoon, when it was decided that the fire was entirely out, and they ceased their efforts.

It is claimed in the libel, and shown in evidence, that 178 firemen

were engaged in the work, and were in attendance, with a few exceptions, the entire time; that, when not actually at work, they slept on the dock, under a tent or some shelter, and were only absent from the place while they were getting their meals; that for the first 50 or 52 hours it was impossible for them to work more than 10 or 15 minutes at a time in the hold, and the entire number were constantly in attendance, ready, when called upon, to relieve those coming out. After that the smoke became less severe, and they were able to remain longer, and make regular gangs and reliefs. They then had one hour in the hold, or on duty, and two off; sometimes two hours on, and four off; but it appears that, as a general thing, the entire company was in attendance, ready to respond to a call all of the time for about 130 hours, although a comparatively small portion of them could work at a time. The labor was severe and disagreeable, the smoke was dense and pungent, the cotton bales full of fire, and liable to burst into flames at any time when exposed to the air. There were two physicians in attendance much of the time, and one constantly, to bathe and attend to the eyes of those coming out of the hold. Burns and bruises were frequent. There is no complaint but what the labor was performed as rapidly as the circumstances would allow, and completed with all the dispatch possible. Of the cargo, all in the forward compartment of the ship, about 4,000 bales, were taken out. The fire commenced low down in the cargo, and must have been burning some days. Some of the bales of cotton (it is impossible to tell just how many) had been entirely consumed, about 300 partially burned, some of them very badly, and a large number of the 4,000 damaged by water. About 11,000 bushels of corn was so damaged by water that it had to be sold. The ship's decks forward of the foremast and the berths under the forecastle head were entirely burned out, and the forecastle head and fittings badly damaged. Otherwise, it does not appear that the vessel was materially injured. The steam fire-engines were owned by the city. There were two of them in attendance, with steam up, for the entire time of the service. The city has been paid \$1,200 for the use of the engines, or \$5 an hour for each.

The chief of the fire department acted also as fire-warden, and receives \$25 per month for his services. Each steam-engine has an engineer and driver, supposed to be constantly in attendance at their engines, who are paid monthly wages. Aside from these, the fire department, or the entire force of firemen, consists of volunteer fire companies, who receive no compensation for their services whatever, whether called to a fire or not. Their services are entirely voluntary and gratuitous, and there is no employment contract or agreement between them and the city government, further than is implied by their organization. They have on several occasions been called upon to extinguish fires in the cargoes of vessels arriving in port, and have always been compensated for such services, although there has never before been any agreement made; but they have been paid a round sum.

In this case the libelants sue upon a contract, alleging that one was

made between Mr. Taylor, H. B. M. V. Consul, and Mr. Fogarty, resident agent of Lloyd's, acting for and in behalf of the master of the ship, and Mr. Fulford, chairman of the fire committee of the city, Mr. Bowers, chief of the fire department, and Mr. Walton, secretary, acting for the firemen, which libelants construe into being for the payment of one dollar per hour for each one that worked and was in attendance, for the entire time engaged during the service, whether actually at work or not, the same as was paid in the case of *The San Juan*.

In answer it is alleged that, when informed that the firemen expected one dollar an hour for their labor, the same as was paid in the Spanish ship *San Juan*, no objection was made, as the ship was on fire, and their services were indispensable, but that the libelants never worked the number of hours claimed. It is also answered that the libelants, as firemen of Key West, while in the performance of the services were only acting in the line of their duty as such firemen; that as such they had no authority to make contracts or demand compensation for their services; that the municipality of Key West has not authorized them to bring suit; and that no service they have rendered can give them a lien on the vessel, enforceable in admiralty by a proceeding *in rem*.

This defense is upon the assumption that the firemen in no way exceeded, in the services rendered, the duty they owed the public through their character as firemen, and in the performance of that duty they had no power to make contracts or demand compensation, nor had they power to render a salvage service, or demand compensation for services as such. The case, therefore, depends entirely upon the duty of the libelants, as firemen, towards this property. As between the property and any one else, this would unquestionably have been a salvage service, and any contract, alleged or proven, would have been considered in connection with the idea of the condition of the property at the time.

The question of the relation of firemen to property in jeopardy from fire on board vessels is not free from difficulty. The case of *Davey v. The Mary Frost*, 2 Wood, 306, has been relied upon in support of the proposition that in this case the duty of the firemen was such as to preclude the idea of a salvage service, or their power to make a contract to perform such a service, and receive compensation therefor. If this view is accepted, it may be urged as strongly against the suit on a contract as it could be in a suit for salvage *eo nomine*; for what a person is bound to do without compensation, the making of a contract under circumstances of compulsion cannot release him from doing, or give him greater rights for pay. The language of the learned justice in the case cited, as well as that in the case of *The Suliste*, 5 Fed. Rep. 99, in which the same views are expressed, although the question was not before the court, shows clearly that, in the opinion of the court, the circumstances of those cases brought it directly within the positive duty of the firemen to extinguish the fire. These are the only cases in which such principle is declared; and while, in view of the circumstances of those cases, such decision is most cordially approved, yet the question remains whether the difference in the circumstances may not justify a different conclusion from that reached

therein. In the case of *The Blackwall*, 10 Wall. 1, it is stated in the argument that the firemen made no claim for salvage, because they were paid by the city; but the court, in its opinion, says: "Pilots under some circumstances may become salvors, and cases may be imagined where firemen perhaps might come within the same rule;" and strongly intimates that the moiety of the salvage earned by the firemen might be paid them, upon petition, out of the funds in the registry of the court.

It is true that these declarations and intimations are outside the case, and can have no further weight than as expressing the views, at the time, of the highest court in the land upon the subject; but they certainly have as much weight and authority as do the declarations in the case of *The Suliste*. In the case of *The Huntsville*, cited in Cohen's Admiralty, 74, a full report of which case I regret that I have not access to at present, it was held that, where the fire in a ship ashore was extinguished by the firemen upon the understanding that the owners of the vessel, and not the city, were to pay the expenses, they were entitled to salvage compensation. In the case of *The Ethiopian*, Mitch. Mar. Reg. 1883, p. 589, where the cargo was on fire, salvage was awarded to the Gravesend fire brigade, who aided with one of their fire-engines. These cases satisfy me that it has not been established, as is contended herein, as a principle of law, that under no circumstances can firemen earn salvage, but that the question depends entirely upon the circumstances of the individual cases.

Not every one is bound to render gratuitous service, even if it is his duty to do what is in his power to save life and property from marine disaster. It is certainly the duty of pilots to do what they can to assist vessels in distress, but courts have repeatedly held that the circumstances of the case would justify a salvage award. The licensed wreckers of this district are bound by their licenses and the rules of this court to proceed to the aid of any vessel in distress, but the idea of a gratuitous service has never been contemplated. Government vessels, officers, and men of the coast-guard, and even agents of underwriters, have been held to be entitled to salvage whenever the services they render exceed in the least the actual duty they are bound to perform gratuitously. Did the service rendered in this case by libelants exceed the duty they owed this property? or were their relations to it such as would of right demand such services gratuitously? The language of the learned justice in the cases of *The Mary Frost* and *The Suliste* shows plainly that he considered that in those cases the firemen did no more than their ordinary duty, and no more that they were bound to do; and upon that consideration the conclusions were reached. In the case of *The Suliste* he mentions the firemen being employed to do this very duty. There had been no employment of the libelants by the city, or payment for their services in this case. There was only their voluntary organization, and their holding themselves in readiness to extinguish fires. Was it ever contemplated in such organizing that they assumed the duty of performing such services as were rendered in this case? The firemen were in duty bound to do all that they had ever impliedly agreed to do, but had they agreed

by any implication to do this? There was no privity of interest between the owners of this property and libelants. The vessel did not come here to receive cargo, or as to a port of discharge. She was in no way connected with the business or interests of the city. The fire did not originate in the city, but at a great distance from it, and was voluntarily brought within its limits after it had become an element of danger. It did not threaten the city, or the property of any of its citizens, as the vessel was lying in the stream at such a distance that, had she been entirely consumed, no harm would have come to any building or wharf. The labor was not of a few hours only or less, such as is gratuitously rendered to the property of the citizen by firemen without materially interfering with their means of livelihood, but the service from the outset contemplated days and nights of arduous labor, not free from risk and danger. Not only did libelants act as firemen in extinguishing the fire, but in order to do so effectively it was necessary to discharge hundreds of bales of cotton, which discharging was done by them. Had it been suggested to the firemen at the time of their organizing that they would be called upon to render such services as the present, and be bound to render them gratuitously, how many of them would have joined the force? Not one, I am satisfied. However so ready they might be to perform the ordinary duties of a fireman, and to respond to all usual calls, there is not one but would have declined such service as this.

I see no reason in law or justice why the owners of this property could demand, under the circumstances, gratuitous exertions from the firemen in this case, any more than from any other class of persons in the city; and it resolves itself into a question of policy. In the case of *The Mary Frost* it is remarked that "an attempt to make the performance of this duty a ground of salvage, when it is a ship that takes fire, is against wise policy." Would it be wise policy to say, by dismissing this libel, that libelants, if they continue their organization and character, have no right of compensation for such services? That so long as they are firemen they are bound to extinguish the fire in the cargo of any vessel arriving in this port, and do so gratuitously, regardless of the circumstances of the case, or time or labor required? How long would their organization continue in event of a demand for their services in another similar case? Can it be doubted that the companies would be disbanded, and their position as firemen given up, before accepting such duties and obligations; thus leaving not only vessels on fire which might arrive in this port without means of assistance, but the city also unprotected? Is it not a wiser policy to declare that it is the province of the courts to accept jurisdiction, and determine the rights between the parties in view of the circumstances surrounding each case, than to declare that before them firemen can have no standing in a salvage suit, either by contract or as salvors? The danger to commerce in this respect cannot be great, as is plainly shown from the very few cases in which firemen ever assumed to pose as salvors. This is a class of firemen's work generally performed by private parties, and undertaken by firemen only when no other means is available, or the fire is jeopardizing other property. The

resolution of the city commissioners, that the city engines and fire department could only be used in this case when no private means could be found sufficient, shows the spirit that pervades city governments in relation to such matters. Were there no means by which rights of firemen could be inquired into in such cases, they would, and not without reason, undoubtedly refuse to render services such as the circumstances show these to have been, when called upon for them. There seems to have been no refusal on the part of the libelants to go to work, nor does it appear that they, or their representatives, were the first to make a demand for compensation. It was only upon the inquiry of the applicants for assistance, and their asking for terms, that any were named. In *The San Juan* it does not appear that any contract, agreement, or terms were demanded, but they accepted what was paid them. The case is so entirely different from *The Mary Frost*, that, while I cordially approve the decision in that case, I cannot consider it binding in this. In that case the ship was receiving cargo from the city, had become for the time a portion of its commercial agencies, and identified with its interests. She was lying at a wharf where a conflagration would endanger the city itself. The labor of the firemen occupied but a short time, and was neither extended nor arduous, and just such service as was absolutely necessary for the protection of the city and its property. The same statement would apply in the case of *The Suliste*. In this case every essential element of service is different. The learned justice in the case of *The Mary Frost* says: "The question is, whether it is a case for salvage. In my opinion it is not." The same question is now whether *this* is a case for salvage, and I must say that in my opinion it is.

The case of a ship taking fire in a harbor or at a dock, while receiving or discharging cargo, and connected by her business in any way with the interests of the city, or where any portion of the city might be in jeopardy, is not under consideration, and nothing herein said is intended as favoring in any way a salvage claim in such case.

Deciding that this may be considered a salvage service decides that in rendering it the firemen went beyond their ordinary duty as firemen of the city, which disposes of the objection to their suing in their own names, and without the consent of the municipality.

This suit, however, is brought upon a contract, and not for salvage.

A contract for the performance of a salvage service may be sued upon as such, and either declared not proven, or set aside as unreasonable, and salvage declared *eo nomine*. The contract, as alleged in the libel, is not denied in form, but in the construction of its terms. Libelants demand pay for the entire number employed for the entire time engaged in the service, regardless of the number of hours they each actually performed labor. The respondent says such was not the understanding, but that the actual number of hours worked by each one only was to be paid for at that rate. Neither party at that time seems to have known the terms of settlement or the manner of work on the *San Juan*, the case referred to in the alleged agreement. Mr. Fogarty only knew that the underwriters were satisfied with the amount paid, and considered it reasona-

ble. Nothing was said by either party about the number of men to be employed.

While perhaps the rate demanded might not be considered unreasonable, even with the construction placed upon it by the libelants, had only the necessary number of men been employed, the much larger number of men than could be of any service being permitted to join in the work, makes the account unreasonably large. The condition in which the property in regard to which the contract is alleged to have been made, was at the time, as well as the lack of mutuality of understanding between the parties as to its terms and construction, satisfy me that all consideration of it should be put aside, and only a question of salvage *eo nomine* considered. It is impossible to determine the number of hours actually worked, even should the construction of the respondent be accepted as to its terms; and the construction of libelants would give an amount larger than would be considered a reasonable salvage. But it must be considered as a salvage service of low merit. The time occupied and labor performed were considerable, but these constitute but minor elements in such a service. The exposure to personal danger, although something, was not great. The services were only valuable by means of the fire-engines, which have been paid for. The libelants had no property hazarded. They lost no time in going or waiting, as the ordinary licensed wreckers of this district so often do. Yet the property was in great peril, and, so far as has been shown, no other means available. The fire-engines were useless without libelants. The property has been saved and restored to the owners in a comparatively undamaged condition.

In *The Blackwall*, *supra*, the supreme court approved as a fair salvage 10 per cent. where a vessel on fire in the harbor was extinguished with comparatively little labor and time. In *The Sultane*, *supra*, the appellate court allowed 8 per cent., or nearly \$20,000, on a value probably not equaling that in this case. In the case of *The Prairie Bird*, arriving June, 1875, in this port with a cotton cargo on fire, much in condition of the vessel in the case at bar, although perhaps in some respects the danger was greater, she being a wooden ship, with no bulk-heads, \$14,000 was given on a valuation of about \$100,000. Ad. Rec. S. D. Fla. vol. 11, p. 78. In the case of *The Albert Gallatin*, which took fire with a cargo of cotton in Mobile bay in April, 1868, on a value of \$346,000, saved by steamers and tug-boats, there was allowed a salvage of more than \$84,000, or about 25 per cent.; and on the *Thalia* and cargo, also on fire the same month, in the same district, over \$32,000 was given on a value of \$113,000 saved. Ad. Rec. S. D. Fla. 1868. In *The Cyclone*, 16 Fed. Rep. 486, 15 per cent. on the vessel and 25 per cent. on the cargo was given for extinguishing fire on a ship laden with naphtha. In *The Lone Star*, 35 Fed. Rep. 793, \$8,350 was given for partially saving the vessel, when the amount actually saved was estimated at from \$22,000 to \$29,000. In *The Florida* and *The Howard Drake*, where the salvors had no property at risk, and were occupied but about three hours, 6 per cent. was deemed a proper salvage to the libelants, although a portion

of the salvors had been paid by the owners. 22 Fed. Rep. 617. In *The Bay of Naples*, ante, 90, (recently decided by Judge BENEDICT, in the district of New York,) a salvage of \$20,000 was given on a valuation of \$100,000.

In all of these cases the salvage service was the extinguishing of fire, but the circumstances surrounding each case are so different that none can be treated as a precedent. In this case there has been no statement, allegation, or estimate of the value of the property, but its character, nature, and condition have been testified to, and, for the purpose of determining an award, I consider it may be safely taken at from \$275,000 to \$300,000. Such approximate valuation will be sufficiently near, as it is not necessary to give a certain percentage. I consider \$12,000 will be a liberal compensation for the time and labor of the libelants, and not an unreasonable burden upon the property, considering all the circumstances. This, after the payment of their proctor's fees, will leave the libelants a little less than had been considered a reasonable compensation by the master and the agent of underwriters present, and conditionally offered; but, as there was no unqualified offer, and the suit was brought at the suggestion of the representatives of the property, costs will necessarily follow.

THE NORTH STAR.

(District Court, E. D. Michigan. December 8, 1890.)

1. COLLISION—DAMAGES—PROFITS.

Where a steamer, which was under charter to carry 25,000 tons of iron ore, was sunk in a collision after she had entered upon the performance of such charter, and her owner was paid \$2,000 for a reassignment and release of his interest in the same, upon the theory that he had the right to substitute another vessel, *held* that, as against the vessel in fault, he could not recover the profits he would probably have realized by the full performance of the charter.

2. SAME—TOTAL LOSS—MEASURE OF DAMAGES.

It seems that the damages recoverable by the owner of a vessel totally lost in a collision are limited to the value of the vessel and interest and the net profits of the particular voyage, and that he is not entitled to the probable profits of a charter unperformed.

3. SAME—INTEREST ON VESSEL'S VALUE.

While interest upon the value of the vessel is a matter of discretion, it will be allowed where the faults of the two vessels are not greatly disproportional, and there is reason to believe that the witnesses have not given a true account of the circumstances attending the collision.

4. SAME—EXPENSE OF REPAIR—EVIDENCE.

Where a witness swore that the expenses of his steamer while undergoing repairs were a certain sum, and the opposing counsel did not cross-examine as to the claims of such expenses, and there was nothing to throw suspicion upon the charge, *held*, that there was no reason for disallowing any portion of such account.

(Syllabus by the Court.)

In Admiralty. On exceptions to commissioner's report. See 43 Fed. Rep: 807.

This was a suit for a collision between the propeller C. J. Sheffield and the steam-ship North Star, which was tried in February, 1890, before the district judge and nautical assessors, and resulted in a decree adjudging both vessels to be in fault, apportioning the damages, and referring the case to a commissioner to compute and report the same. Upon filing such report, exception was taken by the libelants to the refusal of the commissioner to allow the sum of \$14,000 for an alleged loss of profits upon a charter to carry 25,000 tons of iron ore from Two Harbors, Minn., to South Chicago, Ill., during the season of 1889. The commissioner reported that three cargoes, amounting to about 5,832 gross tons, had been transported, and the Sheffield was on a voyage for the fourth cargo at the time of the accident. It was also shown that, under ordinarily favorable circumstances, she would have completed her contract by about the 5th of September, and that the net profits which would have accrued to the libelants, if the contract had been completed, basing the computation on the net profits of the cargo already transported, would have been \$16,000. From this sum the libelants deducted \$2,000, the amount which they realized from the sale or reassignment to the Northwestern Transportation Company of the residue of this contract, leaving as the amount which they claimed for the loss of the charter the sum of \$14,000. The alleged charter of the Sheffield was contained in certain letters between officers of the Northwestern Transportation Company and the managing owner of the steam-ship C. J. Sheffield, copies of which are contained in the commissioner's report. In relation to this the commissioner, Mr. D. J. Davison, found as follows:

"Conceding that this tripartite correspondence amounts to a charter-party which bound the steamer C. J. Sheffield to the carriage, at the specified rate, of 25,000 tons of iron ore from and to the points indicated, is this loss an element to be considered in computing the libelant's damages?

"Both in this country, and in England, in cases of partial loss, where the libelant's vessel has sustained such injuries as to interrupt her voyage, or voyages, and require her to be laid up while the damage is being made good, the net profits the vessel would or might have earned during the period of delay are allowed as an element of damages; and the net earnings of the vessel, at the time of and just prior to the accident, are deemed a just measure of such damage.

"And so, also, where the vessel is under charter for the pending voyage, the profits which would have been realized therefrom, if the voyage had been successfully completed, are allowed as an item of damage. The ground upon which these allowances are made is that the owner of the injured vessel is deprived of her use during the period required for repairs. He has neither his ship nor her value; he cannot, therefore, supply the place of the damaged vessel by the purchase of another, but he must await her restoration before he can, in any manner, derive profit from this investment of his capital. It is not the value of the unexpired term of the charter as a distinct and separate item of damage that is awarded; but the profits that would have accrued under the charter are regarded as the most equitable measure of the demurrage value of the vessel for the period of delay requisite for the repairs.

"The cases in which the question of demurrage has arisen have been generally those where there was a charter or a contract for a single specific voyage; and the allowance of the net freight upon the pending voyage proceeds

on the theory that the vessel, at the time of the accident, has been fitted out, manned, and provisioned and equipped for the contemplated voyage. The expenditures in that regard have been already made, and the amount has become a fixed and definite sum. Her freight has been delivered on board, and its amount determined; and, in most cases, the voyage has been in part accomplished. The only element of uncertainty is as to whether she will safely complete her voyage. That she will do so is deemed as certain as is the success of most business ventures. In cases of a contract for the season, requiring many successive voyages for its performance, there are involved many and greater uncertainties. Freights and wages may so fluctuate as to render the contract not only valueless, but a source of actual loss to the vessel owner.

"In cases of total loss, the full marked or cash value of the vessel, at the time of the accident, is awarded to the owner, thus making, in this respect, the most complete restitution possible in the nature of the case; and which theoretically, at least, restores to him at once his lost vessel. With the money so received, being the full market value of his vessel, he may at once purchase another, put her in commission, and immediately make her a source of profit. If the vessel was under charter for the season at the time of loss, as is claimed in this case, and there is awarded to the owner, as part of the damages resulting from the tort, the value of the unexpired term of the charter, he would then be enabled to duplicate his earnings for the balance of the season, and thus make a profit of his loss.

"It is true, if the owner is unable to secure for his substituted vessel an equally profitable charter or employment, then, in order to make good his loss, he should receive, in addition to the value of his vessel, the amount of this diminution of profits, whatever they could be shown to be. But, in the judgment of the commissioner, this inquiry would involve the consideration of matters too remote and speculative to afford any satisfactory result.

"The ordinary and most equitable rule of compensation in cases of total loss by collision is the full market value of the vessel at the time of the accident, together with her freight upon the pending voyage, with interest from the time of its estimated termination.

"This rule, while it may not in all cases afford complete relief, is reasonably certain in its application, and is the rule, as the commissioner understands, generally adopted by the courts in awarding damages in cases of total loss. Only one or two cases of departure from it are found, notably *The Fredrick L. Porter*, 8 Fed. Rep. 170, in which the court assessed the net freight for the unexpired term of the charter, which was for the season. But, in the opinion of the commissioner, the contract in this case was not such a specific charter of the Sheffield as precluded her owners from substituting another vessel, and thus completing her contract. It was evidently not so considered and treated by the parties, as is evidenced by the fact of payment by the Northwestern Transportation Company to the owners of the Sheffield of the sum of \$2,000 for a reassignment to it of this contract. If there was no privilege of substitution, then all the rights of the libelants under this contract to complete the transportation of the 25,000 tons of ore were extinguished by the disappearance of the Sheffield under the waters of Lake Superior, leaving nothing to assign. The only restriction as to vessels, contained in the original agreement between the InterOcean Transportation Company and the Northwestern Transportation Company for the transportation of 60,000 tons of ore, of which the 25,000 were a part, is that the ore shall be carried by steamers, without consortia. The InterOcean Transportation Company were therefore bound to furnish a cargo of ore to any suitable steamer presented by the owners of the Sheffield, provided she came without a consort, until the transportation of the 25,000 tons was completed.

"In any view of the case, the item of damages claimed for loss of profits on the charter should be, in the judgment of the commissioner, disallowed."

The claimants also filed the following exceptions to this report:

- (1) To the allowance of interest upon the value of the Sheffield.
- (2) In refusing to allow claimants' item of \$720.66, expenses of the vessel while undergoing repairs.

H. D. Goulder and H. H. Swan, for libelants.

C. E. Kramer and Robert Rae, for claimants.

BROWN, J., (after stating the facts as above.) The main exception here relates to the disallowance by the commissioner of the loss of profits upon the charter of the Sheffield to carry 25,000 tons of iron ore. The facts connected with this claim are briefly as follows: On the 28th of March, the Northwestern Transportation Company, by H. H. Brown, vice-president, agreed with the Interocéan Transportation Company to carry for it 60,000 tons of ore from Two Harbors to Chicago, at \$1.20 per gross ton. On the 1st of April, E. M. Peck, president of the Northwestern Transportation Company, wrote to Brown, as managing owner of the Sheffield, (who, as vice-president of the Northwestern Transportation Company, had signed the contract with the Interocéan Company,) notifying him of the charter, and saying that the steamer Sheffield should carry 20,000 (afterwards raised to 25,000) tons of the above amount. This was agreed to by Brown.

This is all of the so-called charter, for the loss of which this large amount of damages is claimed. Now, while this contract may undoubtedly be construed as a binding contract on the part of the Sheffield, and the Sheffield alone, to carry this amount, it was construed by the parties themselves as a contract between the Northwestern Transportation Company and Brown to carry that amount in any steamer he might designate, since, after the loss of the Sheffield, the Northwestern Transportation Company paid to Brown \$2,000 for a reassignment or release of this contract. This could only be done upon the theory that Brown had the right to substitute another steamer in place of the Sheffield. By receiving the money, Brown acquiesced in this construction of the charter, and is not at liberty now, as against the North Star, to make a claim based upon a totally different construction.

Whether a libelant in any case of total loss is entitled to recover the profits of an unexpired charter, I do not find it necessary to express a decided opinion. It has been generally supposed that he was limited to a recovery of the net freight upon the particular voyage, and that interest upon the value of his vessel from that time was allowed in lieu of all other damages; and, with a single exception, the authorities seem to favor that contention. *The Columbus*, 3 W. Rob. 164; *The Amiable Nancy*, 3 Wheat. 546. The case of *The Freddie L. Porter*, 5 Fed. Rep. 822, 8 Fed. Rep. 170, is certainly authority for a broader claim. It ought to be said, however, in explanation of this case, that the opinion of the district judge is founded upon authorities holding that the owner of an injured vessel is entitled to his net freight for the particular voy-

age, and, in cases of partial loss, to an allowance in the nature of demurrage while undergoing repairs. The circuit judge affirms his opinion in a very brief opinion, and couples with it the admission that his decision may be an advance upon any which has been made. It is certainly difficult to reconcile this case with that of *The Amiable Nancy*, 3 Wheat. 546, in which the probable profits of a voyage yet *in fieri* were disallowed, and which has heretofore been accepted as settling the law for this country. There are reasons for allowing the loss of a profitable charter in a case of damage, while the vessel is undergoing repairs, which do not apply to a case of total loss. The time during which the vessel is being repaired is comparatively a short one, and the profits of the charter are adopted simply as a measure of estimating the demurrage; while, in the case of a total loss, the vessel may be under a charter which has one of some years to run, and, if the owner is entitled to recover the profits of such charter at all, there would seem to be no limit to such right, so far as respects the time of its continuance. I am not satisfied that there is anything in this case to take it out of the scope of the decision in *The Amiable Nancy*.

2. With reference to the allowance of the item of \$12,000 interest upon the value of the Sheffield, (which the commissioner puts at \$160,000,) I have felt more doubt. The Sheffield was guilty of so many faults in connection with this catastrophe that I have been strongly disposed to reject this item of interest, as its allowance is a matter of discretion; but upon reflection, I am satisfied that with regard to the main fault, viz., the failure to stop and reverse, a fault but for which the collision would not have occurred, the steamers were equally to blame. In addition to this, there was a frankness upon the part of the Sheffield's officers and crew in admitting their faults, which, while it does not disarm criticism with respect to their conduct, inclines one to take as favorable a view of their case as the facts will warrant. Upon the other hand, there was such a marked discrepancy between the testimony of the men upon the Star, and the statements made by them in their protest, and even in their answer, and such obvious improbabilities upon the face of their testimony, that there is raised in my mind something more than a suspicion that their intention was to make the testimony so far as possible fit the exigencies of their case, as they had been developed by the libellant's evidence, a practice very common in collision cases, and one which the English rule, with regard to the filing of preliminary acts, was intended to provide against. Upon the whole, I have concluded not to disturb the report of the commissioner upon this point.

3. The only other item with regard to which a contest is made relates to the expenses of the North Star while undergoing repairs at Buffalo and Cleveland, which were claimed at \$720.66, and allowed at \$358.75; apparently upon the ground that the testimony did not satisfy the commissioner that such expenses had been incurred. It is true that the testimony with regard to these expenses is not very satisfactory; but so far as it goes, and taking it at its face value, I see no reason to doubt that they were actually incurred while the vessel was undergoing repairs,

and were consequently a proper charge against the Sheffield. With regard to this, the witness Meadowcroft was asked the following question:

"What were the actual expenses and outlay paid by your company in repairing the damage done to the North Star in this collision, and in consequence of your boat being so injured? Please give everything in the way of damage aside from demurrage."

In answer to this, the witness gives the items of the damage, the last one of which is as follows:

"Expenses of vessel while undergoing repairs at Buffalo and Cleveland, made necessary by reason of collision, during the eight days which were claimed the vessel was detained, and including also the towing at Cleveland, \$720.66."

On cross-examination, he testified as follows:

"In giving the expenses during the time you claim she was detained in repairing, you have included some tow bills and possibly other items of that description. Will you give the amount per day of running expenses of the ship during that time? *Answer.* \$83 per day. *Question.* Have you included the fuel for running to Cleveland, and if so to what amount in dollars? *A.* The consumption of coal by which the vessel was running to Cleveland was one ton and a quarter per hour for eighteen hours at \$2.50 per ton; and while in port the consumption of fuel was seven tons per day of twenty-four hours, so that the fuel in running to Cleveland was about \$56, as we have charged."

This was all the testimony in relation to this item. If the running expenses of the ship were \$83 a day, eight days, this would amount to \$664, which, with the \$56 for fuel, would make up the \$720, very nearly the amount of his bill. Now, as the witness gave this as one of several items of his account, we think it was incumbent upon libelants to cross-examine him with regard to the items of such expenses, if they entertained a doubt as to the propriety of their allowance. Instead of this, the commissioner makes an allowance for seven and a half days, of \$47.74, for the pay and subsistence of the officers and crew, \$358.75, a sum which, in view of this testimony, seems somewhat arbitrary. If the witness had been cross examined with regard to this account, and had been unable or unwilling to produce the items, there might be some reason for disallowing the whole amount; but, in the absence of such cross-examination or counter-showing, I see no reason why his general testimony should not be accepted as true. As the crew were detained on board for the eight days, their wages would undoubtedly be a proper charge, as well as their provisions, and the fuel and supplies of other kinds needed and used upon the vessel while in port. Upon the whole, I have concluded to sustain this exception, and allow the item at the amount claimed, \$720.66.

It results that a final decree will be entered for the libelants for the sum of \$84,050.64, with interest from September 21, 1890, the date of the commissioner's report.

THE ALASKA.

(District Court, E. D. Michigan. September 29, 1890.)

1. COLLISION—DAMAGES—RESTORING VESSEL.

The libellant in a collision suit is entitled to recover such damages as naturally follow from the negligence of the respondent, and to have his vessel restored as nearly as possible to her condition before the collision.

2. SAME—BEACHING VESSEL—EXPENSE OF REMOVAL.

Where the injured vessel was beached after the collision, and a bargain was made for a lump sum to take her off and carry her to a port of safety, and the sum agreed upon was actually paid, *held* that, if there was no fraud and no want of reasonable judgment in making the bargain, the amount paid was a just charge against the vessel in fault, although it was shown that the vessel might, in fact, have been gotten off for a much less sum. *Held, also*, that the owner of the injured vessel was entitled to his expenses for coming to look after the wreck.

3. SAME—COST OF SURVEY.

The practice is also to allow the cost of the survey as one of the incidental expenses of the collision.

4. SAME—COST OF REPAIRS.

The cost of repairs was also allowed, although it exceeded largely the estimated cost, and made the vessel a better and a stronger one than she was before.

5. SAME—SALVAGE AND REPAIRS—INTEREST.

Interest upon bills incurred for salvage and repairs is a matter of discretion, and in view of the fact that the vessel was made more valuable by the repairs than she was before the collision, and of some doubt as to whether the entire bill ought to be charged against the respondent, it was *held* that interest should be refused.

6. SAME—EXPENSE OF CONVOY.

The expenses of a convoy to an injured vessel should not be allowed unless the necessity for such convoy be clearly shown.

(Syllabus by the Court.)

In Admiralty. On exceptions to commissioner's report.

This was a libel for collision between the steam-barge Oregon and the steamer Alaska, which occurred on Saturday, November 27, 1886, at a point about six miles below Amherstburg, and near the mouth of the Detroit river. The case was suffered to go by default at the hearing, when a decree was entered for the libellant, with the usual order of reference to a commissioner to assess and report the damages.

After the collision the Oregon steamed to Amherstburg in about 55 minutes, and from there was taken across the river, and beached on Bois Blanc island. On Monday she was raised and towed to Detroit. On Tuesday she was placed in the Detroit dry-dock, and temporarily repaired, and on Wednesday she was started for Buffalo; and, after being held at Amherstburg for 12 hours, by reason of an accident to her convoy, arrived at Buffalo on the morning of December 3d, and was moored at Mills & Co.'s dry-dock. On the 8th of December, and while lying in the river at Buffalo, she was inspected and surveyed by three persons, one of whom, Mr. Humble, was chosen by the owners; another, Mr. Parsons, by the underwriters, and the third was Gilchrist, one of the owners. This survey was made about two months before she was placed in dry-dock for repairs. In the mean time, work was being done upon her by her owners.

Prior to her leaving Detroit the owners of the Alaska employed three persons to make a survey of the damages to the Oregon while she was in dry-dock here.

F. H. Canfield, for libelants.

S. S. Babcock, for claimants.

BROWN, J., (*after stating the facts as above.*) Upon filing the commissioner's report claimant excepted to the allowance of the following items:

1. To the bill of A. N. Moffat for raising the Oregon after the accident and taking her to Detroit, \$750. The testimony shows that a bargain was made with Moffat for a lump sum, and that the bill was actually paid. This makes a *prima facie* case, and renders it incumbent upon the claimant to show either that the money was not paid, which is not attempted, or that there was fraud in the transaction, or that the bargain was not made in the exercise of reasonable judgment. It appears that late upon Saturday evening Gilchrist, one of the owners, came from Vermilion, Ohio, to Detroit, bringing Schuck, one of the other owners, with him. Maytham, another owner, arrived here from Buffalo Sunday morning, the 28th of November, and brought Humble, the foreman of the dry-dock company in Buffalo, at which the work was done upon her, with him. Gilchrist swears that the next day after the collision—viz., Sunday morning—he saw the Oregon sunk at Bois Blanc island, across the river from Malden. Her nose was drawn upon the bank, but her stern was sunk in deep water. He looked her over, and let the job of raising her to Moffat, at \$750; but, before making such contract, he consulted Mr. Murphy, and other Canadian tug-owners. Moffat took his tug and pump and wrecking outfit with him, and went immediately to work pumping her out. They continued pumping until about 12 or 1 o'clock at night, when they stopped, because Moffat thought one pump would not do it, and the Oregon was allowed to refill. Another pump was brought down, but it did not arrive at the scene of operations until after the vessel was afloat. It seems they went to work again in the morning, and got the vessel off about noon, with the pump they had used the day before. Mr. Ashley, one of the owners of the Alaska, swears that he could have got a tug and pump for \$150 a day; and, after he learned of the agreement with Moffat, he told Gilchrist he would not ratify it.

There is no doubt that this contract resulted very favorably to Moffat, and that the amount he received was a large compensation for the service actually rendered; but, when a vessel is in a situation in which the Alaska found herself, prompt action is necessary, and much must be left to the discretion and good judgment of those in charge of her. They would have been at liberty to make a contract by the day, which would probably have resulted more favorably to them, or take their chances under a contract for a lump sum. There is no evidence that Mr. Ashley actually offered to do the job himself, although, after the contract was made, he told Mr. Gilchrist that he could have found tugs and pumps at \$150 a day; but, even if this offer had been made immediately after the accident, as the vessel then was, it was impossible to say how long the tug would have been engaged in getting her off, or whether she was competent for that purpose. If a bargain had been made for a *per diem*

compensation, it would have been for the interests of the tug to have prolonged the job as much as possible; if made for a lump sum, to do it in the shortest possible time. We are bound to consider, in this connection, that it was as much for the interests of the owners of the Oregon as for the owners of the Alaska that the job should be done as cheaply and expeditiously as possible. The underwriters were also interested in the same direction, and no objection was ever made by them to the payment of this bill. The ordinary rule is that, where a vessel stands in need of salvage services, a contract made by a master for a lump sum will be upheld, unless a clear advantage was taken of his necessities, and the contract was an oppressive one under the circumstances as they existed at the time it was made. I know of no reason why the same rule should not apply in a case of this kind. I see no reason to doubt the good faith of Gilchrist in making this bargain; and, while it undoubtedly resulted unfortunately for him, and incidentally for the owners of the Alaska, it might have resulted equally unfortunately for Moffat, if there had been a sudden change in the weather, or a failure of the pumps to do their work as well as expected, or more serious injuries to the Alaska than there appeared to be at the time. Upon the whole, I am unable to say that there was any want of good judgment in making this bargain. The exception must, therefore, be overruled.

2. To Maytham's bill for services and expenses, in coming from Buffalo to Detroit to look after his property, \$25. His original bill was for \$50. Under the circumstances, I think he should be allowed his expenses, but as he was one of the owners, I see no reason for his being allowed a compensation for his services. His expenses for five days, including his fare to and from Detroit, could hardly have been less than \$25, and, under the circumstances, I see no reason for disturbing the allowance of the commissioner. In *Hobson v. Lord*, 92 U. S. 398, 412, it is said that when the owner of a ship sends an agent to a foreign port, into which the ship has put in distress, to advise and assist the master for the benefit of the ship and cargo, the usage of the port of New York is that the amount paid for the services of such agent, and his board and traveling and incidental expenses, are allowed in general average. See, also, *The Cayuga*, 2 Ben. 125; *The Sunnyside*, Brown, Adm. 415. This exception is also overruled.

3. To the allowance of Humble and Parsons' bill for making survey, \$50. Surveys of this kind are almost always made when a vessel has received serious damage, and are often quite necessary in determining whether the vessel should be repaired or not, and are often important in reference to questions of insurance. The practice has been to allow them, and I see no objection to treating this as one of the incidental expenses of the collision. See *Sawyer v. Oakman*, 7 Blatchf. 290, 306.

4. To the allowance of Mills & Co.'s bill for repairs, \$9,674.30. While the Oregon was lying in dry-dock at Detroit, Mr. Ashley, one of the owners of the Alaska, employed three men to make a survey of the damage and probable cost of repairing the vessel, and putting her in as good condition as before the collision. Capt. Jones, a ship-builder

of this city, says the repairs could be done for \$3,524, but he says there were different methods and different opinions. On being shown Mills & Co.'s bill, the total amount of which was \$10,624.49, and asked to pick out the items which were not necessary, he says: "It is very difficult to do so. You can fix a vessel in a good many different ways." He testifies that Mills & Co. are men of good reputation; that the men who made the survey in Buffalo are competent and fair. George Irving, also a ship-builder, went through the vessel alone, and estimated the costs of repairs at \$3,315, and says that the repairs that he intended to make would have made the vessel stronger. John Doran, the other surveyor, testifies that he thinks the repairs put upon the steamer would have made her a stronger boat than she was before. His estimate of the cost of such repairs was \$3,740. He says his estimate included steel arches to make her as good as she was before, to stiffen her, and make her strong; that competent men might differ as to how the Oregon ought to be repaired; and the iron plates under the keelsons were necessary to remedy the injury from hogging.

Upon the other hand, a survey of the vessel was held at Buffalo by two men, one of whom represented the owners, and the other an insurance company, and, in their opinion, the cost of making such repairs would be \$8,240. Without intending, in any way, to impeach the good faith of those who examined the Oregon in Detroit, I am unable to shut my eyes to the fact that persons employed for the purpose of making estimates of damages, or of value, are largely, though perhaps unconsciously, influenced by the wishes of those who employ them, and I feel quite safe in saying that I do not think that any one of these parties would have entered into a contract to make these repairs for the sums named by them. There was a strike among the ship carpenters, at the time, in Detroit, and no work was being done here, and I have no doubt their estimates of damage were controlled, to a certain extent, by the sympathy they naturally felt towards the owners of the Alaska. In addition to that, it is a matter of common experience that the estimates for repairing old houses and old vessels are usually much less than the actual cost of such repairs when made. There is no reason to suppose that the men who made the survey in Buffalo are not fully as competent as those who estimated the damage here, and the fact that their estimate was not very largely exceeded by the actual cost of the repairs, as found by the commissioner, indicates to my mind that it was far the more trustworthy of the two. While I have no doubt that these repairs did make the vessel a better and stronger one than she was before, it is well settled that this cannot be taken advantage of by those who are responsible for the injury. *The Santee*, 6 Blatchf. 1; *The Baltimore*, 8 Wall. 386; *The Catharine*, 17 How. 170; *The Fannie Tuthill*, 17 Fed. Rep. 89. The testimony on behalf of the libelants, as to repairs, includes that of Maytham, one of the owners who ordered the repairs and paid for them; of John Humble, superintendent of Mills & Co.'s yard, who personally supervised the repairs, examined the bill, and swears that the prices charged are the regular rates; of Thomas Walsh, a clerk who kept the time and account

relating to the repairs, and who swears that he opened two accounts with the vessel for the different kinds of work as though there were two vessels; one account for the injury by the collision, and the other for the new work, and that the time spent on each was kept distinct from the other; of Albert Brinkman, foreman, who swears that the repairs and new work were done separately, and separate accounts were kept with each job; that he kept track of every piece of material that went into the boat, and rendered his account to Walsh, the clerk; of Hamilton J. Mills, who swears to the correctness of the bill, and that it has been paid; of Townsend Davis, agent of the insurance companies, who testifies that the insurers paid the loss on the basis of the adjustment including the bills for repairs; and, in fact, of almost every one who would be presumed to have knowledge of the correctness of this bill.

There is really nothing to impeach their testimony, and none of the items of the bill are specifically pointed out as unnecessary to put the vessel in as good condition as she was before. While there may be a suspicion that advantage was taken of this disaster to charge upon the claimants a portion of the betterments, they have not succeeded in establishing, by any preponderance of testimony, that these repairs were not made necessary by the collision. Upon the whole, I see no ground for disturbing the report of the commissioner upon this item, and the exception is therefore overruled.

5. To the allowance of interest upon the cost of the repairs, \$1,817.02. The usual practice has been to allow interest upon the cost of repairs, but, after all, the allowance of interest in actions of tort is a matter not of right, but of discretion. In common-law cases it is said that, in actions for unliquidated damages, interest is not recoverable *eo nomine*, but that the jury, in their discretion, may add interest; that, as the law does not inquire into the particulars of the verdict for damages, in some cases interest furnishes a just and convenient measure for the jury. In the same way interest may be taken into account by the jury in assessing damages in trespass and trover, but in the case of *The Independence*, (*Hemmenway v. Fisher*,) 20 How. 255, 260, where the question arose upon the allowance of interest upon a decree in admiralty, which had been affirmed by a divided court, it was said that—

"In cases of collision and salvage * * * it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It will sometimes happen in an admiralty case that this court will think that the damages estimated and allowed in the circuit court are too high, and yet the opinion here may approximate so nearly to that of the court below that this court would not feel justified in reversing its judgment. * * * No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved, to add, to the damages awarded by the court below, further damages by way of interest in cases where, in the opinion of this court, the appellee upon the proofs is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this court, it must be in the exercise of its discretionary power, and *pro tanto* is a new judgment."

This case was affirmed in *The Ann Caroline*, 2 Wall. 538, and in *The Scotland*, (*Dyer v. Navigation Co.*), 118 U. S. 507, 6 Sup. Ct. Rep. 1174. In the case of *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. Rep. 570, which was an action to recover back duties illegally exacted, it was said that if the plaintiff had been guilty of laches in unreasonably delaying the prosecution of his claim, interest may be properly withheld. When it is given as damages, it is often matter of discretion. Upon appeals to the supreme court, interest is not allowed, unless specially directed. Rule 23.

Under the circumstances of this case, in view of the undoubted and material betterment of this vessel by the repairs, and of the underlying doubt in my mind as to whether this entire bill ought to be charged to the claimants, I think it my duty to refuse the allowance of interest, and claimant's exception to this item of \$1,807.02 is therefore sustained.

These are all the items of the commissioner's report to which exceptions were taken by the claimants. Although upon the argument and in the brief several others are mentioned, I do not feel at liberty to consider them in the absence of formal exceptions upon the record.

I will now proceed to consider the exceptions of the libellant.

1. To the disallowance by the commissioner of the item for towing the Oregon to Buffalo by the propeller Newburgh, \$500. I am disposed, with some doubt, to concur with the report of the commissioner upon this point. Owing to the strike in Detroit, it was found necessary to take the Oregon to Buffalo, and the Newburgh was taken along as a conveyance. It is said that she was employed to tow the Oregon, but the evidence is that the Oregon employed her own motive power, and was not, in fact, aided by the Newburgh. While it may have been a prudent precaution to take the Newburgh along, it was adding a large item to the already large bill for injuries, and it does not seem to me to constitute such a case of necessity as to entitle libellants to recover it from the Alaska.

2. To the deduction from Mills & Co.'s bill for repairs of certain items, amounting to \$930.28. As the commissioner weighed all the testimony upon this point, and his conclusions upon such testimony are not directly attacked, I am not disposed to disturb his allowance.

With the exception of the allowance of interest, therefore, the report of the commissioner is affirmed.

PHIPPS *et al.* v. THE NICANOR, etc.

UNIVERSAL MARINE INS. Co., Limited, v. THE NICANOR, etc.

(Circuit Court, S. D. New York. December 12, 1890.)

1. SHIPPING—STRANDING—NEGLIGENCE.

After passing a certain point at night, a vessel tacked, and the master proposed to take a certain course, (north-east,) which if made good, would have carried the vessel clear of obstructions. There was a dense fog around the vessel, and she stranded at midnight. She had been within the clear-weather range of a certain light for two hours, but her navigators had not seen it. She had in fact been making a northerly course, owing to a change in the wind and to the existence of a certain current. The fact that the currents at that region are variable is well known to navigators, and is set forth in ordinary sailing directions. No soundings were taken, though they would have been sufficient to tell the vessel navigators that she was not making her proposed course good, and the importance of taking frequent soundings in those waters is given in ordinary sailing directions. *Held*, that the stranding arose from negligence.

2. SAME—CONTRIBUTION.

Such negligence would defeat any claim for contribution by the vessel owners on account of such stranding.

3. SAME—GENERAL AVERAGE—VOLUNTARY PAYMENT.

Where a marine protest, showing the fact that the stranding was caused by negligence, is open to the inspection of underwriters, and there is no misrepresentation or concealment on the part of the ship's owners or agents, payment by the underwriters to the ship's agents, on account of a general average adjustment, is voluntary, and cannot be recovered back.

In Admiralty.

FINDINGS OF FACT.

(1) On various dates, between the 8th and 24th days of June, 1889, Thomas W. Howard & Co., of Montevideo, shipped on board the bark Nicanor, then lying at Montevideo, and bound for New York, 13,000 dry hides, of various sizes, all in good order and condition, to be carried by the Nicanor to New York, and there to be delivered in like good order and condition, unto Messrs. Baring Bros. & Co., or their assigns, and the bark agreed, in consideration of freight stipulated to be paid, to transport the hides to New York, and deliver the same as aforesaid, and to that end issued bills of lading at Montevideo to the shippers of the hides, which bills of lading, in due course, were indorsed and delivered for value to Enos Wilder, a merchant of New York, who became the owner of the hides, and entitled to delivery thereof at New York.

(2) On the 6th of July the Nicanor sailed from Montevideo, with the hides on board, bound for New York, and about 3 P. M. of September 2d, in fine weather, passed the light-ship at the south end of Five-Fathom bank, off the Delaware capes. The vessel was on her starboard tack, sailing in a north-westerly direction, and passed between the two light-ships on Five-Fathom bank, leaving the lower one three or four miles on her port side, and she continued sailing in that direction until about 7 P. M., when, being within sight of land, she came about and sailed on her port tack, on courses between east and south, according to the wind, until 9 o'clock. A little before 8 P. M. she made the north-east end

light-ship about ahead. At 9 p. m. the bark went again on her starboard tack, the light-ship at the north-east end of Five-Fathom bank then being between a quarter and a half of a mile south-east from her, and she maintained this starboard tack until the stranding hereinafter mentioned. At the time she tacked the master of the Nicanor proposed to make a north-east course, which would not carry him within the range of Ludlam Beach light. No pilot had been spoken, although pilots frequently board vessels to the southward of this place. The course of north-east, which the master proposed to take, was a proper course for sailing vessels bound from the light-ships to New York, and if made good would have carried the vessel clear of all obstructions. The wind was variable between south-east and east, and gave him a speed of about six knots an hour. There was a heavy haze, growing heavier towards the shore. About 11 p. m. the master saw and recognized Ludlam Beach light about abeam, bearing west, or west by north, at an estimated distance of eight miles. He kept it in sight with the aid of his glasses for about 15 minutes, and then lost it. The range of the light is $11\frac{1}{2}$ miles, and when the Nicanor had that light bearing westerly distant 8 miles she was about due north of the light-ship at the north-east end of Five-Fathom bank. This fact was patent, and should have been recognized by the master of the Nicanor. The Nicanor was at that point, within the ordinary range of Absecon light, though it was not visible, which indicated the existence of a heavy haze or fog along the shore. The vessel continued on her starboard tack after losing Ludlam Beach light. At 12 o'clock midnight the weather got thick around the vessel, with a heavy mist, and about an hour later she took the ground on the bar of Great Egg harbor. The point where she grounded was about north of the light-ship on the north-east end of Five-Fathom bank, and was about 6 miles south-westerly from Absecon light. The fog was still dense, and so continued throughout the night. Absecon light has a range of 19 miles, and was not seen by the navigators of the Nicanor at any time prior to the stranding, though she had been within its clear-weather range since about 10 o'clock, and no light had been seen since Ludlam Beach light.

(3) The yards of the Nicanor were not braced sharp, but so that she carried the wind about abeam. From the time of leaving north-east end light-ship the wind had been variable between east and south-east, and at the time and place of the stranding was about east by south. The vessel, from the time of leaving north-east end light-ship, had been in fact making a north course instead of a north-east course, as expected, and this had been due to the fact that the wind hauled somewhat to the northward, and to the existence of a current which set her somewhat on shore. The currents at that section of the New Jersey coast are variable, being governed by the winds, and the current which was running was the result of easterly winds previously prevailing. The fact that the currents are variable is a fact well known to navigators, and is set forth in the ordinary sailing directions for the coast. No soundings were

taken by the Nicanor, though soundings would have been efficient to tell her navigators that she was not making good her expected north-east course, but was rapidly nearing the shore, and the importance of taking soundings regularly and frequently when off this coast in thick weather is set forth in the ordinary sailing directions.

(4) When the Nicanor failed on her starboard tack to make good a course sufficiently east of north to clear the coast she should have gone on port tack, or, if that was not a serviceable one, she should have anchored.

(5) After grounding, the Nicanor endeavored, without success, to work into deep water. In the morning salvors came to her assistance, and a contract was made with them by the master, as follows:

"SOMERS POINT, Sept. 2nd, 1889.

"I hereby agree to employ the Atlantic and Gulf Wrecking Co. to assist my vessel, now in distress, and to leave the matter of compensation for her services to be decided by the New York Board Underwriters, binding myself and owners to abide by said award.

[S'd]

"J. F. WOLFE, Master Bkt. Nicanor.

"JOHN TOWNSEND, for Atlantic and Gulf Wrecking Co."

The master did not communicate with the cargo interests, or in any way attempt to bind them by this agreement.

(6) On September 3, 1889, the Nicanor was floated. She then resumed her voyage, and arrived at New York on the 4th. A representative of the wreckers, who had remained on board, left the vessel on her arrival.

(7) On September 5th the vessel was entered at the custom-house, on the 6th a delivery permit was obtained, and on the same day the discharge of the cargo began. No cargo had been damaged. No lien by the salvors was asserted against the cargo, and it was delivered to the respective consignees, and taken away as fast as unladen.

(8) On September 6th a hearing was had before the New York Board of Underwriters to determine the amount of salvage, and the following award was thereupon made:

"51 WALL STREET, NEW YORK, September 6th, 1889.

"By an agreement entered into between J. F. Wolfe, master of the Br. Bk. Nicanor, and John Townsend, for the Atlantic and Gulf Wrecking Co., the question of the amounts to be allowed the said salvors for services and assistance rendered to the Br. Bark Nicanor, stranded on Great Egg Harbor bar, September 1, 2, and 3, 1889, was referred to this board for decision and award. The board held a meeting on the 6th September, 1889, at which the respective parties were represented. After due consideration of the case, it was unanimously resolved that the sum of fifteen thousand dollars be awarded to the Atlantic and Gulf Wrecking Company, in full for all services and assistance rendered to the Br. Nicanor while ashore on Great Egg Harbor bar."

[Signed in duplicate:]

"W. I. COMES, Vice-President."

"Attest: "Ab. SPENCER, Clerk of the Board, for Secretary."

The members of the board, who fixed the amount of this award, besides the vice-president, were Mr. Moore, of the Atlantic Mutual Insurance Company, who had the largest insurance on cargo, and Mr. Bleecker, president of the New York Mutual Company, which was also an insurer of the cargo of the Nicanor.

(9) Immediately thereupon the master went to Messrs. J. F. Whitney & Co., the agents of the barkentine, and asked them to advance the money for him to pay the award. They agreed to do so, paid the salvors, and took the following receipt:

"NEW YORK, September 6, 1889.

"Received of Messrs. J. F. Whitney & Co. (agents of the Bk. Nicanor) fifteen thousand dollars, in full for all services of every name and nature rendered the said bark while stranded at Great Egg harbor, as per award of the New York Board of Underwriters, this day.

"ATLANTIC & GULF WRECKING CO.

"Per WM. A. M. KEATES."

(10) Meanwhile an average bond, bearing date September 4th, had been prepared, and upon the making of the award, the signatures of the several consignees, or their underwriters, were obtained thereto. No signatures were affixed till the 6th, and all the signatures were not obtained until several days afterwards. The average bond provided that the different consignees, or their underwriters, should pay to "J. F. Whitney & Co., owners, or agents of the owners, of the said vessel," whatever should be shown to be a charge upon said cargo, to be stated by Currey & Whitney, adjusters, according to law.

(11) After the shipment of the hides and wool, and before the stranding of the Nicanor, the libellant, which is a marine insurance company, organized and existing under the laws of Great Britain, made marine insurance in favor of Enos Wilder upon one-half interest of the said hides shipped by Thomas W. Howard & Co.

(12) On September 11th Mr. James Lawson, on behalf of two of the libellants, (the British & Foreign Insurance Company, and the Universal Marine Insurance Company,) apparently unaware that the salvage award had been paid by the ship's agents, called on the average adjusters, and offered to pay part of the award. On being told of the payment of the award, he requested a *pro forma* statement to be made up to show the proportion due from said two companies, and thereafter addressed the following letter to the vessel's agent:

"NO. 4 HANOVER STREET, NEW YORK, September 17th, 1889.

"Messrs. J. F. Whitney & Co., New York—DEAR SIR: Nicanor. On the 11th inst. I called upon the adjusters, Messrs. Currey & Whitney, for the purpose of offering on behalf of the 'Universal Marine' and the 'British & Foreign' to send checks for our respective proportions of the salvage award. I was much surprised to learn that you had already settled with the salvors, and paid for our account the amount we owed. We did not authorize you to pay our share of the salvage, which we were ready, at any time, to pay ourselves. I therefore beg to notify you that I am still ready to give my check for my

share of the award, and that I will refuse to recognize any claim for commissions for advancing or collecting the same.

"Yours, very truly, JAMES LAWSON, Atty."

The following was inclosed in the above:

"NEW YORK, Sept. 14, 1889.

"*Messrs. J. F. Whitney & Co., New York*—DEAR SIR: We confirm our verbal tender made by Mr. Lawson, Wednesday, on behalf of the Universal and British & Foreign, to advance our share of the salvage contribution in case of the Nicanor, and hereby give notice that we shall refuse to recognize any claim for commission for advancing.

Yours, truly,

"BRITISH AND FOREIGN MARINE INS. CO., (LD.) New York Branch.

"L. A. WRIGHT, Underwriter."

(13) To which Messrs. Whitney & Co. replied:

"NICANOR.

"NEW YORK, Sept. 18th, 1889.

"*Jas. Lawson, Esq., Atty. Universal Ins. Co., 4 Hanover St., City*—DEAR SIR: Your favor of 17th, inclosing letter of British and Foreign Mar. Ins. Co. of 14th, received, and we note your remarks in regard to Nicanor. Having already advanced to the master the sum required by him to pay the salvage award, we fail to understand why he should surrender the commissions properly due us for so doing. At the time the award was made there was no intimation from any underwriter concerned of a desire to provide funds. Our adjusters have prepared a *pro forma* statement, showing \$2,700 as your share of the salvage award, (approximate.) If you elect to pay this amount, it will stop the charge of interest from date of payment; but in accepting it we do so with the express understanding that it is without prejudice to any of our rights in the case.

"Yrs., &c.,

J. F. WHITNEY & Co."

(14) Thereupon the libellant paid by check inclosed in the following letter:

"NO. 4 HANOVER STREET, NEW YORK, September 20th, 1889.

"*Messrs. J. F. Whitney & Co., New York*—DEAR SIR: Nicanor. Your favor of 18th inst. is received, together with a *pro forma* statement from your adjusters. I inclose herewith my check for \$2,500, being an approximate proportion of my share of the salvage award. Mr. Wilder informs me that the hides are not worth more than \$2.75 in New York; but, as your adjusters valued them for contribution at \$3.00 each, I have made my check for the round sum above mentioned, instead of the amount stated by them. I will refuse to recognize any claim on your part for commissions for advancing or collecting \$2,500. You were not authorized to pay the amount I owed on account of salvage award.

"Yours, very truly,

JAMES LAWSON, Atty."

(15) On or about October 4th the general average adjustment, called "Statement of Salvage Charges," was made up. Besides the salvage award there was included \$1,261.24 for ropes and sheaves of the vessel, for her disbursements in procuring the salvors, for protest, survey, and adjusters' fees, and agents' commissions for advancing and collecting, and interest. The contribution thereby required from the interest insured by the libellants was \$2,514.50.

(16) The marine protest was at all times prior to the payment open to the inspection of the libelants. It showed that the vessel stranded at 1:30 P. M., on Great Egg Harbor bar; that at 9 P. M. she had tacked to the north-east, the wind hauling to the south-east, the north-east light-ship at Five-Fathom bank bearing south-east about half a mile distant; that at 11 P. M. she made the light on Ludlam beach, bearing west about eight miles distant; and that at midnight the weather was becoming thick, and a heavy mist overspread the sea. So far as the protest indicated no soundings were taken at any time while on this north-east tack.

(17) There was no fraud or misrepresentation or concealment on the part of the ship's master, or of her agents or owners. The payment referred to in the eleventh finding was made to the ship's agents, (who had themselves settled with and paid the salvors,) voluntarily, and without duress or detention of goods, and with means of knowledge of the facts which, it is now insisted, indicate the negligence on the part of the ship was the cause of the stranding.

CONCLUSIONS OF LAW.

(1) The stranding arose from negligence especially from the failure to take regular and frequent soundings.

(2) That the stranding arose from negligence would constitute a full defense to any claim for contribution founded on the stranding.

(3) The payment by the libelants on account of the adjustment was voluntary, and cannot be recovered back.

(4) The libel is dismissed, with costs in both courts.

Butler, Stillman & Hubbard, for libelants and appellants.

Wing, Shoudy & Putnam, for claimants and appellees.

LACOMBE, Circuit Judge. To all arguments based upon the payment of salvage by cargo owners, in order to obtain free delivery of their goods, the sufficient answer is that libelants made no such payments. The salvors asserted no lien upon the goods; their claim was settled by the ship, whose agents, at the captain's request, paid the salvage award and cleared the goods from any lien for such service. The captain made no attempt to bind the cargo or the owners by his agreement with the salvors. Instantly, upon the fixing of the amount due to them, he procured the funds upon the ship's responsibility from its agents and paid the salvors. So far as the ship was concerned, her whole contract of carriage was fully performed. She delivered the goods to consignees in good order, and free from any lien or incumbrance. It is true that she herself asserted a claim for the proportionate amount of the salvage she had paid, and of certain other expenses connected with the stranding; but there is nothing in the evidence to show that she sought to compel payment of this claim by any duress of goods. To any action upon such claim, whether backed by a general average bond or not, negligence causing the stranding would be a full defense. Nay, more, the ship could not establish such claim upon proof of the bare fact that she

stranded; she would have to show sufficient of the attending circumstances to warrant the inference that she stranded without fault. There is nothing to show any concealment or misrepresentation on the part of the ship, and if the libelants did not have full knowledge of all the facts attending the stranding, they had in the marine protest, and in the excerpt therefrom prefixed to the average bond, sufficient to inform them that the ship went ashore while making her way up the Jersey coast on an inshore tack (when his recorded observations should have shown the master that she was making in towards shore) in thick weather, and without using the lead. The libelants are chargeable not only with what they knew, but with what their available means of knowledge would have disclosed to them. Having paid the ship's claim for contribution, voluntarily, with these facts before them, they cannot now insist that the ship shall repay it to them, upon the theory that when they paid it they were mistaken in supposing that the ship, whose stranding, not being in itself a sea peril, was *prima facie* negligent, could show that she used due diligence and proper skill to avoid the accident, and that it was inevitable.

THE TITAN.¹

THE FRANCIS.

SANBORN v. THE TITAN AND CAR-FLOAT No. 6.

(District Court, S. D. New York. December 18, 1890.)

COLLISION—STEAM-VESSELS MEETING—TIDE-RIP—SWINGING—EAST RIVER NAVIGATION—SAFE MARGIN—WRONG SIDE OF RIVER—PROXIMATE CAUSE.

The tug T., moving slowly with two car-floats along-side, came around the Battery into the East river, near the New York shore. The steam-boat F. came down the East river with the ebb-tide, at a speed of about 12 knots, and shaped her course to pass the T. starboard to starboard, each giving a signal of two whistles. On the ebb, there is a tide-rip off the Battery, which tends to swing to starboard the head of a vessel entering the East river near the New York shore. This was known to the pilots of both vessels. The T. swung about two points to the starboard on striking the tide-rip, and collided with the F. The river was clear of vessels at the time. *Held*, that the F. was bound to have so shaped her course as to leave a safe margin for the known effects of the tide; that the course of the T. along the New York shore, contrary to statute, was not the proximate cause of the collision, and was immaterial, the F. having had ample time and space to keep out of the way; and that the F. alone was liable for the collision.

In Admiralty. Suit to recover damages caused by collision.

Sidney Chubb, for libellant.

Goodrich, Deady & Goodrich, for respondent.

BROWN, J. The array of witnesses against the libellant on every important point is too great to warrant a decree in his favor. The weight

¹Reported by Edward G. Benedict, Esq., of the New York bar.

of testimony is that the collision was from 300 to 500 feet off pier 3. The Titan was heavily incumbered with two car-floats along-side. She came out of the North river around the Battery, near the New York shore, in order to avoid the strong ebb-tide, and continued near that shore until she struck the ebb, probably shortly before the collision. The Francis had come down the East river at the rate of about 12 knots, including the tide, and passed under the bridge within one-third of the distance across from the Brooklyn shore. The place of collision was less than a third of the channel-way across from the New York piers to Diamond reef. The statute required the Francis to keep in mid-river, as near as may be, and nothing prevented her doing so, as the river was unusually clear of other vessels. When her master and pilot first noticed the Titan, each vessel was on the starboard hand of the other, though probably very slightly. The Titan, as the libellant's officers say, was then headed a little towards the New York shore, and so her own witnesses state. Her position and course were evident to the Francis, and she was proceeding very slowly, and there was abundant room for the Francis to keep out of the way by going to the left, by a large and safe margin, and passing starboard to starboard. Two whistles were exchanged between the vessels, indicating their intention to pass in that way. The libellant's witnesses claim that they would have passed safely had not the Titan sheered to starboard on striking the ebb-tide; but they state that this sheer did not commence until about 15 seconds before the second signal of two whistles, and that the Francis ran only about 200 or 300 feet after that last signal. From this it is evident that the swing of the Titan began less than half a minute before collision, and that any change in her position arising from her swing must have been comparatively small, as she was going very slowly. Her own witnesses, including some disinterested witnesses, who were watching her, did not observe any such swing; and the whole amount of her swing, as indicated by the diagram of the angle of collision, allowing one point for the swing of the Francis to port, as her witnesses state, was only two points. The liability to such a moderate change of heading in meeting the ebb-tide is well known to those navigating the harbor, and must be counted on and allowed for in passing. A change of two points within less than half a minute, and going so slowly as the Titan was going, could not have changed her position in the river over 50 feet. The Francis in passing to the left was bound to allow much more than that. The statute required 20 yards even in ordinary circumstances, and here the liability of the Francis to swing to port was known.

I am quite satisfied that the collision happened because the Francis, at the first signal which her witnesses mention, in shaping her course to go to the left, did not allow a sufficient margin for safety. She starboarded, but not hard. She headed to the left, very likely enough, if her heading could have been made good; but she could not make her heading, because the strong ebb carried her down so rapidly; in other words, she did not make sufficient allowance for the effect of the tide on

either vessel. There was abundant time and space for the Francis to have kept away in mid-river after the position and course of the Titan were seen and understood. The position of the Titan near the New York shore, instead of in the middle of the river, presented no difficulty or embarrassment to the Francis, and was therefore not a proximate cause of the collision. *Cayzer v. Carron Co.*, L. R. 9 App. Cas. 873; *The City of Springfield*, 29 Fed. Rep. 923; *The Britannia*, 34 Fed. Rep. 558.

The testimony of many of the defendants' witnesses, a number of them disinterested, makes it difficult to resist the conclusion that the Francis did cross the river somewhat rapidly after passing under the Brooklyn bridge, so as to get pretty near the New York shore when in the vicinity of Wall-Street ferry. This explains the testimony of the Titan's pilot, and his uncertainty as to the intended course of the Francis.

I am not satisfied that there was any material porting of his wheel, or any such change in his position through the swing in the tide, as to excuse the Francis for not passing by a safe margin to starboard, in accordance with the signals exchanged.

I do not perceive any fault contributing to the collision in the management of the Francis, under the circumstances, and must therefore direct a decree dismissing the libel.

PAUL v. BALTIMORE & O. & C. R. Co.

(Circuit Court, D. Indiana. December 11, 1890.)

REMOVAL OF CAUSES—CITIZENSHIP—CORPORATIONS—CONSOLIDATION.

Notwithstanding the consolidation of two railroad corporations of different states, each retains its identity as a corporation of the state in which it was originally created; and in a suit against the consolidated corporation brought in one of such states, it cannot obtain a removal to the federal courts on the ground that it is a citizen of the other state, though the consolidation was had under the laws of the latter.

At Law. Motion to remand.

Penfield & Blatner and *R. W. McBride*, for plaintiff.

J. H. Collins, for defendant.

WOODS, J. The petition for removal was on the ground of local prejudice. It is alleged that the plaintiff is a citizen of Indiana, and the defendant a corporation organized under the laws of Ohio, and therefore a citizen of that state. In the motion to remand it is averred, and the averment is supported by affidavit, that the defendant company is a citizen both of the state of Ohio and of the state of Indiana, duly formed by the consolidation (in 1876) pursuant to the laws of the states of Ohio and Indiana, of two several railroad corporations,—one of the state of Ohio, known as the Baltimore, Pittsburgh & Chicago Railway Company, Ohio Division, and the other of Indiana, known as the Baltimore, Pittsburgh & Chicago Railway Company, Indiana Division,—and that said consolidated corporation is the sole defendant herein. Counsel for the defendant in his brief says:

“It is conceded that the Baltimore, Pittsburgh & Chicago Railroad Company, Indiana Division, was an Indiana corporation, and that the Baltimore, Pittsburgh & Chicago Railroad Company, Ohio Division, was an Ohio corporation. Had an attempt been made to remove this case while the corporations were in that condition, the case would have come under the decision of *Railroad Co. v. Wheeler*, 1 Black, 286. In that case the Ohio & Mississippi Railroad Company was a corporation of Indiana and also a corporation of Ohio, precisely as the Baltimore, Pittsburgh & Chicago Railroad Company was originally a corporation both of Indiana and Ohio. But this consolidation was made under what is now section 3971 of the Revised Statutes of Indiana, and sections 3379 to 3392, inclusive, of the Revised Statutes of Ohio. In this connection it should be noted that section 3971 of the Revised Statutes of Indiana provides simply that any railroad company organized under the general or special law of the state ‘shall have the power to intersect, join, and connect its railroad with any other railroad constructed or in process of construction in this state or in any adjoining state, at such point on the state line or at any other point as may be mutually agreed upon by said companies; and said railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed.’ It will thus be noted that the statute of the state of Indiana authorizes the consolidation to be made and

the corporation to be formed under the laws of the adjoining state, there being no law in Indiana providing for the incorporation of the consolidated company. Accordingly, this certificate of incorporation was executed under the sections of the Revised Statutes of Ohio, to which reference has hereinbefore been made; the certificate was made under these sections, the consolidation was made under these sections, and the contract of consolidation was executed in the state of Ohio. These sections make the consolidated railroad company to all intents and purposes a corporation organized under the laws of the state of Ohio. Such being the case, it is respectfully submitted that the Baltimore & Ohio & Chicago Railroad Company is an Ohio corporation. The case does not come under the case in 1 Black, above referred to, but does come under the case of *Railroad Co. v. Harris*, 12 Wall. 65."

Under the decision and opinion in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. Rep. 1004, it seems clear that notwithstanding the consolidation of the two companies "the separate identity of each as a corporation of the state in which it was created and as a citizen of that state" was not lost.

In *Muller v. Dows*, 94 U. S. 444, in respect to corporations of Missouri and Iowa, it is said:

"The two corporations became one, but in the state of Iowa that one was an Iowa corporation, existing under the laws of that state alone. The laws of Missouri had no operation in Iowa."

And in *Railroad Co. v. Whitton*, 13 Wall. 271, it is said:

"In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that state. It is not there a corporation or citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its *status* or citizenship may be elsewhere."

See *Burger v. Railroad Co.*, 22 Fed. Rep. 561, and citations.

This suit, brought as it was in Indiana, was necessarily against the Indiana corporation, and the Ohio body, or the defendant describing itself as an Ohio body, of course had no right to ask a removal.

Though not made a ground of the motion to remand, it may be observed that the affidavit in support of the motion for removal is defective. It does not sufficiently show the existence of prejudice or local influence. *Malone v. Railroad Co.*, 35 Fed. Rep. 625; *Niblock v. Alexander*, ante, 306, (this court, filed December 10, 1890.) Motion to remand sustained.

AMSDEN v. NORWICH UNION FIRE INS. SOC.

SAME v. TRADERS' INS. CO. OF CHICAGO.

(Circuit Court, D. Indiana. December 2, 1890.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION.

Act Cong. March 3, 1887, requires a petition for removal to be filed before defendant is compelled to plead to the action under the state practice. *Held* that, under Rev. St. Ind. 1881, § 516, which enables the plaintiff to fix the day of defendant's appearance by indorsement thereof on the complaint in cases where the summons is returnable in term-time, but which nowhere prescribes a time for answering or pleading, defendant's application for a removal, made after the appearance day so fixed, is in time, provided it is made at or before the time when an answer or plea is required to be filed by a rule of the court, whether the rule be general or special.

2. SAME—RESIDENCE—FOREIGN CORPORATION.

The fact that, in compliance with Rev. St. Ind. 1881, § 3765, a foreign corporation doing business within the state has appointed a resident agent upon whom process may be served, does not constitute it a resident of the state; and, on being sued in a state court, it may assert its non-residence, and claim a removal to the federal court, under Act March 3, 1887, providing for removal by non-residents. Disapproving *Scott v. Cattle Co.*, 41 Fed. Rep. 225.

At Law.

Love & Morrison and *Hord & Adams*, for plaintiffs.

Duncan & Smith, for defendants.

WOODS, J. In each of these cases there is a motion to remand to the state court, and the grounds of the motion are the same in both cases. The record shows that the action in each case was commenced on the 22d day of May, 1890, in term-time of the Shelby circuit court, by the filing of a complaint upon which there was an indorsement fixing June 7, 1890, as the return-day of the writ of summons; that the summons was accordingly issued and served upon the proper local agent of the respective companies more than 10 days before the return-day; that on Thursday, June 6th, the court adjourned until Monday, June 9th; that on June 6th, during the temporary vacation of the court, the defendants filed their respective applications and bonds for the removal of the causes to this court, and on June 9th in open court "offered to file the same with the court, to which the plaintiffs objected, for the reason that the same was not filed in open court on or before the return-day of the summons." The same objection is urged here, counsel for the complainants insisting that upon a strict and proper construction of the statute the application for a removal must be made in court; that the filing with the clerk was ineffective; to which point they cite *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. Rep. 28; *Shedd v. Fuller*, 36 Fed. Rep. 609; and that the impossibility of presenting the application to the court on the return-day of the summons because of the temporary adjournment of the court, however unfortunate for the defendants, is a fact which, under the law, is not material or relevant to the question; that, under the state statute, the defendants were bound not only to appear upon the day named in

the summons, but also to plead or answer on that day, and that on any subsequent day a motion for removal of the causes to the federal court was too late. In support of this view counsel have cited *Kaitel v. Wylie*, 38 Fed. Rep. 865; *Wedekind v. Southern Pac. Co.*, 36 Fed. Rep. 279; *Dixon v. Telegraph Co.*, 38 Fed. Rep. 377; *Doyle v. Beaupre*, 39 Fed. Rep. 289.

In *McKeen v. Ives*, 35 Fed. Rep. 801, a closely similar question was considered, and the Indiana statutes bearing upon it (Rev. St. 1881, §§ 314, 400, 401, 516) were quoted from and construed. It is provided in section 516 that "when the complaint is filed, whether before or during any term of court, the plaintiff may fix the day during such term, by indorsement thereof upon the complaint at the time of filing the same, on which the defendant shall appear." But there is nothing explicit in this provision or elsewhere in respect to the time of answering or pleading in such cases. That is left to be governed by the rules or practice of the court. Doubtless, upon the return-day of the writ as indorsed on the complaint, if the summons has been duly served, the defendant failing to appear, judgment may be taken against him by default, but not for failing to plead or answer, unless a rule to answer has been entered against him, or unless there is a general rule of the court requiring the defendant in cases so commenced so plead or answer on that day. It is not claimed that the Shelby circuit court had a general rule on the subject. As was said in *McKeen v. Ives*:

"The right to make the motion [for removal] is not restricted by the act of March 3, 1887, to the time of appearance, or to the time when a default for want of appearance might be taken; but, by the terms of the act, the petition may be presented at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

The meaning of this expression does not turn upon the definition of the word "require," as was erroneously assumed in *Tan-Bark Co. v. Walder*, 37 Fed. Rep. 547, where it was quoted and disapproved; but upon the difference between a statute which, like that of Indiana, fixes the time for appearance to an action, and one which fixes the time for pleading or answering. Thus understood, the expression is in entire harmony with the decisions in *Wedekind v. Southern Pac. Co.*, *supra*, and other cases cited to the contrary. If, therefore, the Shelby circuit court had been in session on the 7th of June, and had entered no rule against the defendants to answer on that day, as perhaps it might have done, the motion as made the 9th would have been in time; in other words, under the Indiana statute, which, in respect to cases in which the summons is made returnable on a day in term-time, fixes a time for appearance, but does not prescribe a time for answering or pleading, the party may apply for a removal at or before the time when an answer or plea is required by a rule of the court to be filed, whether the rule be general or special. Upon this view, it is not necessary to consider the effect of the filing of the motion with the clerk during the temporary adjourn-

ment of the court, and the presentation of the petition to the court at the first opportunity in open session. See *Burck v. Taylor*, 39 Fed. Rep. 581; *Brown v. Murray Nelson & Co.*, 43 Fed. Rep. 614.

Another objection made to the jurisdiction of this court is that the parties on both sides of the cases are citizens of Indiana. The defendants, it is conceded, are corporations of other states, but they had filed from time to time with the auditor of state the statements and instruments required by section 3765 of the Indiana statutes, (Revision of 1881,) "authorizing their agents doing business in the state to acknowledge service of process for and on behalf of the companies, and consenting that service of process upon such agents should be taken and held to be as valid as if served upon the company according to the laws of the state;" and it is insisted that by so doing they became resident citizens of the state within the meaning of the removal act. This position is supported by the decisions in *Scott v. Cattle Co.*, 41 Fed. Rep. 225; *Zambrino v. Railway Co.*, 38 Fed. Rep. 449; but the weight of authority, and, as it seems to me, sound reason, are the other way. There is, I think, no well-considered exception to the rule that the residence and citizenship of a corporation must be in the jurisdiction of its creation. It may send its agents into other states to do business, and may consent to be sued there in the state courts by means of process served upon its agents; but even if so intended, it could not thereby effect a change of residence or citizenship. Without enlarging upon the question, reference is made to the authorities cited by counsel for the defendant, some of which show the general rule of corporate domicile or residence, and others cover the particular question: *Railway Co. v. Whitton*, 13 Wall. 289; *Morton v. Insurance Co.*, 105 Mass. 141; *Telegraph Co. v. Dickinson*, 40 Ind. 444; *Hobbs v. Insurance Co.*, 56 Me. 417; *Knorr v. Insurance Co.*, 25 Wis. 143; *Stevens v. Insurance Co.*, 41 N. Y. 149; *Merrick v. Van Santvoord*, 34 N. Y. 218; *Railroad Co. v. Wheeler*, 1 Black, 286; *Hatch v. Railroad Co.*, 6 Blatchf. 105; *Wilson v. Telegraph Co.*, 34 Fed. Rep. 561; *Cooley v. McArthur*, 35 Fed. Rep. 372; *County Court Taylor Co. v. Baltimore & O. R. Co.*, Id. 161; *Filli v. Railroad Co.*, 37 Fed. Rep. 65; *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1; *Bensinger, etc., Co. v. National, etc., Co.*, 42 Fed. Rep. 81; *Henning v. Telegraph Co.*, 43 Fed. Rep. 97; *Purcell v. Land Co.*, 42 Fed. Rep. 465; *Fales v. Railway Co.*, 32 Fed. Rep. 675; *Rece v. Newport News, etc., Co.*, (W. Va.) 9 S. E. Rep. 212. See, also, *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. Rep. 1004.

Under the acts of congress of March 3, 1887, and August 13, 1888, a corporation, it may be, can be sued in a federal court only in the state where it was created; but when, under statutes of the state like the one referred to, it is sued elsewhere in local tribunals, by means of process served upon an agent, it may assert its non-residence, and, if the facts in other respects justify it, may claim a removal to the federal court.

Motions overruled.

BRODHEAD v. SHOEMAKER *et al.*

(Circuit Court, N. D. Georgia. December 26, 1890.)

1. REMOVAL OF CAUSES—PROBATE PROCEEDING.

Under Code Ga. §§ 2424, 2427, which provide for the probating of a will in solemn form by a proceeding *inter partes* which is conclusive as against those contesting the will, such a proceeding is a suit within the meaning of the removal statutes.

2. SAME—LOCAL PREJUDICE—TIME OF APPLICATION.

Under Act Cong. Aug. 13, 1888, (25 St. at Large, 433,) which provides that removals on the ground of prejudice or local influence may be had "at any time before the trial," the removal is not too late if the case, though it has been once decided, is yet to be tried *de novo* in the appellate tribunal before a jury.

3. SAME—APPLICATION—TRAVERSE.

A petition for removal on the ground of local prejudice, when in proper form and duly verified, cannot be traversed or contradicted by the adverse party. Following *Cooper v. Railroad Co.*, 42 Fed. Rep. 697.

In Equity. On motion to remand.

The Georgia Code provides:

"Sec. 331. Courts of ordinary have authority to exercise original, exclusive, and general jurisdiction of the following subjects-matter: (1) Probate of wills; (2) the granting of letters testamentary, of administration, and the repeal or revocation of the same." "Sec. 2421. The court of ordinary has exclusive jurisdiction over the probate of wills. The residence of testator at his death gives jurisdiction to the ordinary of that county." "Sec. 2423. Probate of a will may be either in common or solemn form. In the former case, upon the testimony of a single subscribing witness, and without notice to any one, the will may be proven and admitted to record. But such probate and record is not conclusive upon any one interested in the estate adversely to the will, and, if afterwards set aside, does not protect the executor in any of his acts further than the payment of the debts of the estate. Purchasers under sales from him legally made will be protected, if *bona fide* and without notice. Sec. 2424. Probate by the witnesses, or in solemn form, is where, after due notice to all the heirs at law, the will is proven by all the witnesses in existence and within the jurisdiction of the court, or by proof of their signatures and that of the testator, the witnesses being dead, and ordered to record. Such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executor." "Sec. 2427. Notice of a motion for probate in solemn form must be personal if the party resides in the state, and at least ten days before the term of the court when the probate is to be made. If the residence be without the state, or unknown, then the court shall pass such order as to publication as will tend most effectually to give notice. The records of the court shall show the persons notified, and the character of the notice given." "Sec. 3611. An appeal lies to the superior court from any decision made by the court of ordinary, except an order appointing a temporary administrator." "Sec. 3627. An appeal to the superior court is a *de novo* investigation. It brings up the whole record from the court below, and all competent evidence is admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case. Sec. 3628. An appeal suspends but does not vacate judgment, and if dismissed or withdrawn, the rights of all the parties are the same as if no appeal had been entered. Sec. 3629. No person shall be allowed to withdraw an appeal after it shall be en-

tered, but by the consent of the adverse parties. Sec. 3630. "All appeals to the superior court shall be tried by a special jury at the first term after the appeal has been entered, unless good cause be shown for continuance."

On the 21st of February, 1889, Robert S. Brodhead filed a petition in the office of the ordinary of Floyd county, Ga., showing that his wife, Susan A. Brodhead, lately domiciled in and a resident of said county, departed this life on the 17th day of February, 1889, after having heretofore, to-wit, on the 22d day of October, 1887, made, executed, and published her last will and testament, wherein petitioner is nominated and made sole executor; and petitioner, said executor, produces said last will and testament, and prays that the same may be probated and admitted to record as provided by the statute, etc. Thereafter, on the 4th day of March, 1889, after due proceedings had, said last will and testament of Susan A. Brodhead was admitted to probate in common form under the statute hereinbefore cited, and letters testamentary were ordered to be issued to the said Robert S. Brodhead, as sole executor nominated in said will. Thereafter, on the 19th day of March, 1889, the said Robert S. Brodhead filed with said ordinary a petition setting forth the death of said Susan A. Brodhead; her last will and testament; the fact that she left no children; that petitioner is her sole heir at law, and entitled to all her real and personal estate; that she left no heirs at law in the state of Georgia other than petitioner, but did leave three heirs at law by the laws of the state of Pennsylvania, to-wit, petitioner, and Jane H. Shoemaker, and Elijah McB. Shoemaker, the two latter of the state of Pennsylvania, in which last-named state deceased is alleged to have left certain property in the nature of annuities, alleged to be personal property. Petitioner alleged that the said last will and testament had already been probated in common form, and, producing the will, prayed that it might be proven in solemn form according to the statute hereinbefore cited. To that end he prayed that the heirs at law of said deceased, to-wit, Mrs. Jane H. Shoemaker and Elijah McB. Shoemaker, be cited to appear in the said court of ordinary on the first Monday of the month of May following, to show cause, if any exists, why said will should not be proven in solemn form, and admitted to record as the last will and testament of said deceased. Thereupon an order was made that the said Jane H. Shoemaker and Elijah McB. Shoemaker, residents of Wilkesbarre, Pa., should appear before the court of ordinary at Floyd county on the first Monday of May following, then and there to show cause, etc.; and it was further ordered that the said heirs at law be served personally with a copy of the petition and order, at their residence, or by service on their attorney at law, and also by publication. Thereupon Jane H. Shoemaker and Elijah McB. Shoemaker appeared in the said court of ordinary, and filed a demurrer to the said petition; and after said demurrer was overruled they appeared as caveators, and in their said caveat, denied the jurisdiction of the court of ordinary of the county of Floyd, on the ground that the only residence of the deceased in the state of Georgia was the county of Fulton, wherein she left personal property,

and afterwards, without waiving the said *caveat* filed on the jurisdictional ground, did further caveat the application to prove in solemn form, and for grounds, alleged:

"(1) That on October 22, 1887, the date when said paper purporting to be a will was executed, the said Susan A. Brodhead was not entitled to make a will, because laboring under disability of the law which arises from want of capacity, in this: That she had not the capacity necessary to enable her to have a decided and rational desire as to the disposition of her property. (2) That on October 22, 1887, the said Susan A. Brodhead was not entitled to make a will because laboring under disability of the law arising from a want of perfect liberty of action, in this: That the propounder, Robert S. Brodhead, who was her husband, exercised undue influence upon her by cruel treatment and practicing upon her fears, thus substituting his own will for the wishes of said Susan A. Brodhead; that this cruel treatment consisted of blows inflicted upon her, and * * * profane language, and harsh manner, by which the will of a weak and diseased woman was absolutely controlled. (3) That on the date when said paper purporting to be the will was executed, the said Susan A. Brodhead was not entitled to make a will because laboring under disability of the law arising from want of perfect liberty of action, in this: That her said husband, the propounder, to whom nearly her entire estate, consisting of personalty and lands of very great value, was bequeathed and devised, held her in duration of imprisonment, and by imprisonment, and the threat of imprisonment, compelled her to execute the paper aforesaid, whereby his wishes were substituted for the will of the said Susan A. Brodhead. (4) That on the date when said paper purporting to be the will was executed, said Susan A. Brodhead was not entitled to make a will, because laboring under disability arising from want of capacity and the want of perfect liberty of action, in this: The said Susan A. Brodhead had no children; that she had been for years before the date aforesaid addicted to the intemperate use of liquor and opiates to such an extent as to have impaired her mind, and to render her an imbecile, and the prey of any designing person; that so imbecile had she become that she would yield to any directions that were imposed upon her by any person who would supply her with liquor or opiates; that her will power had been totally destroyed, and she was constantly subject to the fears and apprehensions which characterize that diseased condition; and these were emphasized by the cruel and harsh treatment of her said husband, the propounder herein; that the propounder had an easy subject upon which to operate, and, to secure the execution of the paper aforesaid, used fraudulent practices upon testatrix's fears, and through diseased craving for stimulants and opiates."

Wherefore caveators say that—

"The paper purporting to be the will of said Susan A. Brodhead is not her will, and should not be admitted to probate and record."

Thereupon, on the 6th day of May, 1889, following, the said court of ordinary entered the following:

"Upon the hearing and petition of Robert S. Brodhead, upon the probate of solemn form of the paper pronounced by him as the last will and testament of Susan A. Brodhead, late of said county, deceased, and for its admission to record as such, and it appearing that the parties in interest are heirs, to-wit, Mrs. Jane H. Shoemaker, mother of the testatrix, and Elijah McB. Shoemaker, brother of the testatrix, both of the city of Wilkesbarre, Pa., have had legal notice of said application, and the time of hearing, and have failed to show any legal and sufficient cause why said paper should not be proven and admitted to record as the last will and testament of said deceased, it is therefore

ordered and adjudged by the court, upon the proof of said last will by all the witnesses to said will, that the same be set up as the last will and testament of the said Susan A. Brodhead, deceased, and that the same be admitted to record as such. It is further ordered and adjudged that letters testamentary issue to the said Robert S. Brodhead, the executor named in said will, upon his taking the oath required by law."

From the aforesaid judgment and decree of the court of ordinary in the case the said Jane H. Shoemaker and Elijah McB. Shoemaker, under the statute hereinbefore cited, appealed the said cause to the superior court of Floyd county, which appeal was allowed, and the proper record filed in the clerk's office of said superior court of Floyd county, August 2, 1888. On October 17, 1889, the following order was entered in the superior court of Floyd county:

"Robert S. Brodhead, Executor and Propounder of the Last Will and Testament of Susan A. Brodhead, vs. Jane H. Shoemaker and Elijah McB. Shoemaker.

"Appeal from the court of ordinary. Probate of will in Floyd county, Georgia. Ordinary No. 30 and 31. Floyd superior court, September term, 1887.

"By the consent of counsel for the parties it is ordered that the above case now on the board for the 21st inst. be advanced, and reset for trial on the third Monday of November next."

On the 15th day of November following, Jane H. Shoemaker and Elijah McB. Shoemaker filed a petition in the circuit court of the United States for the northern district of Georgia, setting forth the aforesaid litigation; the residence of Robert S. Brodhead in the state of Georgia; their own residence in the state of Pennsylvania; alleging that from prejudice and local influence petitioners will not be able to obtain justice in said state court, or in any other state court to which the said defendants may, under the laws of the state of Georgia, have the right, on account of such prejudice or local influence, to remove said cause; that the value in dispute largely exceeded the sum of \$2,000; and praying that the said suit might be removed to the circuit court of the United States for said northern district of Georgia. Together with said petition, several affidavits and exhibits were filed. Thereupon, on said petition, the said circuit court certifying that it being made to appear that, from prejudice and local influence, the said defendants will not be able to obtain justice in the said superior court of Floyd county, Ga., or in any other state court to which said defendants might, under the laws of the said state, have the right, on account of prejudice and local influence, to remove said cause, it was ordered that said cause be removed; and said cause is hereby removed from said superior court of Floyd county to the circuit court of the United States for the northern district of Georgia. The record being filed in this court, Robert S. Brodhead appeared, and moved to remand the case to the superior court of Floyd county on the following grounds:

"(1) Because the removal was had on the *ex parte* petition of caveators, without notice to the propounder or his counsel. (2) Because the court of ordinary of Floyd county, Ga., is a court of record, having general, original, and exclusive jurisdiction of the probate of wills, and the petition to remove said cause should have been filed in that court prior to the trial therein; and

after the decision of that court on a regular hearing thereof, and the appeal from the judgment there rendered, the petition filed in Floyd superior court came too late. (3) Because this court has no jurisdiction of this case, or of the probate of wills, either original or otherwise, and can acquire none under the removal act of 1887. (4) Because the petition and affidavit for removal are uncertain and insufficient in law, and present no allegations sufficiently certain to authorize, or require issue to be joined therein. (5) Because the petition for the removal, and the affidavit of Jane H. Shoemaker, upon which said petition is based, are not true; mover in motion traversing the various allegations of said petition and affidavit."

*J. Branham, A. R. Brandtge, and Thos. L. Bishop, for plaintiff.
Harry Jackson, Tom Cobb Jackson, Geo. R. Bedford, and Wright, Mayerhard & Wright, for defendants.*

Before PARDEE and NEWMAN, JJ.

PARDEE, J., (after stating the facts as above.) Under section 2423 of the Code of Georgia, a proceeding to probate a will in common form is a probate proceeding pure and simple, the probate and record not being conclusive upon any one interested in the estate adversely to the will, and, if afterwards set aside, not protecting the executor in any of his acts further than the payment of the debts of the estate. Under the same section, and sections 2424 and 2427 of the same Code, a proceeding to probate a will in solemn form is a proceeding *inter partes* to establish the will conclusively and as a muniment of title; and when, in such a proceeding, the heirs at law are brought in, and they contest the validity of the will and the capacity of the testator, an issue or controversy is formed or made which can be classified as a suit at law. The pleadings in the state courts in this case show such controversy between the parties. From them it clearly appears that the plaintiff, or propounder, a citizen of Georgia, is seeking to establish in his favor, and conclusively against the defendants or caveators, citizens of Pennsylvania and heirs at law of Mrs. Brodhead, the validity of Mrs. Brodhead's will; the said defendants denying the capacity of Mrs. Brodhead to make a valid will, and specially denying the validity of the will propounded. The pleadings further show that, dependent upon the controversy thus existing in the case, depends the ownership and title to property, not only in the state of Georgia, but in the state of Pennsylvania. From the statutes cited, and the record of the case as made up to the time of removal, it appears perfectly clear that the proceeding pending in the superior court of Floyd county, Ga., taken in connection with the removal statutes of the United States, was a suit in which there was a controversy removable by the defendants to the circuit court of the United States for the northern district of Georgia, upon compliance with the conditions prescribed in said removal statutes; and this, within the rule laid down by the supreme court in *Guines v. Fuentes*, 92 U. S. 10; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327. See, also, *Boom Co. v. Patterson*, 98 U. S. 403; *Hess v. Reynolds*, 113 U. S. 75, 5 Sup. Ct. Rep. 377; *Payne v. Hook*, 7 Wall. 425; Justice BRADLEY's dissenting opinion in *Rosenbaum v. Bauer*, 120 U. S. 461, 7 Sup. Ct. Rep. 633.

Objection is made, however, that, if the case was removable, the application therefor, coming after appeal from the court of ordinary to the superior court of Floyd county, came too late. Code Ga. §§ 331, 2421, 3479, 3611, 3627, 3628, 3630, show that, while the proceeding to probate a will in solemn form must be instituted in the court of ordinary of the county in which the testator had his residence at his death, which court of ordinary, under the statute, has original and exclusive jurisdiction in the matter of probating wills, yet the trial and decision of the ordinary is not final and conclusive upon the facts involved, as either party may appeal the matter to the superior court of the county, carrying up the whole case for a trial *de novo* upon new and additional evidence, and, if desirable or necessary, upon amended pleadings, and where, for the first time in the proceedings, the issues involved can be submitted to a trial by jury. Section 2 of the act of 1887, re-enacted August 13, 1888, (25 St. at Large, 433,) provides that "removals of cases pending in the state courts to the circuit courts of the United States, on the ground of prejudice or local influence, may be had at any time before the trial thereof." The third clause of section 639 of the Revised Statutes, which was the law controlling removals in cases of prejudice or local influence prior to the act of 1887, provided that the removal should be on a "petition filed at any time before the trial or final hearing in the suit." Under this statute, there is a line of decisions holding that, no matter how many previous trials might have been had in the case, the removal might be had at any time before the final and effective trial. See *Insurance Co. v. Dunn*, 19 Wall. 214; *Vannevar v. Bryant*, 21 Wall. 41; *Railroad Co. v. Bates*, 119 U. S. 464, 7 Sup. Ct. Rep. 285. In the case of *Fisk v. Henarie*, 32 Fed. Rep. 417, which was a case removed under the act of 1887 on the ground of prejudice or local influence, after a number of trials had been had in the case, and after there had been one appeal to the supreme court of the state, resulting in a new trial being ordered, Judge DEADY, after considering the whole question in a very able and elaborate opinion, holds that, "the phrase 'before the trial,' as used in the act of 1887, fairly construed, means the same as the phrase in the third clause of section 639, Rev. St., 'before the trial or final hearing of the suit.'" He says:

"In the nature of things the trial of the case is not any one, but the final one,—the one that stands as the thing accomplished in the case. Where a jury is discharged without a verdict the proceeding is properly known as a 'mistrial;' and where a verdict is set aside because it ought not to stand the result is the same,—the proceeding has miscarried, and the consequence is not a trial, but a mistrial; and in the case of removal from local prejudice or influence, there is a good reason for giving the non-resident party the right to make the application after a mistrial, for, as was said by Mr. Justice MILLER in *Hess v. Reynolds*, 113 U. S. 75, 5 Sup. Ct. Rep. 377, 'the hostile local influence may not become known or developed at an earlier stage of the proceedings.'"

We agree with the opinion of Judge DEADY, and merely add to the reasoning part of what was said by the chief justice in *Yulee v. Vose*, 99 U. S. 545, when considering the removal under the act of 1866, and

which seems to be perfectly applicable to removals for prejudice and local influence under the act of 1887:

"In view of the fact that sometimes, in the progress of a cause, circumstances developed themselves which made such a transfer desirable, when at first it did not appear to be so, the right of removal in this class of cases was kept open until the trial or final hearing, instead of being closed after an entry of appearance, as was the rule under the act of 1789. We think this gives such a party the right of removal at any time before trial, when the necessary citizenship of his co-defendants is found to exist, and a separation of his interest in the controversy can be made. There is nothing in the act to manifest a contrary intention, and this construction does no more than give the party to whom this new privilege is granted an opportunity to avail himself of any circumstances that may appear in his favor previous to the time when he is called upon finally to act."

But the objection is specifically made in the present case that, although a cause may be removed for prejudice or local influence after a mistrial in the state court, it cannot be removed after there has been a trial in one state court, and an appeal taken therefrom to another. The jurisdictional act of 1887 says:

"Where a suit is now pending or may be hereafter brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, the defendant, being such citizen of another state, may remove said suit into the circuit court of the United States for the proper district, at any time before the trial thereof," etc.

This statute plainly reads that a suit pending for trial in the state court may be removed, if a proper case, before the trial. If it be true, as claimed, that the act of 1837 was passed for the purpose of restricting and limiting the jurisdiction of the United States courts, and therefore to be strictly construed, it does not follow that the courts should insist upon additional conditions relative to the right of removal. If the suit is pending in the state court, and the trial is yet to be had, and the right of removal from prejudice and local influence is not affected by any number of preliminary trials, not conclusive on parties, previously had in that court, why should the right of removal be affected by any number of preliminary and inconclusive trials in any other state court from which the suit has been removed by the operation of the laws of the state? In *Boom Co. v. Patterson*, *supra*, a case removed under the act of 1875, where the petition for removal was required to be filed in the state court "before or at the time at which said cause can be first tried, and before the trial thereof," the trial before commissioners (the appeal from whose decision constituted the pending suit) was held to be preliminary, and in the nature of an inquest; stress being laid on the fact that, under the laws of the state, on the appeal there was to be a trial by jury. In *Hess v. Reynolds*, *supra*, a case removed under section 639, Rev. St., on account of prejudice and local influence, and where the pending suit was an appeal from the decision of commissioners appointed by the probate court, Mr. Justice MILLER, for the court, says:

"It is said, however, that the trial spoken of had taken place before the commissioners of Ionia county, to whom the case had been referred. But we do not look at that proceeding as a trial within the meaning of the statute. It

was merely a report, subject to be affirmed or rejected by the probate judge, and, by the express terms of the statute, subject to a right of appeal to a court in which a trial by jury could be had. The latter was the trial or final hearing of the suit which would conclude the right of removal, and, until such trial commenced, the right of removal under this provision remained."

Here, again, stress was laid upon the fact that the original proceeding was by the statute subject to a right of appeal to a court in which a trial by jury could be had. In *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. Rep. 1113, where one of the pending suits in the state courts held to be removable under the act of 1875 was an appeal from a trial before a mayor and jury, the case was held to be controlled by *Boom Co. v. Patterson*, *supra*, and that the said trial by the mayor and jury did not affect the right of removal. In the cases of *Railway Co. v. Jones*, 29 Fed. Rep. 193, and *Mineral Range R. Co. v. Detroit & Lake Superior Copper Co.*, 25 Fed. Rep. 515, cited with approval in the case of *Searl v. School-Dist.*, 124 U. S. 197, 8 Sup. Ct. Rep. 460, which was a similar case, it was held that proceedings for expropriation instituted before commissioners under special or general statutes of a state, for assessment of damages, were controversies removable under the federal statute to a proper circuit court of the United States; and that the removal could be properly made in the case pending before such commissioners, and before any appeal to another court. In *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 473, 10 Sup. Ct. Rep. 399, which was a case commenced, under the Indiana statute, against Delaware county, before the board of county commissioners, and after trial before said commissioners was appealed to the circuit court of the county, and thereafter removed by reason of prejudice and local influence to the circuit court of the United States, the case was held removable; the court using this language:

"It follows, according to the decisions of this court in analogous cases, that the trial in the circuit court of the county was 'the trial' of the case at any time before which it might be removed to the circuit court of the United States under clause 3, § 639, Rev. St.," citing *Boom Co. v. Patterson*; *Hess v. Reynolds*, *supra*; *Railway Co. v. Kansas City*, 115 U. S. 1, 5 Sup. Ct. Rep. 1113; and *Searl v. School-Dist.*, *supra*.

From these adjudged cases, it seems clear that, while a proper controversy may be removed under the statutes of the United States as soon as properly made before any state tribunal, yet, where the time of removal under the statute is before the trial thereof, the removal is not too late if the case is yet to be tried upon its merits before a state tribunal of either original or appellate jurisdiction; and, particularly, if such trial is to be a jury trial; and in this connection we may notice that Const. U. S., Amend. 7, provides "that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," from which we think it a fair inference that the trial mentioned in the removal act refers to and was intended to mean the trial by jury secured by the constitution, and that while the defendant still has the right to challenge the array of jurors, it cannot be too late to remove the cause for prejudice and local influence. In the present case the whole case was carried to the superior court of Floyd county,

in which court there was to be a trial *de novo* with the right to present additional evidence and to amend the pleadings; and, for the first time in the progress of the cause, a trial by jury was to be had.

It is further objected, however, to the right of removal in this case, that the order of removal was obtained from the circuit court without notice to the parties, and upon affidavits which, it is alleged, are not true. In the case of *Cooper v. Railroad Co.*, 42 Fed. Rep. 697, this court held that—

"Since Act Cong. March 3, 1887, which provides for the removal of causes on the ground of local prejudice, does not prescribe any mode of procedure, a petition for removal, accompanied by an affidavit by a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, is sufficient to justify an order of removal; and where such an affidavit is presented the court will not permit the adverse party to traverse it, and will not hear evidence on the subject."

Since that decision it has been the rule of this court. On the whole case presented on this motion to remand we are of opinion, for the reasons aforesaid, that the cause was properly removed from the state court to this court. The motion to remand is denied.

NEWMAN, J., concurs.

CENTRAL TRUST CO. v. SHEFFIELD & B. COAL, IRON & RAILWAY CO.,
(ANNISTON LOAN & TRUST CO., Intervenor.)

(Circuit Court, N. D. Alabama, N. D. December 23, 1890.)

1. RAILROAD COMPANIES—RECEIVER'S CERTIFICATES—ESTOPPEL.

Where, by consent of all parties, the receiver of a railroad company, though not engaged in operating the road, is authorized by order of court to issue certificates which shall constitute a lien on the company's property superior to certain prior mortgages, and the money obtained on such certificates is used in preserving and improving the property, the purchasers of the property at a subsequent sale to foreclose said mortgages are estopped from denying the validity of the certificates.

2. EQUITY—INTERVENTION—PLEADINGS—ADMISSION.

Where, on the *ex parte* application of the receiver, said order is modified so as to declare some of said certificates invalid, with the privilege to the holders of such certificates to intervene in the suit and have their validity adjudicated, a petition in intervention by such certificate holders, which recites the entry of the modified order, does not thereby admit the invalidity of the certificates.

3. SAME—PREMATURE SUIT.

The fact that the principal of such certificates is not due does not make the intervention premature, if the interest thereon is then due and unpaid.

4. SAME—PARTIES.

The receiver who issued the certificates, and who has in his hand the funds from which they should be paid if valid, is a necessary party defendant to such intervention.

5. SAME.

The complainant in the original suit is not a proper party defendant to such intervention, where it appears that he no longer has any interest in the fund in controversy, and no relief is asked as against him.

In Equity. On demurrer to intervention.

In this cause the Anniston Loan & Trust Company files an intervention, setting forth as follows:

"(1) Your petitioner, the Anniston Loan and Trust Company, a body corporate under the laws of the state of Alabama, respectfully represents unto your honors that on, to-wit, the 11th day of July, A. D. 1889, a decree was rendered by your honors authorizing and empowering Jacob G. Chamberlain, receiver of the Sheffield and Birmingham Coal, Iron, and Railway Company, to issue receiver's certificates or debentures in a sum not exceeding one hundred and fifty thousand dollars, bearing a rate of interest not exceeding 7 per cent. per annum, and constituting such certificates, when issued, a first lien on all the property, rights, appurtenances, and franchises of the said Sheffield and Birmingham Coal, Iron and Railway Company, as set forth and described in two mortgages or deeds of trust, the first executed on the 2d day of January, 1888, and the second mortgage executed on the 1st day of June, A. D. 1888, together with all other properties, rights, and franchises of the said Sheffield and Birmingham Coal, Iron, and Railway Company, of every nature and description, wheresoever situated, and also a lien upon whatever residue of the earnings, incomes, and profits of said property that there may be, which have accrued since the appointment of the receiver, and after deducting operating expenses, and the cost of needed repairs, and the expenses of the receivership; said decree and said certificates further providing that said lien should be prior to all other liens of any kind whatsoever against said property. The said second mortgage executed June 1, 1888, as aforesaid, although formally a lien upon a railroad known as the 'Sheffield and Birmingham Railroad,' was not a lien on said railroad when said certificates were issued, copies of which said mortgages are attached as Exhibits A and B to the original bill of complaint in the above-entitled cause, to all of which reference is hereby made, and all of which more fully and at length appear in and by said decree of this court in said cause, and to which reference is hereby made, and the same made a part hereof, as though they were herein particularly set out at length. Said receiver's certificates will be produced by the complainant on the trial of said cause.

"(2) That said Jacob G. Chamberlain, receiver as aforesaid, acting under and by virtue of the authority vested in him by said decree, engaged one Charles D. Woodson, president of the First National Bank of Sheffield, Ala., as his agent to negotiate the sale of eight of said certificates, to-wit, Nos. 1, 2, 3, 8, 9, 10, 11, and 12, respectively, of the par value each of five thousand dollars, bearing 6 per cent. interest, payable at the National Park Bank, New York city, three years after date, the said certificates 1, 2, and 3 being dated September 19, 1889, and the said certificates Nos. 8, 9, 10, 11, and 12 being dated, to-wit, the 10th day of October, 1889, with interest payable semi-annually, and said certificates 8, 9, 10, 11, and 12 were duly placed in the hands of said Charles D. Woodson to be negotiated and sold by him, with full power and authority to act for and represent the said Jacob G. Chamberlain in the matter of the sale of said certificates. That under and by virtue of said authority, and while the said certificates were in his possession and control, on, to-wit, the 10th day of October, 1889, the said Charles D. Woodson sold the same to one Duncan T. Parker, who is now dead, at and for the sum of, to-wit, five thousand dollars for each certificate, and the said Parker thereupon paid the said Woodson the said price of the said certificates, and thereupon they were turned over and transferred to him by said Woodson.

"(3) That afterwards, on, to-wit, the second day of November, 1889, the said Duncan T. Parker sold, transferred, and delivered said certificates Nos. 8, 9, 10, 11, and 12, for a valuable consideration, to-wit, for the sum of five

thousand dollars (\$5,000.00) each, to your petitioner, and the said certificates are now owned and held by petitioner.

"(4) That it is the duty of the said Jacob G. Chamberlain, receiver, to pay the semi-annual interest and the principal of said certificates out of any funds or property in his hands as such receiver; that the semi-annual interest on said certificates 8, 9, 10, 11, and 12, amounting in the aggregate to, to-wit, seven hundred and fifty dollars, (\$750.00,) due on, to-wit, the 10th day of April, A. D. 1890, at the National Park Bank of New York city, were on that day presented at said bank for payment of the interest thereon, but such payment was refused; and petitioner since then has frequently called upon and requested the said receiver to pay the interest on said certificates, but he has wholly failed and refused to do so, though the funds in his hands are amply sufficient for the payment thereof.

"(5) That on the — day of —, 1889, the said Jacob G. Chamberlain duly reported the sale of said receiver's certificates 8, 9, 10, 11, and 12, of five thousand dollars (\$5,000.00) each, by C. D. Woodson, and at the same time reported the sale of certificates Nos. 1, 2, and 3, also of five thousand dollars (\$5,000.00) each, to the United States circuit court of the northern division of the northern district of Alabama, and that the proceeds of said sale had been placed by said Woodson to the credit of said receiver at the First National Bank at Sheffield, Ala., less 6 per cent. commission for selling.

"(6) That on, to-wit, the 3d day of December, 1889, A. D., a decree was rendered in said court, foreclosing the mortgage above referred to, and ordering the sale of the property embraced therein, and expressly ordering that the purchaser at said sale should be required to pay the receiver's certificates embraced in schedule 'B' attached to the said decree, among which are the said certificates Nos. 8, 9, 10, 11, and 12, owned and held by the petitioner, all of which more fully appears in and by said decree, to which reference is hereby made, and the same made a part hereof, as though herein set out at length. It was further ordered by said decree that the purchaser of said property should pay said certificates, in addition to the amount bid at said sale for said property.

"(7) That, on January 4th, said court made an order purporting to modify the former decree of December 3, 1889, so far as to authorize the purchaser at said sale to contest the validity of said certificates Nos. 8, 9, 10, 11, and 12, sold by said C. D. Woodson as agent for said receiver for said D. T. Parker, as aforesaid, and purchased from said Parker by petitioner; that said decree of January 4, 1890, was made after said D. T. Parker had purchased the said certificates from said C. D. Woodson, the duly-authorized agent of the receiver for the sale thereof, in good faith, and for a valuable consideration, and sold them to petitioner, in good faith, for a like good and valuable consideration, and after said receiver had reported said sale to said court, and reported that the money paid for the purchase of said certificates was on deposit to his credit in the First National Bank of Sheffield, Ala., and without any notice to said D. T. Parker, or petitioner, the owner of said certificates; that on the 21st day of April, 1890, said property was sold under said decree of foreclosure, and a part of the same was purchased by Napoleon Hill, trustee, for certain parties, for three hundred and fifty thousand dollars, (\$350,000.00,) and a certain other part of said property was sold to James C. Neely, trustee, for other parties, for one hundred and fifteen thousand dollars, (\$15,000.00,) which said sale was duly reported to said court, and confirmed on May 10, 1890, subject to all liens created upon said property by the receiver, under the order of the said court, and required by the previous or subsequent orders of said court to be paid by said purchaser, all of which more fully appears from the report of sale made by the special master, D. D. Shelby, in

said case, and the decree entered in said cause by said court, and on file in said court, to which reference is here made, and the same made a part hereof, as though it was herein particularly set out at length.

"(8) That the bondholders under said mortgage are very numerous, and unknown to your petitioner, and it is not practicable to make them parties to this intervention."

The relief prayed for is a decree requiring the accumulated interest and principal due on said receiver's certificates to be paid out of any funds or property in the hands of, or under the control of, the receiver; and that the amount due upon said receiver's certificates be declared a lien upon the property mentioned in the decree of foreclosure; and for sale of the same, and for general relief.

The defendants unite in a demurrer to the said bill of intervention, and assign as grounds:

"*First.* That it appeareth by the petition and intervention that said Anniston Loan & Trust Company is not entitled to the relief prayed for against those defendants, or either of them. *Second.* That it appears from said petition and intervention that there is a misjoinder of the parties, and that neither said Central Trust Company of New York, nor said J. G. Chamberlain, receiver, is in anywise interested in said litigation, or properly a party thereto. *Third.* It appears by said petition and intervention that said receiver's certificates therein referred to, three of them for \$5,000 each, dated September 19, 1889, and three of them for \$5,000.00 each, being dated 10th October, 1889, are not due until three years after the dates thereof, respectively, and that petitioner, claiming to own and hold five of said receiver's certificates, for five thousand dollars each, dated 10th of October, 1889, has no right to sue for or recover the principal, or any part thereof, of said certificates, the same not having become due. *Fourth.* Because it appears that petitioner has no right whatever to any suit or action upon said five receiver's certificates, numbered respectively 8, 9, 10, 11, and 12, dated 10th of October, 1889, except for past-due interest thereon. *Fifth.* Because it appears from said petition and intervention of the Anniston Loan & Trust Company, and by proceedings and records in the cause of the *Central Trust Company of New York vs. Sheffield & Birmingham Coal, Iron & Railway Co.*, to which reference is made as if the same were particularly set out at length in said petition and intervention, that said receiver's certificates were issued only upon the property, including the furnaces, coal lands, coal mines, and coke ovens, and that said certificates were not issued upon or made a lien on any line of railway; and that therefore said certificates were issued illegally, and without authority in law or equity, and are in no sense a lien upon the properties referred to in said petition and intervention, prior in right or superior to said two mortgages referred to in said petition and intervention. *Sixth.* That it appears from said records and proceedings in said cause of the *Central Trust Company of New York vs. Sheffield & Birmingham Coal, Iron & Railway Company and another*, which are particularly referred to in said petition and intervention, that, at the time of the order, to-wit, on the 11th day of July, 1889, authorizing said J. G. Chamberlain, as receiver, to issue said receiver's certificates, said receiver did not have under his custody or control any line or lines of railway that he was operating or managing; and that said certificates were not issued in an action then pending for the foreclosure of a railway mortgage or mortgages; and that said certificates were so illegally and improvidently issued, and constitute no lien upon said properties referred to in said petition and intervention of the Anniston Loan & Trust Company. *Seventh.*

That it appears that there is no copy or copies of said five receiver's certificates attached to the petition and intervention of said Anniston Loan & Trust Company, nor is there any offer to produce the originals of said certificates at the hearing. *Eighth.* That it appears by said petition and intervention, and the records and proceedings in this honorable court, therein referred to and made a part of said petition and intervention, that the order and decree of this court of 4th January, 1890, modifying the decree of foreclosure and sale of 3d December, 1889, together with the petitions, allegations, and proof upon which said order and decree of 4th January, 1890, was made, are true and undisputed; and, under these facts, the Anniston Loan & Trust Company are not entitled in law or in equity to set up said five receiver's certificates, or to recover anything from any person or corporation upon the same, or enforce any lien therefor."

John B. Knox, for intervenor.

Henry B. Tompkins, for defendants.

PARDEE, J., (*after stating the facts as above.*) 1. The Central Trust Company of New York is the party plaintiff in the suit in which the intervention is filed, and had a direct interest when the receiver's certificates were issued. The record shows that, by proceedings subsequent to the decree, the said trust company has no longer any interest in the validity of the receiver's certificates forming the subject of this intervention. No relief is asked against or affecting said trust company. It may be dismissed without prejudicing the rights or remedies of the other parties. Jacob G. Chamberlain, the receiver, is alleged to have issued said certificates, and is charged with having in his hands funds sufficient and applicable to pay the same, and direct relief is prayed against him.

2. If it be true that the principal of the said receiver's certificates, which form the basis of this intervention, is not yet due, still the interest thereon is due, and the intervention can be maintained therefor.

3. The demurrer appears to present a proposition that, as the receiver was not in possession of, nor operating, any line of railway, and as the suit pending was not for the foreclosure of any railway mortgage, there was no authority in the court to authorize the issuance of, nor in the receiver to issue, receiver's certificates which should constitute a lien on the property in the possession of the court; and, particularly, a lien prior in right to the two mortgages which were the subject of the foreclosure suit. Counsel have submitted no argument on this proposition, nor cited any authority. It seems to me that if the proposition is sound, which is not granted by any means, the real defendants in this intervention, the purchasers at the foreclosure sale, are estopped from setting it up. Receiver's certificates were issued by consent of the parties; by the same consent they were made a prior lien on the property in the possession of the court; moneys obtained thereon were used for the preservation and improvement of the property; and the property was sold and purchased with the clear understanding and agreement that the valid outstanding receiver's certificates constituted a prior lien which the purchasers assumed and undertook to pay.

4. It is contended that, as it is a well-settled principle that a pleading is to be taken and construed against the pleader, and that, as in this intervention, the intervenor refers to the records of the court in the case in which he intervenes, and, particularly, to a certain decree modifying the main decree in the case, that thereby he admits the facts alleged upon which the modifying decree was based. This is the only ground of demurrer upon which counsel have submitted any argument. An examination of the record shows that the decree was modified upon the *ex parte* application of Chamberlain, the receiver, setting forth that the five certificates, which are the basis of this intervention, had been disposed of by one Charles D. Woodson, without his authority, and that the proceeds had not come to his hands; and thereupon the decree was modified in regard to the terms of sale, as follows:

"That there be stricken from the said decree these words: 'And expressly subject to the receiver's certificates heretofore authorized to be issued by said Jacob G. Chamberlain, the receiver, to an amount not exceeding one hundred and fifty thousand dollars, (\$150,000.00);' and that, in the place and stead of said words, there be inserted these words: 'And expressly subject to the receiver's certificates heretofore authorized to be issued by said Jacob G. Chamberlain, the receiver, to an amount not exceeding one hundred and twenty-five thousand dollars, (\$125,000.00,) and that the twenty-five thousand dollars of said receiver's certificates, disposed of by said C. D. Woodson, the same being five certificates of five thousand dollars (\$5,000.00) each, and numbered 8, 9, 10, 11, and 12, dated October 10, 1889, and set forth in the "Schedule B" of said decree, be not included in said amount of one hundred and twenty-five thousand dollars, (\$125,000.00,) but that the purchasers of said property at the sale under said decree take the same subject to the right to resist the payment of said five certificates so disposed of by said Woodson; and that the validity of said five certificates be adjudicated in this court upon a proper case to be made by the parties in interest.' "

The intervention asserts that this modification of the decree was made subsequent to the time that the intervenor's rights had attached and accrued, and it was necessary and proper for the intervenor, who, under the terms of the aforesaid modified decree, was given the right to intervene in this cause, to state the basis of his right to intervene, and thereby to refer to the order of court made as aforesaid, but to hold that, by intervening and referring to his authority therefor, he admits the truth of the statements contained in the *ex parte* statement of the receiver upon which the order was made, is to hold that he admits away his entire case, and this in direct opposition to the express and sworn averments of his intervention. The case seems to turn upon the fact whether or not the proceeds of the five receiver's certificates sued upon by the intervenor came to the hands of the receiver. The decree throwing a cloud upon intervenor's rights gave him authority to intervene and assert them. It would be a vain thing to give him such right if coupled with a condition that, in order to exercise it, he must admit as truth a state of facts which kills his case. The purchasers of the property referred to in the intervention took the same with the express understanding that the receiver's certificates held by the intervenor had been issued under orders of the court importing a lien on the property they purchased, and were

outstanding; and, further, might be presented as a valid indebtedness of the receiver. They were granted the right, and they assumed the burden of contesting their validity. In their interest the contest was restricted to this court. The intervention fairly presents the case for them to contest. The demurrer will be sustained, so far as the Central Trust Company of New York is concerned, but be overruled as to the other defendants, who will be required to answer the said intervention by the rule-day in February, 1891.

WAKELEE v. DAVIS.

(Circuit Court, S. D. New York. January 7, 1891.)

1. EQUITY JURISDICTION—INJUNCTION—ESTOPPEL.

One who is about to sue on a judgment which is void for want of proper service is entitled to a decree enjoining the judgment debtor from setting up its invalidity, when it appears that the latter, while obtaining a discharge in bankruptcy, secured substantial benefits by contending that the judgment was valid, and would not be bound by his discharge.

2. SAME—REMEDY AT LAW.

Injunction will not issue to restrain the debtor from relying upon his discharge in bankruptcy, because, if he pleads such discharge, complainant can then avail herself of the facts constituting the estoppel.

3. STARE DECISIS—LAW OF THE CASE.

A decision on demurrer is the law of the case until a different rule is laid down by the supreme court, although such decision was rendered by another judge than the one trying the case finally.

Final Hearing in Equity.

Anson Malby, for complainant.

Henry A. Root and Thaddeus D. Kenneson, for defendant.

COXE, J. This bill is filed in aid of an action at law, which the complainant alleges she is about to commence, upon a judgment recovered against the defendant in a state court of California on the 18th of November, 1873. Under the decision of the supreme court in *Pennoyer v. Neff*, 95 U. S. 714, this judgment was void, the summons having been served by publication only, in an action *in personam*. On the 6th of March, 1877, the defendant obtained a discharge in bankruptcy from the United States court for the district of California, he having been adjudged a bankrupt by said court September 30, 1869. This discharge, if there were no estoppel, would be a bar to the debt represented by the judgment. *Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. Rep. 981.

The complainant contends that the defendant is estopped from denying the validity of the judgment and from relying upon the discharge as a defense, because in 1876, in the bankruptcy court, he obtained substantial benefits by contending that the judgment was valid and would not be barred by a discharge. The complainant insists that he should be held to the same position now, and prays for an injunction restrain-

ing him from asserting the invalidity of the judgment and from relying upon his discharge as a defense thereto. The cause has been twice before this court upon demurrer. 37 Fed. Rep. 280; 38 Fed. Rep. 878. The facts sufficiently appear in these decisions, and need not be stated again. On the last demurrer the present bill was sustained. The court there decided the following propositions: *First*. That the bill stated a cause of equitable cognizance. *Second*. That, having affirmed the validity of the judgment in the proceedings in bankruptcy, the defendant is now estopped to impeach it. *Third*, that if the defendant pleads his discharge in the action at law about to be commenced, the plaintiff can avail herself of the facts constituting the estoppel, and, upon this branch of the case, is not in need of the assistance of a court of equity. The propositions of law presented are the same now as on demurrer. Some testimony has been taken *pro* and *con*, but, upon all important questions, it is substantially conceded that the legal aspects of the cause remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the supreme court. A re-examination and discussion of the question involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision. It follows that the complainant is entitled to a decree for an injunction restraining the defendant from asserting that the judgment of November 18, 1873, is not valid and does not still stand of record. The complainant is entitled to costs.

CORNWALL v. DAVIS.

(Circuit Court, S. D. New York. January 7, 1891.)

PER CURIAM. The decision in *Wakelee v. Davis*, ante, 532, determines this cause also. The complainant is entitled to a similar decree.

COFFIN et al. v. CHATTANOOGA WATER & POWER Co.

(Circuit Court, S. D. Tennessee, E. D. January 8, 1891.)

EQUITY—PRACTICE—PARTIES.

Where a judgment creditor of a corporation files his bill in the circuit court to subject the equitable interest of defendant in its mortgaged property to the payment of his debt, the owner of the company's property, stock, and franchises will not be permitted to become a party defendant on his petition alleging that he has already commenced an equity suit in the state court against plaintiff to determine the amount of the debt and to set aside certain transactions between them, where the chancery suit in the state court is in no way affected by the suit in the federal court, and the property is not paying expenses, and the intervention of petitioner would merely delay the suit.

In Equity.*Warder & Evans*, for complainant.*P. A. Brauner*, for defendant.*E. M. Dodson*, for petitioner, Dean.

KEY, J. The bill and amended bill in this case alleged that complainants are creditors of defendant; that they have a judgment upon which execution has been returned *nulla bona*; that defendant has nothing subject to execution. Complainants claim that besides this judgment defendant owes them other debts. It is alleged that defendant has mortgaged all its property for the payment of bonds it has issued, which are in the hands of their purchasers, and that these bonds are not yet due, nor is the interest upon them. The bill seeks to subject the equitable interest of defendant in its mortgaged property to be sold to satisfy complainants' debts and such other debts as may be found to be due. In the mean time a receiver was asked for and appointed. John R. Dean comes and files a petition asking to be made a party defendant to the suit. He alleges that he was the owner of the property and franchises that made the paid-up capital stock of the company, of the value of \$120,000, and that he is still the owner of 280 shares of stock of the par value of \$28,000; that he claims to be the owner of 890 other shares of stock of the par value of \$100 per share, being all the stock of the company except 30 shares, owned by F. A. Berkstresser. He further alleges that on the 19th September, 1889, he and the defendant company had filed a bill in the chancery court at Chattanooga against complainants and one R. C. Cook to settle various matters of controversy which had arisen between the parties to the suit, and that amended and supplemental bills had been filed and were pending at the time the bill was filed in this court. This bill, as the petition states, alleged that he was the owner of valuable real estate on Cameron hill, and had a charter for a railroad to be built, and an incline, and had organized a company for that purpose, and had obtained valuable franchises and donations, all of which he had transferred to the company. That in order to carry out his schemes of improvement he had appointed R. C. Cook as his agent to dispose of a part of the stock, all the stock belonging to Dean. That instead of selling the stock Cook made a contract with complainants to sell them certain bonds to be issued by the company at the price of 93½ cents on the dollar, agreeing that they should have a first mortgage on the property, and 610 shares of the stock of the company, (\$61,000,) Dean reserving the right to repurchase the stock within 90 days from the completion of the plant at 25 cents upon the dollar. Dean says he ratified the trade with a reluctance, as he was in financial straits. Complainants were to purchase 50 bonds of \$1,000 each at 94½ cents upon the dollar, and the amount was to be placed to the credit of the company in complainants' bank, and was to be drawn upon as the work of construction of the plant of the company progressed. That in the progress of things complainants stopped payment of the drafts, and demanded a new contract. That Dean was financially embarrassed, and

at the mercy of complainants in his enterprise, as they knew, and of which they took unconscientious and undue advantage; and, being coerced by these advantages, Dean yielded helplessly to the demands of complainants and Cook, and agreed to a new contract, by which the 50 bonds issued under the first contract were to be taken up and canceled, and 75 bonds of \$1,000 each were to be issued, secured as the first were. That 60 of the new bonds were to be purchased by complainants at 90 cents on the dollar, and the remaining 15 were to remain in the hands of the company for betterments and extensions, and Dean surrendered his option to repurchase the stock. Dean alleges in an amended bill in the chancery court that Cook was operating the company as general manager without authority, contracting large debts against it, and, if allowed to go on, the company would be insolvent. That the creditors were clamoring for their debts; its paper had been protested; and its employees were unpaid; and he was operating the incline at a loss, etc. As Cook is no longer in control of the company's affairs, these allegations as to him are not important now. Dean's counsel admits that the real question in the chancery court suit is whether the debt is \$60,000 or \$50,000, as a fixed charge upon the property, and whether complainants should pay 93½ cents or 90 cents per dollar on the bonds. The debt secured by the mortgage, whatever it is, remains a charge upon the property, should the relief prayed in this bill be granted. The proceedings here in no way affect or stay Dean's cause or causes in the chancery court, the forum of his own choice. The issues there and here are entirely different. Furthermore, the report of the receiver shows that the property's income has paid but little more than half the expenses under his administration of its business, and the street railroad lines and the incline have ceased operations, and nothing, or but little, of the plant is in use. There is nothing to pay creditors, salaries, or other running expenses, and the property unused must deteriorate, and expenses must be incurred in caring for it. Under the delay which would necessarily result from the admission of Dean as party to contest his issues here, the equity the defendant has in its property would diminish in value, while the interest upon the debts would increase the liabilities, and no revenues or income is derived to meet any liabilities or expenses. Under these circumstances, and especially as this suit does not embarrass Dean's chancery court proceedings, his motion to be allowed to become a party defendant to this suit is disallowed, and his petition dismissed. His attitude in the controversy is not a defensive one. His position is essentially aggressive. The issues he tenders in his petition do not properly arise under the bill. He should become an actor, rather than a defendant.

YEATMAN *et al.* v. BRADFORD *et al.*

(Circuit Court, S. D. Tennessee, E. D. January 8, 1891.)

EQUITY—PRACTICE—JURISDICTION—AUXILIARY BILL.

After there has been a final decree and confirmation of sale in a suit for the partition and sale of land, an auxiliary bill seeking to set aside as fraudulent a contract made by the parties after the final decree, and attacking the proceedings in that suit on the ground of want of proper service and other irregularities, cannot be maintained, since there is a complete remedy at law.

In Equity.

Nash H. Burt, A. S. Colyar, and Warder & Evans, for complainants.

Clark & Brown, for defendants.

KEY, J. The bill in this case alleges that on the 29th day of January, 1883, defendant Bradford, as an heir of P. B. West, filed a bill in this court for the sale for partition of certain wild mountain lands. This bill purported to make the other heirs of said West parties thereto. The present bill alleges that many of the heirs were not made parties to the original suit, and that others were made parties so imperfectly that no decree made in the cause is binding upon them; that 4th October, 1883, a decree was entered in the original cause, which recites that the cause was heard upon complainant's bill, the answers thereto, the judgment *pro confesso* heretofore taken against a portion of the defendants, and the proof in the cause; and, it appearing to the court that all the parties are *sui juris*, and represented in court by counsel, it is, by consent of counsel for all parties, given in open court, decreed that E. M. Dodson and W. D. Spears be appointed to sell the lands. This order of sale was revived May 9, 1884, and October 7, 1884. On 9th of May, 1885, these commissioners reported that they had sold the lands to complainant Bradford for \$3,500, but that he had failed to comply with the terms of sale. At the same term of the court the commissioners were relieved and discharged, and the clerk of the court, as special commissioner, was ordered to sell the lands. June 29, 1885, the clerk sold the land to one Foster for \$2,650. The report of this sale was confirmed, and the title divested out of his heirs and vested in the purchaser, Foster; and it was ascertained upon report that West's heirs were indebted to Foster \$1,953.73, and to counsel in the cause \$550, while the other costs were more than \$150. The payment of these debts and fees and costs absorbed the entire fund resulting from the sale, and nothing was left for distribution. Foster made an arrangement by which the fees and costs were paid, and, as the indebtedness was due him, the court, 16th October, 1886, canceled his notes for the purchase money. This ended the action and jurisdiction of the court over the original cause. The present bill alleges that April 4, 1887, said Bradford and his sisters entered into a written contract with A. L. Spears, in which Spears agreed to furnish the money to pay Foster the money paid by him in his purchase, and he and Bradford and his sisters were to become

owners of the land. This transaction is attacked as fraudulent, and the chief object of the present bill is to set it aside. If the present bill can be maintained at all it must be upon the ground that it is dependent upon or ancillary to the original bill filed for partition. It cannot be sustained otherwise because of the want of the proper citizenship of the parties. If it be dependent upon the original bill, the citizenship of the parties does not affect it. If the original suit was ended, and had passed from the court, and afterwards transactions occurred in regard to the subject-matter of the suit with which the court had nothing to do, and over which it had no power or control, such transactions could not be brought before the court by a dependent bill, unless these latter transactions were a part of the links of a chain of fraud which had its beginning in the original suit. The averments of the bill make no such case as this, nor do they attempt so to do. If there be fraud, and it relates solely to the transactions which took place after the end of the original suit, an independent bill should be resorted to for their impeachment. It could have nothing to do with the decrees of the court which preceded them, and which had in no way entered into the matters complained of. An examination of the proof in the record fails to bring to light anything in the original suit or in its history or progress to fix fraudulent conduct upon any of the parties or attorneys. The proceedings under the original bill are very imperfect and irregular, most reprehensibly so. There are several of the heirs of Patterson B. West who are not made parties. There was, in other respects, a want of such orderly and systematic proceeding as is required in the conduct of litigation. Indeed, the *gravamen* of the bill seems to be that there was such a want of parties, process, and other steps as made the decrees in the case void, and yet it seeks to impeach contracts made after the decrees as fraudulent, as if the decrees had legitimate support. It is clear that if there be errors in the decrees, remedy was by appeal or by bill of review, if the term or terms had closed at which such decrees were rendered. If a dependent or auxiliary bill were permitted to remedy errors or alleged errors in decrees and judgments there would scarcely ever be an end of litigation in many cases. Now, if, as this bill alleges, the decrees were void for the want of proper parties or the necessary steps, they bind no one, and the persons in interest have a simple, complete, and adequate remedy at law. The case of *Lewis v. Cocks*, 23 Wall. 466-471, is decisive of this case. A judgment had been obtained against Cocks, and two of his houses and lots sold under execution to satisfy it. Service had been made, not on Cocks, but upon his agent. The purchaser at the execution sale mortgaged the property, and it was sold under the mortgage and purchased by Lewis, and Cocks filed his bill in equity to have his property reconveyed to him upon the grounds (1) that the court had no authority to render the judgment, (2) that there was no legal service upon Cocks, (3) that there had been fraud upon the part of the purchaser at execution sale. There was no fraud proven, and the court was held to have been competent to render the judgment, and the case turned upon the want of service, and the court says:

"If the bill alleged only the nullity of the judgment under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon those grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izzard and give it to the complainant, could such a bill be sustained? Such is the case before us. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is peculiarly one of the character where for that reason a court of equity will not interpose. This principle in English equity jurisprudence is as old as the earliest period in its recorded history. Spence, Eq. Jur. 408, note b; Id. 420, note a. The sixteenth section of the judiciary act of 1789, (1st. at Large, 82,) enacting 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law,' is merely declaratory, and made no change in the pre-existing law. To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of the complainant. Where the remedy at law is not 'as practical and efficient to the ends of justice and its prompt administration' the aid of equity may be invoked; but if, on the other hand, 'it is plain, adequate, and complete,' it must be pursued. *Boyce v. Grundy*, 3 Pet. 215. In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel; nevertheless, if it clearly exists, it is the duty of the court *sua sponte* to recognize it and give it effect. *Hipp v. Babin*, 19 How. 278; *Baker v. Biddle*, Bald. 416. It is the universal rule of courts of equity to dismiss the bill if it be grounded upon a mere legal title. In such case the adverse party has the constitutional right to trial by jury. *Hipp v. Babin*, 19 How. 278. * * * In the present case the bill seeks to enforce 'a merely legal title.' An action of ejectment is an adequate remedy. The question touching the service of process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review they can be better presented by bills of exception and a writ of error than by depositions and other testimony and appeal in equity."

This long quotation is justified by the appropriateness of the decision to the case in hand. The bill will be dismissed, with costs, and without prejudice. The following decisions are referred to in regard to the principles governing dependent or auxiliary bill: *Dunn v. Clarke*, 8 Pet. 1; *Dunlap v. Stetson*, 4 Mason, 349; *Freeman v. Howe*, 24 How. 450; *U. S. v. Throckmorton*, 98 U. S. 61-71; *Krippendorf v. Hyde*, 110 U. S. 279, 4 Sup. Ct. Rep. 27.

LAKE SUPERIOR IRON CO. *et al.* v. BROWN, BONNELL & CO. *et al.*

(Circuit Court, N. D. Ohio, E. D. September 5, 1890.)

1. ABATEMENT OF ACTION—DISSOLUTION OF CORPORATION—REVIVOR.

Under Rev. St. Ohio, §§ 5679, 5680, which provide that no pending action against a corporation shall abate by its dissolution, and that execution on a judgment obtained in such action may issue against the trustees of the dissolved corporation in its corporate name, a suit in equity in a federal court, wherein the corporation has been declared insolvent, and a receiver appointed to administer its property as a trust fund for the benefit of creditors, need not be revived as against a receiver appointed by a state court, which has dissolved the corporation during the pendency of the proceedings in the federal court.

2. SAME.

On general principles of equity jurisprudence, a federal circuit court, which has obtained possession of the property of an insolvent corporation in proceedings instituted against it by its creditors, and which has been directed by the United States supreme court to make a distribution of such property among the creditors in a specified manner, does not lose its jurisdiction by the dissolution of the corporation and the appointment of a receiver by a state court; nor do such proceedings in the state court necessitate a revival of the suit in the federal court.

3. JUDICIAL SALES—APPRAISERS—DISINTERESTED FREEHOLDERS.

Rev. St. Ohio, § 5589, which requires three "disinterested freeholders" to appraise lands before a judicial sale thereof, does not disqualify a distant relative of one of the creditors of a corporation, whose claim represents only a small portion of its aggregate indebtedness, from acting as an appraiser on a judicial sale of its property for the benefit of all its creditors.

4. SAME—PURCHASER'S OPTION TO TAKE ADDITIONAL PROPERTY.

A judicial sale of the property of a corporation is not rendered invalid by the receiver's announcement at such sale that the purchaser would also have the right, at his election, to take certain land, not covered by the order of sale, and acquired by the receiver during his administration of the corporate property.

5. SAME—INADEQUACY OF PRICE.

The mere fact that the receiver, on taking possession, inventoried the property at a sum considerably greater than that fixed by the appraisers on a judicial sale thereof eight years afterwards, is not a ground for setting aside the sale for inadequacy of price.

In Equity.

Henry Crawford, for exceptions.

C. C. Baldwin and *Hine & Clark*, for creditors and purchasers.

Frank Wing, for receiver.

RICKS, J. At the October term, 1889, of the supreme court of the United States, (10 Sup. Ct. Rep. 604,) a decree was entered affirming the decree of this court rendered in this case at the February term, 1886; and on the 26th day of May, 1890, a mandate of said court was received directing this court to enforce its decree. In pursuance to said direction, an order of sale was issued out of the clerk's office on the 3d day of June, 1890, directing the special master commissioner therein named to appraise, advertise, and sell the property described in the decree and order of sale as upon a judgment at law. On the 23d day of July, 1890, the master commissioner returned the order of sale, reporting that on the 22d day of July he had sold the said property to William McCreery, Henry Tod, Charles C. Baldwin, and Cecil D. Hine, as trustees for the sum of \$700,000, said sum being more than two-thirds of the appraised value thereof. On the 22d day of August exceptions to the report of

said master were filed by the Leadville Coal Company and Charles S. Worden, on behalf of themselves and such other creditors as might choose to join therein. A motion was also filed on behalf of the purchasers, to confirm said sale. The case is now before the court upon these exceptions and upon the motion to confirm.

The exceptions filed may be briefly stated as follows: (1) Appraisal void because not made on actual view. (2 and 3) Appraisal void because two of the appraisers related to or employed by creditors. (4 and 5) Appraisal void because certain of receiver's contracts for sales and supplies not appraised. (6) Appraisal void for inadequate price. (9) Order of sale void because corporation dissolved by state court, and suit thereby abated, and for other exceptions noted in the opinion.

The exceptions and the objections are stated in inverse order to their importance. It will be well to consider the last exception first, because, if well taken, there will be no need to spend time considering the others. The ninth and last exception is:

"That this action abated on the dissolution of such corporation by judicial decree, and said Taylor, the receiver, who now, under the statute, is vested with the title to all the corporate assets, has not been made a party to this suit in any way."

Postponing, for the time, a consideration of the question whether in an equity suit of this character, after a final decree adjusting all the rights of the parties, a dissolution of a defendant corporation, independent of any statutory provision, would make a revivor necessary, we pass to the consideration of the Ohio statutes prescribing the procedure necessary to dissolve a corporation created by authority of the state. After a careful examination of the several sections of the statute on this subject, it seems clear that this legislation fully saves and excepts from the general effects of dissolution all rights of parties in suits "pending in any court in favor of or against any corporation," and specially provides that no such action "shall be discontinued or abate by the dissolution of the corporation, whether the dissolution occur by the expiration of its charter or otherwise; but all such actions may be prosecuted to final judgment by the creditors, assignees, receivers, or trustees, having the legal charge of the assets of the corporation, in its corporate name."¹ The statute provides still further that final relief by execution shall not be delayed by such dissolution, but that "execution may be had, and satisfaction or performance of the same enforced by the creditors, assignees, receivers, or trustees, having the legal charge of the assets of the dissolved corporation, in the corporate name of the dissolved corporation."² Now, if we apply these provisions to the case before us, they relieve the court of all difficulty in speeding the suit to a final decree of confirmation and settlement. The jurisdiction of the court from the time the supplemental bill was filed has proceeded upon the well-settled principle in equity that the property and assets of this insolvent defendant corporation was a trust fund, to be distributed for the benefit of its creditors as their

¹ Rev. St. Ohio, § 5679.

² Rev. St. Ohio, § 5680.

rights and equities should be finally determined. In order to adjudicate those rights, the creditors were allowed and required to become parties to this suit. Their claims have been filed, the amounts due them have been determined, and their priorities fixed by final decree. Every person interested in the assets of this insolvent corporation is before the court, and his rights have been fully determined. The court has complete jurisdiction both of the funds and of the parties, and is ready to make distribution of the trust fund; but is now, after seven years of litigation, asked to relinquish jurisdiction, turn the property and funds that have accumulated by judicious management over to another court, and require creditors to renew litigation in another forum. Such an extraordinary abandonment of creditors to such a harsh fate would be justified only by a clear and undoubted want of jurisdiction.

The Ohio statutes, and the general principles controlling equity procedure, furnish abundant reasons for retaining jurisdiction and giving parties final and complete relief in these proceedings. The provisions of the statute quoted make it plain that, after final decree of dissolution in the state court, these proceedings could still have been prosecuted against the defunct corporation in its corporate name, and without revivor, as was done in this case. By the express provision of the statute before quoted, "execution may be had, and satisfaction or performance of the same enforced, * * * in the corporate name of the dissolved corporation." If such unembarrassed relief was provided for enforcing a judgment at law, how much more liberal a construction might be claimed for such a provision when applied to a suit in equity, where the well-established principle controls that the equitable rights of the creditors of a corporation survive its dissolution, although their remedy at law is extinguished. A court of chancery will furnish a remedy to protect and enforce their equitable rights against any assets belonging to the company at the time of its dissolution. At the time the proceeding to procure a decree of dissolution was instituted in the Ohio tribunal, this court had control of all the property of the defendant, and was operating its mills by a receiver. It had adjudged the defendant insolvent, and had reached out its long arms to bring all parties, resident and non-resident, before it, to adjudge their rights to the property and fund it had seized. It had impressed upon the fund and property the character of a trust, and had undertaken to convert them, so as to make an equitable distribution thereof among the beneficiaries entitled to share therein. This afforded a sufficient basis for the equitable jurisdiction claimed. It was, in most respects, in the nature of a proceeding *in rem*, and its jurisdiction of the property and assets was incontestable.

The mandate of the supreme court specifically directed this court to enforce the decree which it had affirmed. This affirmance was made after the decree of dissolution in the state court. Under that mandate, this court had no discretion as to how, or when, or upon what terms, the defendant's property should be sold. We are directed to enforce the decree as affirmed, and in that decree the provisions for its execution are definitely prescribed. We do not assume to modify or annul any

of its provisions, but have undertaken to execute it as literally as possible. The provisions of the Ohio statutes have been carefully considered, not because we hold that our jurisdiction to proceed without revivor can be aided by this statute, for it is well settled that the equity jurisdiction of this court can neither be restricted nor enlarged by state legislation. But, inasmuch as all the authority and rights claimed by the receiver appointed in the state court are conferred by the Ohio statutes, I have carefully considered them, in order to ascertain whether, even under all the power thereby conferred upon said receiver, a revivor as to him was necessary. The saving exceptions made by said statutes, as hereinbefore quoted, make it plain that even under their provisions it was not. The court which decreed dissolution and appointed him did not contemplate that he should assume the right to claim the title to the property or fund. In its decree it expressly directed that he should "not interfere with the possession of the receiver appointed by the federal court of the effects and assets of said corporation." It is therefore clear that, even if we concede to the state statutes all that is claimed, the decree of dissolution of the state court neither ousted this court of its jurisdiction nor made revivor proceedings necessary. Neither under the general equity jurisdiction of this court could such decree of dissolution affect its jurisdiction or make revivor necessary. As before stated, the court had possession and control of this defendant's property and assets as a trust fund, to be converted and distributed to the beneficiaries under said trust. Its jurisdiction thereof had been finally fixed by the supreme court, and the manner in which that trust fund should be converted for distribution had been prescribed, and this court was directed to carry out the decree. We are now asked to disregard this mandate, assume the right to annul its provisions by relinquishing jurisdiction, and transfer the fund and property to a new tribunal, for further litigation. There is no equity in such a claim. The ninth exception is therefore overruled.

The eighth exception involves substantially the same question. The contract therein referred to was not of a nature to affect the rights of the parties thereto, and the decree of dissolution, for the reasons above given, did not supersede or make invalid any decree or any order in the proceedings in this case. Said exception is therefore overruled.

The remaining exceptions are based upon objections to the sale because one of the appraisers, Caleb B. Wick, was related to some of the creditors, and because another appraiser, James Neilson, was at the time in the employ of C. H. Andrews, one of the creditors, and a party to this suit; and that, because of such relationship, these appraisers were not "disinterested freeholders," as prescribed by the Ohio statutes,¹ and because of such want of proper qualification this sale should be set aside.

There is nothing in the affidavit in support of these exceptions, or in anything appearing on the record in this case, to show that these appraisers were not in every other respect well qualified and fitted for their

¹Rev. St. Ohio, § 5839.

duty. The court is entirely satisfied that the property was appraised at a fair valuation, and that, therefore, the appraisers discharged their duty intelligently and impartially. It appears from affidavits in the case that Caleb B. Wick, one of the appraisers, was a nephew of Hugh B. Wick, who died in 1880, and a nephew of Paul Wick, who died in June, 1890. The heirs of said two uncles, together with John C. Wick, a cousin of said appraiser, comprise the firm of Wick Bros. & Co., who are creditors in this case. Caleb B. Wick, the appraiser, is not shown to have any interest in this firm or their claim. The only ground upon which it is claimed that he is not a disinterested freeholder is that he is related in the degree above stated. It further appears from affidavits that John C. Neilson, the other appraiser, was not at the time he acted in that capacity in the employ of C. H. Andrews, a creditor in this case. The question is therefore presented to the court whether the fact that Caleb B. Wick was a distant relative of some of the creditors disqualified him to act as an appraiser. Various cases have been cited, in which, under the statutes of other states, an appraiser related to some of the parties in the case has been held to be disqualified; but in all these cases the relationship existed as to parties who were more directly and more extensively interested in the result of the sale. In this case the interest of the creditors with whom these appraisers are connected by relationship or business is so small a portion of the aggregate claims of over \$1,000,000 that it would be straining the application of the statute to hold that for such reason these appraisers were disqualified to act. The court, being entirely satisfied that the appraisal was just and fair, and that the property sold for a full and satisfactory consideration, claims the right and privilege to look to the result reached; and, if that is satisfactory, and the court is persuaded that upon the whole proceedings the sale should be confirmed, it will not subject the parties interested to the delay or expense of a resale because of any such technical objection.

Another exception urged goes to the irregularity of the sale, because the decree expressly required that the property should be appraised and sold in connection with pending and unfinished contracts of the receiver, and that such contracts were of great value, in addition to the tangible property itself; and that the master commissioner and appraisers improperly ignored that provision of the decree, and did not include in their appraisals the value of such contracts. By an examination of the decree it will be found that the court ordered the master commissioner "to cause the real and personal property herein described, except materials and supplies, and products manufactured or in process of manufacture, to be appraised, advertised, and sold," etc.; and, by another provision of the decree, it was ordered "that the receiver herein be, and he is hereby, empowered to sell at private sale all the materials and supplies and product manufactured, or in process of manufacture, in his hands, for such reasonable price, and at such time, as in his discretion he should deem best." This was a plain direction to the master to appraise only the property described in the decree. This property con-

sisted of real estate and personal property therein described, but did not include pending contracts between the receiver and purchasers of material, or parties to contracts for the delivery of ore or other products used by the receiver in the mills. It is further clear that, by the provisions of said decree, this court has full control to direct the receiver in such sales as he may hereafter make of manufactured products in his hands to sell such interest as he may have in pending contracts which will be of value, and add to the sum to be distributed to the creditors in this case.

Another objection to such sale is stated to be that the receiver, before said sale, under the instructions of the court, gave notice that any purchaser of the property then offered for sale would have the right to buy from the receiver certain real estate purchased from and conveyed to him by Arms, Bell & Co., on notice to the receiver of an election to buy; and after the accepted bid of said purchasers they did notify the receiver of their election to buy such real estate. This refers to real estate that had been purchased by the receiver, under orders of the court, from time to time during his receivership. This real estate comprised small parcels that were offered to the receiver from time to time by parties who owned them, because they were more valuable to the plant operated by the receiver than they were to the owners. It seemed to the court at the time the orders were made to be of advantage to the receiver and the creditors that such property should be purchased, and in every case it was done with the consent of the creditors, and at their request. The title to such property was vested in the receiver for the benefit of creditors. It was not included in the property described in the decree, which the master commissioner was ordered to sell, and was not therefore appraised as a part thereof. It appeared to the court fair and just to whoever might become the purchasers of the property, as well as to the interest of the creditors, that the purchaser should have the privilege of buying this property from the receiver at the price paid therefor. The receiver was therefore authorized to make such announcement at the sale. It did not in any way relate to the property described in the decree, and ordered therein to be sold, could not affect the regularity of the sale, and is a matter fairly within the discretion of the court.

It is further objected that the property sold for a grossly inadequate price, as shown by the report of the receiver. Under this objection, it is claimed that, when the receiver took possession of this property, he made an inventory thereof, and returned the same into the court. From this report it appears that the property was valued at a sum considerably greater than that fixed by the appraisers under the order of sale now under consideration. But it must be remembered that this plant has been operated by the receiver for nearly eight years. During that time he has been authorized to keep the property in repair, but he has not been permitted to expend any considerable sum in the purchase of new machinery. It is a matter within the knowledge of all that during the past eight years there have been many changes and improvements in machinery in such mills. While the property has been preserved in

good repair, the mill is not now equipped with the most approved and valuable machinery. There has been likewise a general depreciation of such property throughout the country. The appraisers undoubtedly considered all these circumstances. The court is satisfied, from the qualifications of these appraisers, their knowledge of mill machinery, and their familiarity with the value of such property, that the same was appraised, as before stated, at a fair price, and sold for a reasonable sum. The price can certainly not be claimed as inadequate. No affidavits have been filed by persons qualified to judge, claiming that the same was sold for an inadequate price. No offer is now made to advance the bid, and no misconduct is alleged on the part of the purchasers. The exception is based entirely upon the difference between the appraised value and the value as inventoried by the receiver, as above stated; and, for the reasons stated, this is not sufficient to show inadequacy of price.

The tenth exception is that the five coal leases in the name of Ralph J. Wick, trustee, cannot now be legally sold and conveyed, because said Wick is not a party hereto, and said property is out of the territorial jurisdiction. It is now too late to entertain the objection that Wick, as trustee, is not a party to this case even if it be true. The leaseholds are personal property, and are described in the decree as the property of the defendant, and were properly appraised, advertised, and sold as part of the personalty, and within the jurisdiction of the court. If there should be any contention hereafter between Wick, trustee, and the purchasers as to the title to these leaseholds acquired by this sale, because of the alleged failure to make him a party thereto, such contention can be settled elsewhere. It is no reason for setting aside this sale.

In thus finally disposing of this protracted litigation, it seems proper, and due to my predecessor and his associates, the circuit judges who have aided him in the management of this vast property, to direct attention to the satisfactory results that have followed its seizure and operation. The property has not only been preserved intact for the protection of creditors, but, by the wise management of the receiver and his principal agents and officers, under the general direction of the court, a fund of over \$700,000 has been accumulated, so that, after long and expensive proceedings, it seems assured that every creditor will be paid the principal sum due him in full. But for the appointment of a receiver, the property would have been dissipated, and largely wasted in hostile litigation, to the prejudice of all concerned. It is not often that such beneficial results follow such long litigation, and it is proper subject of congratulation to all concerned.

JACKSON, J., concurs in this opinion.

DARTMOUTH SAV. BANK *v.* BATES *et al.*

(Circuit Court, D. Kansas. December 19, 1890.)

LIEN OF JUDGMENT—RECORDING—TERRITORIAL JURISDICTION.

Prior to 1888 the lien of judgments in the federal courts was co-extensive with their territorial jurisdiction. Act Cong. Aug. 1, 1888, (25 U. S. St. 357,) provides that the judgments of the federal courts within any state shall be liens on property throughout such state in the same manner as the judgments of courts of general jurisdiction of the state: provided, that if the state laws require judgments of the state courts to be recorded in other counties before they become liens on lands situate therein, this act shall only be applicable in case provision is made for recording of federal court judgments also. Gen. St. Kan. 1868, c. 80, § 419, provides that judgments of state and federal courts shall be liens on the debtor's lands in the county where rendered, and that "any judgment" may be recorded in other counties, and become a lien from that time on the land of the debtor in such county. *Held* that, under these two acts, a judgment in a federal court in Kansas was a lien only on the land of the debtor in the county in which the court was held, but that the lien might be extended by recording the judgment under the state law.

In Equity. Bill for injunction.

Frederick D. Fuller, for plaintiff.

C. M. Welch, for defendants.

Before CALDWELL and FOSTER, JJ.

CALDWELL, J. At the threshold of this case we are met with the question whether a judgment rendered in the circuit court of the United States for the district of Kansas is a lien on the lands of the judgment debtor outside of the county in which the court was held and the judgment rendered. The judgment that gave rise to this suit was rendered in the circuit court of the United States at Topeka, in Shawnee county, and the lands of the judgment debtor upon which it is claimed the judgment was a lien are situated in Wabaunsee county. Land was not liable to be sold on execution at common law, and, as a consequence of this, at common law a judgment created no lien on the land of the judgment debtor. The lien was created in England by the statute of Westminster 2, (13 Edw. I.) c. 18. This statute gave the *elegit* or writ of execution, which subjected real estate to the payment of debts. This statute did not, in terms, declare that a judgment should be a lien on the lands of the debtor, but the courts held that the effect of a statute subjecting lands to sale on execution was to make the judgment a lien on the lands of the debtor; and in this country state statutes subjecting land to sale on execution received the same construction, and were held to make judgments liens on the lands of the debtor within the territorial jurisdiction of the court rendering the judgment. *Masingill v. Downs*, 7 How. 766, and cases cited. The laws of the several states on the subject of judgment liens are not now, and never have been, uniform. By the laws of some states a judgment is not a lien on lands; in others it is a lien co-extensive with the territorial jurisdiction of the court. In some the lien takes effect from one date, and in others from another, and the duration of the lien is different in different states. No act of congress was ever passed declaring, in terms, that judgments

in the federal courts should be liens, independently of the state law, on the judgment debtor's lands. It is within the constitutional power of congress to make judgments in the federal courts liens on the debtor's property, and to fix the territorial extent and duration of such liens, independently of state laws. But in this, as in all other matters relating to the practice and proceedings for obtaining and enforcing judgments in the federal courts, it has always been the policy of congress to conform the processes in the federal courts to those in the state courts. In *Ward v. Chamberlain*, (2 Black, 430, 442, 443,) the supreme court said:

"Under the earlier process acts this court twice decided that the laws of the states furnished the rule of decision in respect to the lien of judgments and decrees rendered in the federal courts upon the land of the debtor; and since the passage of the act under consideration it has been twice affirmed by this court as a matter of history that the act was passed to confirm the view expressed in those decisions. *Beers v. Haughton*, 9 Pet. 361; *Ross v. Duval*, 13 Pet. 64. Perfect coincidence of opinion upon the subject appears to have prevailed throughout between congress and the court, and on all sides apparently the endeavor has been to assimilate the proceedings in the federal courts for the levying of executions issued on judgments and decrees for the payment of money to those prevailing in the courts of the states."

In the same case the court said:

"The course of legislation shows that it has always been the intention of congress to prevent a creditor suing in the federal courts from obtaining an advantage over another creditor suing in the state courts." 2 Black, 441.

And it was early decided "that congress, in adopting the processes of the states, also adopted the modes of process prevailing at that date in the courts of the several states in respect to the lien of judgments within the limits of their respective jurisdictions." *Brown v. Pierce*, 7 Wall. 217, and cases cited.

A question having arisen as to whether the adoption of the processes of the several states adopted the state laws on the subject of the duration of judgment liens, congress, on the 4th of July, 1840, passed an act on that subject, which is now section 967 of the Revised Statutes of the United States, and reads as follows:

"Sec. 967. Judgments and decrees rendered in a circuit or district court within any state shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state cease by law to be liens thereon."

Upon the passage of this act, the rule in the state and federal courts as to the creation and duration of a judgment lien was the same,—that is, the state laws regulated the creation and duration of the lien of judgments in both courts, but the rule was not the same as to the territorial extent of such lien, and for this reason: In those states in which judgments were liens on the lands of the debtor, the lien was restricted to the territorial jurisdiction of the court rendering the judgment, usually a county. But the statutes of those states usually provided a mode of extending the lien of a judgment of a state court to any county in the state by filing a transcript of the judgment in the county clerk's office;

but those statutes, as a rule, did not make a like provision for filing and entering transcripts of federal judgments. If, therefore, in those states the lien of a judgment in a federal court was restricted to the county in which the court was held and the judgment rendered, the suitor in the state court would have an advantage over the suitor in the federal court in the matter of the judgment lien, because, while the suitor in the state court could extend the lien of his judgment to any other county in the state by filing a transcript of it in the clerk's office, the suitor in the federal court had no such right. In this condition of things the courts held that the lien of judgments in the federal courts was, by analogy to the state laws, co-extensive with the territorial jurisdiction of such courts. *Den v. Jones*, 2 McLean, 78; *Massingill v. Downs*, 7 How. 760; *Brown v. Pierce*, 7 Wall. 217; *Williams v. Benedict*, 8 How. 107; *Barth v. Makeever*, 4 Biss. 210; *Trapnall v. Richardson*, 13 Ark. 543; *Byers v. Fowler*, 12 Ark. 218.

In *Massingill v. Downs*, *supra*, the court said:

"In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by the express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."

The last sentence in this extract has reference to the fact (as is shown elsewhere in the opinion) that the state law made provision for extending the lien of judgments of the state courts by filing an abstract of the same in the clerk's office of any other county, but made no such provision with reference to judgments of United States courts; and suitors, therefore, in the state courts would be "in a much better condition than in the federal courts," if the lien of judgments in those courts was restricted to the county in which they were rendered. Before the case last cited was decided, the difficulty in the way of putting the liens of judgments in the two jurisdictions on an equal footing as to the territorial extent of the lien had been pointed out by Mr. Justice McLEAN, sitting in the circuit. He said:

"The law of the state, which extends the lien of a judgment of a circuit court of the state to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to be recorded by any clerk of the state court. * * * If it shall be deemed important to have the records of the judgments of this court recorded in the county where the lands of the defendant are situated, it may be required by act of congress, or by a rule of this court, if the law of the state shall require the clerks to make such record." *Den v. Jones*, 2 McLean, 83, 85.

It is quite obvious that if congress or the federal courts had possessed the power to require the clerks of the state courts to enter on the records of those courts the judgments of the federal courts as was provided in

the case of judgments of the state courts, that the rule that the lien of a judgment of a federal court was co-extensive with the territorial jurisdiction of the court would never have been adopted. The process acts did not cover the case, and could not be made to do so. If the courts held the lien was restricted to the county in which the judgment was rendered, this would give a preference to suitors in the state courts, because they could extend the lien of their judgments beyond the county in which they were rendered by filing transcripts in the clerk's office of other counties; but suitors in the federal courts were denied that privilege. The rule, therefore, was adopted of making the lien co-extensive with the jurisdiction of the courts. This rule resulted in giving suitors in the federal courts a preference over those in the state courts as to the territorial extent of the lien, and worked a hardship on the citizens generally. The mass of the people relied confidently on the records in the clerk's office of their county disclosing all judgments that were liens on property in the county. Most people were ignorant of the all-pervading lien of a judgment in a federal court, and they bought and sold lands on the faith of what the county records disclosed. The result was that cases of great hardship occurred. Persons who bought and paid for lands on the faith that the records in the county clerk's office showed the condition of the land with reference to judgment liens thereon, afterwards lost their lands by reason of the liens of judgments in federal courts held in some other county, and often at a distance of hundreds of miles from the county in which the lands lay. To correct these hardships, and to put the suitors in the state and federal courts on an equal footing in respect of the territorial extent of the liens of judgments in the two jurisdictions, in so far as congress could do it, the act of August 1, 1888, (25 U. S. St. 357,) was passed. That act provides—

"That judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state. * * * Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the state of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

The first clause of the act places judgment liens in a federal court on the same footing in all respects as a judgment lien in a state court of general jurisdiction. But the power of congress was not adequate to the task of extending the territorial operation of a judgment lien in the mode

provided by state laws for a judgment in the state court. Congress was confronted with the difficulty pointed out by Mr. Justice McLEAN,—the law of a state might provide for filing and docketing a transcript of a judgment of a state court in the clerk's office of any county in the state, and in this way extend the lien of a judgment beyond the county in which it was rendered. But there was no federal clerk's office, or other like office, in each county in the state in which a judgment rendered in a federal court could be docketed; and congress could not make it obligatory on the state clerks to docket and enter a judgment of a federal court on their records. But it was entirely competent for the state to require her clerks to perform this service, and the proviso in section 1 of the act declares, in legal effect, that when the laws of a state provide for docketing in her clerks' offices, or other offices, the judgments of federal courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a federal court in that state shall be the same as that of a judgment in the state court. Where the laws of a state provide for docketing the judgments of its own courts in any county in the state, but do not make a like provision as to the judgments of the federal court, the act of congress is not operative; and in such states the lien of a judgment of a federal court continues to be co-extensive with its territorial jurisdiction. The law of this state conforms exactly to the requirements of the act of congress, and makes it operative in this state. The statute reads as follows:

"Judgments of courts of record of this state, and of courts of the United States rendered within this state, shall be liens on the real estate of the debtor within the county in which the judgment is rendered from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered. An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor within that county from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk. Executions shall only be issued from the court in which the judgment is rendered." Gen. St. Kan. 1868, c. 80, § 419.

Under this statute it is plainly the duty of any clerk of the district court of the state, when the journal entry of a judgment rendered in a federal court held in this state is filed in his office, "to enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk." The words "any judgment" in the second sentence of the section obviously, and according to every rule for the construction of statutes, include the judgments specifically mentioned in the first sentence of the section. It may or may not include others, but it undoubtedly includes them. Section 3 of the act of congress expressly provides that the act shall not be construed to re-

quire the filing of a transcript of a judgment of a United States court in the county clerk's office of the county in which the judgment was rendered, in order that such judgment may be a lien on any property within such county. The result is that a judgment in a United States court in this state is a lien on the lands of the debtor only in the county in which the court was held and the judgment rendered; but the lien may be extended to any other county, in the mode provided by section 419 of the General Statutes of the state above quoted.

The defendants' judgment was not a lien on the lands of the debtor in Wabaunsee county, and the plaintiff is entitled to an injunction, as prayed for in its bill. Decree accordingly.

FOSTER, J., concurs.

CURIEL v. BEARD, Collector.

(Circuit Court, D. Massachusetts. December 26, 1890.)

1. CUSTOMS DUTIES—CONSTRUCTION OF LAWS—AMER PICON.

The preparation known as "Amer Picon," which is prepared by Picon & Co. according to a private formula used by them, which contains from 30 to 40 per cent. of alcohol, and which is advertised as a specific against malaria, and also as a tonic, is dutiable under act Cong. March 3, 1883, Schedule H, as "bitters containing spirits," and not under Schedule A of said act, as a "proprietary preparation," though it is not used as an intoxicating beverage.

2. SAME—BOTTLES.

The glass bottles containing "Amer Picon" are dutiable under said Schedule H as bottles containing spirituous liquors.

At Law.

This was an action at law by Herman A. Curiel against Alanson W. Beard, collector of customs for the port of Boston, and was heard by the court without a jury. The facts in the case were agreed to be as follows:

"That plaintiff, on September 30, 1889, imported into the port of Boston from Rouen, France, the preparation known as 'Amer Picon,' and entered it for warehouse at 50 per cent. *ad valorem*, under the clause in Schedule A of the act of March 3, 1883, providing for 'proprietary preparations;' that the collector classified said merchandise as 'bitters containing spirits,' at two dollars a gallon, under the clause in Schedule H of said act, providing for 'cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters containing spirits;' that due protest and appeal were made, and that the secretary of the treasury decided that said merchandise was duly assessed with duty at two dollars a gallon, and affirmed the decision of the collector; that thereupon plaintiff withdrew from warehouse part of said merchandise for consumption, paid duties thereon at the rate of two dollars a gallon, and duly brought suit to recover the excess of duties paid by him; that said 'Amer Picon' is prepared by Picon & Co., Rouen, France, and recommended by them to the public as a remedy or specific against malaria or fever affecting the human-body; that it is prepared by them as manufacturing chemists, according to a private formula owned by them, and put up in glass bottles in which is blown the words 'Amer Picon,' Phillipsville; that on each

bottle is a printed label; that said 'Amer Picon' was advertised as a remedy against said diseases in the American Medical Association Annual and in the Medical Record, which are medical publications, and also in the New York World, New York Times, and New York Herald of September 1, 1889; that plaintiff is the agent of said Picon & Co., and that said 'Amer Picon' is sold by the importer to druggists and apothecaries only; that the articles named in Schedule H, as above, are usually sold in bar-rooms; that the definition given to these articles in the standard dictionaries may be taken as the true definition, and that, so far as known, 'Amer Picon' is not sold in bar-rooms as a beverage or otherwise, and that said 'Amer Picon' contains between 30 and 40 per cent. of alcohol; that a duty of three cents a bottle was exacted by defendant on the bottles containing said 'Amer Picon' under said Schedule H, providing for a duty on bottles containing wines, brandy, and other spirituous liquors."

The sections of the statute which are here under consideration will be found in 22 St. at Large, pp. 494, 505.

J. H. Robinson, for plaintiff.

The name "Amer Picon" literally signifies "Picon's Bitters;" Picon & Co. being the manufacturers.

(1) The article in question is a "proprietary preparation," within the meaning of the law, being prepared according to a private formula owned by the manufacturers, and being recommended and used as a remedy against disease. *Ferguson v. Arthur*, 117 U. S. 482, 6 Sup. Ct. Rep. 861.

(2) The article in question is not included under the words "similar spirituous beverages or bitters, containing spirits." It is not provided for by name under this paragraph, and the articles which are named are spirituous beverages only, and sold as such in bar-rooms, by liquor-dealers, for their intoxicant effects alone, and the composition of them is well known. The article here in question is therefore not "similar" to those which are in this paragraph specified by name. *Greenleaf v. Goodrich*, 101 U. S. 278; *Schmieder v. Barney*, 113 U. S. 645, 5 Sup. Ct. Rep. 624.

(3) The article in question is specifically enumerated and provided for in Schedule A as a "proprietary preparation," and is therefore within the exception in the paragraph of Schedule H. *Hartranft v. Langfeld*, 125 U. S. 128, 8 Sup. Ct. Rep. 752.

(4) Since the article in question should be classified as a "proprietary preparation," it follows that the bottles are not dutiable under Schedule H. The protest is sufficient to support this action so far as it relates to the bottles, because it claims that the substance contained in the bottles is dutiable only under Schedule A; and the collector was therefore well notified of the grounds of the claim that the inclosing bottles were not dutiable as containing wines, brandy, or other spirituous liquors. *Swanston v. Morton*, 1 Curt. 294; *Burgess v. Converse*, 2 Curt. 216, 18 How. 413; *Steegman v. Maxwell*, 3 Blatchf. 367; *Arthur v. Morgan*, 112 U. S. 501, 5 Sup. Ct. Rep. 241.

T. H. Talbot, Asst. Dist. Atty., for defendant.

(1) The protest as to the assessment and payment of the duty on the bottles is not sufficient to enable the plaintiff to recover in this action. The protest should set forth distinctly and specifically the grounds of the objection. Rev. St. § 2931. In this case the plaintiff has merely protested against the decision assessing duty at three cents a bottle, without stating any grounds of his objection. *Curtis v. Fedler*, 2 Black, 461; *Swanston v. Morton*, 1 Curt. 294; *Thomson v. Maxwell*, 2 Blatchf. 885; *Chung Yune v. Kelly*, 14 Fed. Rep. 639.

(2) The article in question is properly dutiable as "bitters containing spirits." The proper name of the preparation is, in English, "Picon Bitters." This brings it in terms within the provisions of Schedule H.

(3) Assuming that the article in question is also included within the terms of the section relating to "proprietary preparations," it is still properly dutiable under Schedule H, according to the provision that, "if two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates." 22 St. at Large, p. 491, § 2499.

CARPENTER, J. I think this case ought to be decided by reference to the composition and use of the liquid substance which is contained in these bottles. The plaintiff claims that such substances as are included under the name "proprietary preparations" have use as medicines distinctively, and that such as are included under the paragraph beginning "cordials, liquors, arrack," etc., have use as intoxicating beverages. I think, however, that the last-named substances, while used as intoxicating liquors, have also a use as tonics, not in the sense in which that word is commonly used, but in the sense in which it is discriminatively used in describing the operations of various substances upon the functions of the human body. That tonic effect undoubtedly is an effect distinctly different, physiologically, from the intoxicating effect. It therefore follows that the fact that this substance is not used as an intoxicating beverage, which I infer from the fact that it is not sold in bar-rooms, is not conclusive upon the question whether it be or be not a tonic. But the composition of the substance, as well as the representations of the makers of the substance, seem to me to be conclusive upon that question. With great accuracy in their advertisements and on their labels, they describe the uses of this substance, and they describe it, in the first place, to be a preservative against fevers, and, in the second place, as having "tonic properties," and as being an "excellent restorative." Substances having such qualities do not come within the description of remedies for disease, and I therefore find this substance in question to be under the definition of that schedule of the act under which the collector has decided it to be dutiable.

Plaintiff's counsel contends with much acuteness that the clause relating to proprietary preparations contains a specific enumeration as compared with the clause under which I find this substance to be dutiable. The words "generic" and "specific" are relative words. The name which is said, by comparison with some other name, to be "specific," is so said because the definition given of the name alleged to be specific limits the subject under consideration more or further than the definition which is assigned to that name which is called "generic." In this case I see no substantial difference in extent and breadth of specification between these two sections. The two names given are, in substance, "proprietary remedies" on one hand, and "spirituous beverages" or "bitters" on the other, and they seem to me to be, for practical purposes, equally general.

On the question of the tax assessed upon the bottles, I am convinced by the argument of the learned counsel that the protest is sufficient to authorize a recovery if such an error had been made as he claims to ex-

ist. The substance, however, being dutiable in manner as I have decided, it follows, I think, that the bottles are dutiable as containing "spirituous liquors," according to the provisions of Schedule H of the tariff act.

Judgment for the defendant.

CHASE v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, N. D. Georgia. December 23, 1890.)

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—DAMAGES.

The receiver of a telegraphic message, the delivery of which has been negligently delayed, cannot recover for mental suffering alone, unaccompanied with other injury.

(Syllabus by the Court.)

At Law. On demurrer to declaration.

Blackburn & Garrett, for plaintiff.

Bigby & Berry, for defendant.

NEWMAN, J. The plaintiff avers that by gross negligence the defendant delayed the delivery of a telegraphic message to him, whereby he was prevented from reaching the death-bed of a brother-in-law, and by reason of which he reached the point where the relation died several hours after death; his sister, in the mean time, being compelled to appeal to strangers for assistance, on account of which he was caused serious inconvenience, great mortification, and mental suffering. He claims punitive and vindictive damages in the amount of \$5,000. To this declaration a general demurrer is filed. Can a recovery be had for mental suffering and anguish alone, unmixed with other injury? is the question presented by this demurrer. The negligence of the defendant is sufficiently averred; and it seems to be settled in this country, contrary, however, to the English cases, that the receiver of a telegram may recover damages actually sustained by negligent delay in delivery. An examination of the adjudged cases, however, shows that the great weight of authority is against recovery in a case like this for mental suffering alone.

In the case of *Relle v. Telegraph Co.*, 55 Tex. 308, it was held that "a telegraph company is liable for an injury to the feelings of a son by the willful neglect to deliver to him a message announcing the death of his mother, whereby he was prevented from attending her funeral." But in the subsequent case of *Railway Co. v. Levy*, 59 Tex. 563, this opinion was overruled, and the court held as follows: "The plaintiff sued a telegraph company for delay in delivering to him a message announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. Held, that there could be no recovery for his mental suf-

fering." The case of *Relle v. Telegraph Co.*, *supra*, was referred to, and the court say "that it cannot be sustained upon principle, nor upon the authority of adjudicated cases." There are later cases in Texas on this subject, but I understand them to be in harmony with the case last cited.

In the case of *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. Rep. 574, this question was considered, and the majority of the court held that damages for mental suffering may be recovered. LURTON, J., with whom FOLKES, J., concurred, dissented, saying "that an action for injury to the feelings, or fright or grief, or other mental injury, cannot be sustained as an independent ground of action." It appears that there are statutes in Tennessee requiring telegraph companies to deliver telegraphic messages "correctly, and without unreasonable delay;" and for a failure to do so the defaulting company is declared to be "liable in damages to the party aggrieved." CALDWELL, J., who delivered the opinion of the court, lays some stress on this statute, and TURNEY, C. J., in a concurring opinion, rests his concurrence primarily upon this statute; holding that it covers all messages, and makes no distinction as to the character of messages. So that in this case a bare majority sustained the right of action for damages of this sort, and the right rested largely upon the statutes of the state.

I have found no other case that goes to this extent, nor has any such case been cited. On the contrary, quite an array of authorities deny the right to recover for damages of this character. *Russell v. Telegraph Co.*, (Dak.) 19 N. W. Rep. 408; *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. Rep. 807; *Railway Co. v. Levy*, 59 Tex. 542, 563; *Wyman v. Leavitt*, 71 Me. 227; *Johnson v. Wells*, 6 Nev. 224; *Nagel v. Railway Co.*, 75 Mo. 653; *Railway Co. v. Stables*, 62 Ill. 313; *Freese v. Tripp*, 70 Ill. 503; *Meidel v. Anthis*, 71 Ill. 241; *Joch v. Dankwardt*, 85 Ill. 333; *Porter v. Railway Co.*, 71 Mo. 83; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. Rep. 501; *Ferguson v. Davis Co.*, 57 Iowa, 601, 10 N. W. Rep. 906; *Stewart v. Ripon*, 38 Wis. 584; *Masters v. Warren*, 27 Conn. 293; *Blake v. Railway Co.*, 10 Eng. Law & Eq. 442; *Lynch v. Knight*, 9 H. L. Cas. 577; *Burke v. Railway Co.*, 10 Cent. Law J. 48; *Rowell v. Telegraph Co.*, (Tex.) 12 S. W. Rep. 534; *Thompson v. Telegraph Co.*, (N. C.) 11 S. E. Rep. 269, 30 Amer. & Eng. Corp. Cas. 634.

The telegram in this case was sent from one point in Georgia to another. Section 2943 of the Code of Georgia is as follows: "Exemplary damages can never be allowed in cases arising on contract." The plaintiff sues for punitive and vindictive damages only. I do not understand that this character of damages can be recovered, except for an actual tort. Any right of the plaintiff in this case would be for breach of an implied contract to promptly deliver the telegram, and it seems that vindictive or punitive damages would never be given in a case of this kind. The demurrer to the declaration in this case must be sustained.

MASON v. BEEBEE *et al.*

(Circuit Court, S. D. Iowa, C. D. December 17, 1890.)

1. GARNISHMENT—PROCEDURE—JUDGMENT ON ANSWER.

Plaintiff, having obtained a judgment against defendant, garnished a corporation for which defendant was working, whose answer was as follows: The persons forming the corporation, among whom was defendant's wife, agreed to devote their time and services to it without compensation; but it was agreed that defendant's wife should contribute the services of her husband instead of her own, and that, if necessary, \$25 a week was to be paid to her for her living expenses. This sum was paid her for a given time, but there was never any agreement whereby the corporation was to pay defendant anything, or whereby it employed him at all, except as a substitute for his wife, under said agreement. *Held*, that plaintiff was not entitled to judgment on the answer, as it does not on its face show any liability of the garnishee to defendant.

2. SAME—CONFLICT OF LAWS—EXEMPTIONS.

Where defendant is a resident of Illinois, and wages due him were earned there, the *situs* of the debt is Illinois, though plaintiff may have garnished the debtor while he was in Iowa, and by virtue of the principles of comity the Iowa court will apply the Illinois exemption laws to such wages. Limiting *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. Rep. 343.

At Law. Motion by plaintiff for judgment on answer of garnishee.

W. S. Clark, for plaintiff.

J. H. Jones, for garnishee.

SHIRAS, J. The plaintiff herein obtained judgment in this court against J. T. Beebee and I. N. Rice for the sum of \$449.85, on which execution was issued, and service thereof was had by garnishing the Rice-Hinze Piano Company, a corporation created under the laws of Iowa. J. C. Macy, the president and treasurer of the company, answered the garnishment on behalf of the company, and the plaintiff now moves for judgment on such answer, claiming that it appears therefrom that the garnishee, since the service of the writ of garnishment, has paid for the benefit of I. N. Rice, one of the execution debtors, the sum of \$500, which amount should have been held for the benefit of the execution plaintiff.

In the answer on behalf of the garnishee the following facts are stated: The Rice-Hinze Piano Company was organized at Des Moines, Iowa, in March, 1889, and continued the manufacturing of pianos at that place until about the 1st of June, 1890, when the factory was removed to Chicago. The capital stock of the corporation was fixed at the sum of \$25,000, of which J. C. Macy owned \$22,000, and Mrs. L. E. Rice, wife of I. N. Rice, owned \$1,000, and Mrs. Hinze \$2,000; that it was agreed that the members of the company should devote their time and services to the work of the company without compensation; that when Mrs. Rice subscribed for her shares of stock, it was agreed that she should contribute the time and services of her husband in place of her own, and that if it became necessary the company should pay her, for her living expenses, the sum of \$25 per week; that so long as the business was carried on at De Moines no payments were made her, but after the removal to Chicago weekly payments of \$25 were made to her. Touching any arrangement between

the company and I. N. Rice personally, the answer of Mr. Macy is as follows:

"Neither the Rice-Hinze Company, nor myself, as its representative, nor myself individually, nor no other person representing either the company or myself, has ever made any arrangements, direct or otherwise with I. N. Rice, or any one representing him, for his services, except as hereinbefore stated; that is, that Mrs. Rice should contribute the services of her husband to the company in place of her own services. The money that is paid to Mrs. Rice is charged to her account on the books of the company, and I. N. Rice has absolutely nothing to do with the matter. He is not employed by the company, is not working for the company, and is not paid by the company. He is simply sent there by Mrs. Rice to represent her interests, and to fill her position, and to do the work which, under the agreement made when said company was organized, was to be done by her, and which would be done by her if she were able and capable of doing it."

On part of plaintiff it is argued that it is fairly inferable from the whole of the answer made on behalf of the garnishee that the arrangement made between Mrs. Rice and the company is merely a means of hiring I. N. Rice, and for his services paying the agreed sum of \$25 per week. It is not to be denied that there is much force in the argument, and it may be true, as claimed, that the real purpose of the arrangement was to secure the services of I. N. Rice for the company at the price named, payment therefor to be made to his wife as a means of avoiding the claims of creditors, but I do not think the court is justified in so finding upon this motion.

To entitle an execution plaintiff to a judgment against a garnishee upon his answer alone, it must clearly appear that the liability exists. It is said by the supreme court of Iowa, in *Morse v. Marshall*, 22 Iowa, 290, that "in order to charge a garnishee on his answer alone there must be in it a clear admission of a debt due to, or the possession of money or attachable property of, the defendant. * * * If it be left in reasonable doubt, whether he is chargeable or not, he is entitled to a judgment in his favor." The same rule is reiterated in *Church v. Simpson*, 25 Iowa, 408; and *Hibbard v. Everett*, 65 Iowa, 372, 21 N. W. Rep. 683. In the answer of the garnishee in this case there is not only not a clear admission of a debt due, but an absolute denial of any liability whatever. True, these general statements are accompanied with details intended to show the actual arrangement between the parties, and if these details, fairly construed, showed a liability on part of the garnishee, it would be so adjudged, notwithstanding the general denial of liability. The difficulty is that if we accept as true the statement of the arrangement as made by the garnishee, it does not necessarily show that the company has been indebted to I. N. Rice in the past, or will become so in the future. Suppose the answer had stated that Rice worked for the company, giving his entire time and services thereto, but that the agreement was that he should do so without receiving any pay or compensation therefor, would the court be justified in rendering a judgment against the company for what it might deem was the reasonable value of such services, upon the argument that no reasonable man would make such an

arrangement, and that it must be a mere cover and sham? Clearly not, it seems to me. If issue is taken upon the answer of the garnishee, and evidence showing the fact of insolvency, and any and all other circumstances showing the real situation of the parties is introduced, then, upon such issue, the court will adjudge the matter according to the fair preponderance of the entire evidence, but upon a motion for judgment upon the answer alone the facts stated in the answer must be accepted as true, and the conclusion they require must be the one placed upon the answer. The result of a judgment in favor of plaintiff would be to compel the garnishee to pay to the plaintiff the sum of \$500, while it is not made to appear from the answer that if Rice had sued, in his own behalf, the piano company, he would be entitled to any judgment against the company. If this was an action by Rice against the company, and the only evidence offered was the testimony of Macy, president of the defendant, containing just the facts and statements set forth in the answer of the garnishee, it is clear that he could not recover thereon against the company, and that for the reason that it did not appear that the company was bound to him for the work he had done, but, on the contrary, that the company was not bound to pay him for his services. Under these circumstances, I do not think the liability of the garnishee is made to appear so clearly as to justify a judgment against it.

If, however, it should be held, according to the contention of plaintiff, that I. N. Rice is in fact engaged as a foreman or superintendent in the factory at Chicago, and that the company, for such services, has engaged to pay the price or wages of \$25 per week, the mode of payment testified to being merely a sham, then the question arises whether such salary or wages is not exempt from execution. Rice is a married man, and head of a family, and under the statutes of Illinois, as well as under the statutes of Iowa, his wages are exempt from execution, unless allowed to accumulate beyond \$50 in amount in Illinois or beyond 90 days in Iowa. On behalf of plaintiff it is contended that as Rice is now a non-resident of the state of Iowa, his wages are not exempt from execution. In a general sense it is held that matters of exemption pertain to the remedy, and are governed by the law of the state wherein suit is brought, but the reason for such holding is that the property sought to be reached is situated where the remedy is sought, and in truth it is the *situs* of the property that determines what statute shall govern in the matter of exemption. *Spindle v. Shreve*, 111 U. S. 542-546, 4 Sup. Ct. Rep. 522. As to all property situated in Iowa, it is the law of Iowa which determines what portion of it, if any, may be held exempt from execution. Therefore it is held that the provisions of the statute of Illinois, for illustration, cannot be invoked to protect property in Iowa from seizure upon execution, even though the cause of action may have arisen in Illinois, and between citizens of that state. *Newell v. Hayden*, 8 Iowa, 140.

The question, then, arises whether the property or debt sought to be reached by the process of garnishment in this case is situated in Iowa or in Illinois. From the answer of the garnishee it appears that the fac-

tory of the piano company is situated in Illinois; the work done by I. N. Rice was so done and performed in Illinois; the weekly payments were made to him in Illinois, and he is a resident of that state. As the weekly wages were earned and came due, the debt thus created was the property of I. N. Rice, and, as a chose in action, "follows the person of the owner and has its *situs* at his domicile." *Tappan v. Bank*, 19 Wall. 490. It is equally true that personal property may be held to have a *situs* other than that of the owner's domicile. Based upon this fact the supreme court of Iowa, in *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. Rep. 343, held that, under the attachment laws of Iowa, a debt due from the railway company to a resident of Nebraska, for wages earned in Nebraska, was a debt due in the state of Iowa, in such sense that a garnishment in attachment would give jurisdiction to the court, and further, that, the debt having a locality in Iowa, the question of exemption was to be determined by the law of Iowa, and, as the provisions of that law did not apply to non-residents, the attachment creditor could hold the debt, although by the statute of Nebraska it would have been exempt. It seems to me that the attention of the court could not have been fully given to the latter proposition; but it is assumed to necessarily follow from the ruling that the presence of the debtor in Iowa gave the debt a location in Iowa sufficient to sustain jurisdiction by attachment in the Iowa court. The *situs* of property for the purpose of jurisdiction is one thing, and its *situs* for the purpose of determining the rights of parties thereto is another, and the two are not necessarily the same.

I do not think the reasoning of the court in the *Mooney Case*, upon the point that a debt due from a person living in Iowa may be reached by garnishment upon attachment, under the provisions of the Iowa statute, and thereby jurisdiction may be acquired over the debt considered as property, can be successfully questioned; but even if there might be another side to the argument, yet that decision settles the law to be that a debt due from a person in Iowa to a non-resident may be deemed to be property in Iowa, within the meaning of the attachment laws of the state, so that by garnishing the debtor in Iowa jurisdiction can be secured in the attachment proceedings. The jurisdiction thus secured enables the court from which the writ issued to hear and determine all claims made touching the property, and to subject it to further process of the court. Does it follow that because the debt has a *situs* in Iowa, by reason of the presence of the debtor in Iowa, sufficient to sustain the jurisdiction of the court in attachment, that it may not be shown to have another *situs* with regard to other questions and rights?

To property thus seized by attachment a dozen claims may be asserted, and the court can hear and determine the issues thus presented. A lien for taxes may be asserted against the property, and the court will determine the *situs* of the property for purposes of taxation in determining the question of the priority of the lien for taxes. The garnishee may present various questions touching the extent of his liability, and these the court will determine with regard to the law of the place of con-

tract or performance as the case may require. It cannot be true that simply because the court originally obtained jurisdiction by garnishment upon attachment, the court is precluded from ascertaining the proper *situs* of the property with regard to other rights and questions that may be asserted to the property. The jurisdiction of the court having attached, then all other questions are to be decided upon their own merits, and just the same as though the jurisdiction had attached by means other than by attachment.

In the case at bar the jurisdiction was obtained by personal service upon I. N. Rice in Iowa, and the garnishment was had upon execution, and not upon attachment. Certainly it cannot be true that the question whether the debt due Rice for wages earned in Illinois is or is not exempt from seizure in Iowa is to be determined or influenced by the fact that the garnishment was upon attachment rather than upon execution. The real question is whether Rice can claim the benefit of the Illinois exemption, and this depends upon the ruling as to the *situs* of the property with reference to the exemption laws, and not upon any difference between the process of attachment or of execution under the statutes of Iowa. The jurisdiction of the court in a given case having attached, whether based upon personal service or upon service of a writ of attachment by garnishment, then the court can determine whether the attached property should be sold upon execution or be released because exempt from seizure for debt, and this question should be determined the same in a case wherein jurisdiction rests upon a garnishment as in a case wherein personal service was had upon the defendant within the territorial jurisdiction of the court. The query is, what is to be deemed to be the *situs*, with regard to the exemption law of Illinois, of a debt due for wages earned in Illinois by a resident of that state? Why not, to such a case, apply the general rule that a chose in action has its *situs* at the domicile of the owner thereof? True, it may be said that this is a fiction of the law which will, in many instances, be disregarded. Is it, however, any more of a fiction than to hold that the *situs* of the debt is wherever the debtor may be found? Fiction or not, it is the primary or general rule, and will govern unless good reason exists for adopting some other guide. What principle is there, or statutory provision, which requires the holding that the exemption afforded by the Illinois statute to wages due should be lost to a resident of that state simply because the debtor happened to come, for a single day, into Iowa, and was here garnished upon execution? If a resident of Illinois buys realty in Iowa, or sends personal property, like cattle or horses, into Iowa to here remain, he, by his own act, subjects the property to the laws of Iowa, and is conclusively bound thereby. If A., a resident of Illinois, engages in the service of B., likewise a resident of Illinois, his wages, if he is a head of a family, are exempt to the amount of \$50. B. comes to Iowa for a temporary purpose, and is garnished on an execution against A. issuing from a court in Iowa. Did B., by coming to Iowa, without the knowledge, perhaps, of A., change the *situs* of A.'s property, to-wit, the sum due him for wages, so that the benefit of the exemption secured to

him by the Illinois law is thus lost to him? Is the *situs* of A.'s property, to-wit, the debt due him for wages earned in Illinois, changed back and forth every time B. chooses to cross the Iowa state line? Why not hold that the *situs* of the property, in view of the exemption laws, remains unchanged at the domicile of the owner of the chose in action?

But it may be said that it is only on the principle of comity that Iowa will recognize and give force to the laws of another state. This may be true, but if the basis of recognition be comity only, it is, nevertheless, the fact that recognition should be given to the laws of a sister state, when justice and fair dealing require it, unless the right claimed is contrary to public policy or some statutory or other established rule of law in Iowa. The statutes of Iowa, in this regard, are in entire accord with those of Illinois. It is the settled policy of Iowa to exempt the wages earned by the head of a family. No ground, therefore, exists for refusing to recognize the law of Illinois on the theory that such recognition would contravene the rule prevailing in Iowa on that subject. The supreme court of Iowa, in *Teager v. Landsley*, 69 Iowa, 725, 27 N. W. Rep. 739, held that the courts of Iowa would, by injunction, restrain a citizen of Iowa from prosecuting a suit by attachment in Minnesota against another citizen of Iowa, and by garnishment reaching a debt due for wages earned in Iowa. It was held that the jurisdiction to issue the injunction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, "to restrain them from doing acts which will work injury and wrong to others, and are contrary to equity and good conscience," it being further said that "the settled policy of this state is to exempt certain property from the payment of debts. Contracts are made and credit extended with full knowledge of the law in this respect, and the state, we think, has the power to compel its citizens to respect the laws beyond its territorial limits." If it is the settled policy of this state that wages earned in this state, and exempt from execution under the laws thereof, will be protected from seizure in Illinois whenever the courts of Iowa can afford such protection, by enjoining the creditor from prosecuting his suit in Illinois, and this for the reason that it is contrary to equity and good conscience to permit the creditor, by suing in Illinois, to evade the settled policy of Iowa in exempting wages from seizure for debt, why should the courts of Iowa encourage citizens of Illinois to come into this state for the purpose of evading the settled policy of the laws of Illinois by subjecting, through the process of Iowa courts, wages earned in Illinois, and exempt by the laws of that state, to the payment of their claims? Is it consistent for the courts of Iowa to forbid, by injunction, its own citizens from suing in Illinois for the purpose of evading the exemption laws of Iowa, and at the same time entertaining suits by citizens of Illinois brought here for the purpose of evading the exemption laws of Illinois? If this becomes the settled doctrine in Iowa, and is accepted as the correct rule of law, it must be expected that the adjoining states will adopt the same principle in dealing with the citizens of Iowa, and what will be the necessary consequences? Thousands of men are in the employ of the for-

sign railway and other corporations in this state. Under the law of Iowa, wages are exempt to heads of families. If the rule announced in *Mooney v. Railroad Co.*, *supra*, is carried out, without modification, the protection intended to be secured to the families of the wage-earners, by the exemption law of the state, is practically destroyed. A creditor can go to Illinois or Wisconsin, bring suit by attachment, garnish the railway company, and defeat the Iowa exemption on the fiction that the debt due from the corporation has a *situs* in the state wherein suit is brought. It may be answered that the Iowa courts will enjoin the creditor from so doing under the rule followed in the *Teager Case*. The creditor may not reside in Iowa, or, if a resident, he may absent himself from the state, so that personal service cannot be had until the attachment suit is disposed of, or by the easy device of selling the claim to a non-resident the effect of an injunction may be avoided. At best, the cost of an injunction suit renders that form of protection valueless to the wage-earner. Practically, therefore, the doctrine laid down in the *Mooney Case* strips the families of workmen in Iowa of the protection the statute intended to give them. By holding, as that case seems to do, that the *situs* of a debt due for wages earned in Iowa, in regard to this matter of exemption, is to be deemed to be wherever the debtor may be found for purpose of garnishment, it follows that the creditor of the workmen may evade the Iowa statute by the simple device of bringing, or causing to be brought, an attachment suit in an adjoining state. The injustice and inequity of such a result, it seems to me, may be avoided by holding that when, by garnishment upon execution or attachment, it is sought to reach a debt due for wages, the court has the right to determine whether the debt is or is not exempt from seizure upon judicial process, and that in the determination of this question the *situs* of the debt will be deemed to be at the domicile of the wage-earner by whose labor the property, *i. e.*, the debt due him, was created. In the case of corporations carrying on business in several states wages earned will be governed by the law of the place where the workman has his domicile, according to the primary rule regarding the location of choses in action.

If a workman, living in Iowa, earns wages in Iowa for work done for a foreign corporation, the question of the exemption or non-exemption of such wages should be governed by the law of Iowa, no matter where the tribunal may be located that is required to hear and determine the question. Is there any reason, either in matter of form or of substance, that prevents courts from adjudging, in such cases, the rights of parties, according to the law of Iowa, or the law of Illinois, as the case may be? I can see no difficulty in so doing. For illustration: Suppose suit is brought in Iowa by attachment against a non-resident, and service is had by garnishing a supposed debtor living in Iowa. The garnishee answers that he is indebted to the defendant for goods sold him on credit in one amount and for wages for work done in Illinois by the defendant, a resident of Illinois, in another amount. A third party appears, and, being allowed to intervene, sets up that the debt due from the garnishee for goods sold had been assigned to him for value before service of the

writ of garnishment, and therefore the attaching creditor could not subject that debt to execution. The defendant in the attachment suit also appears, and sets up that the debt due from the garnishee for work done was for wages earned in Illinois for work done therein, he (the defendant) being the head of a family, and therefore the wages are exempt. Would not the court be charged with the duty of hearing and determining both the issues thus presented? In passing upon the claim of the intervenor, would not the court ascertain the facts of the transfer, and, finding that it had been made in Illinois, where both the defendant and the intervenor lived, would not the court apply the law of Illinois, in determining whether a legal and valid transfer of the debt had been made, and would it be debarred from viewing the fact of the transfer in the light of the Illinois law, simply because the suit in Iowa had been brought by attachment and garnishment? If, then, it appeared that a valid transfer of the claim had been made, according to the law of Illinois, before service of the writ of garnishment, would not the intervenor defeat the attachment? Coming, now, to the issue as to the wages earned in Illinois, the court would, in like manner, ascertain the facts; and, it being made to appear that by the law of Illinois wages earned by heads of families are exempt from execution; that the attachment defendant lived in Illinois, and by working for the garnishee in Illinois had earned certain wages due and payable in Illinois; and that he was the head of a family, and was such when the wages were earned,—then the question would arise as to the law that should be applied in determining the question of exemption. The law exempting wages from execution goes upon the principle that the family of the workman has an interest therein, and the protection of the statute is afforded only to wages earned by the heads of families as distinguished from persons not so situated. Practically the exemption statutes, both of Illinois and Iowa, assign to the families the wages earned by the head thereof; and in *Teuger v. Landsley* the wife joined with the husband in suing out the injunction sustained in that case. Why should not the court, then, hold that when the wages were earned in Illinois by a resident head of a family, the statute of Illinois practically assigned the debt due for the wages thus earned to the family, and that the same force should be given to such statutory assignment as to a written assignment to a third party as against a writ of attachment in another state against the head of the family alone? But, aside from all refinements of this nature, upon the true principles of that enlightened comity that should exist between the sister states of this Union, it seems clear to me that the courts of Iowa should give full recognition to the policy of the Illinois statute, which is in harmony with that of Iowa, which is that the wages earned by the head of the family belong to the family, and cannot be seized for the debt of any member thereof, and that the beneficent purpose of the statute cannot be evaded by the device of crossing the state line and bringing suit in the courts of an adjoining state. The benefits of the exemption thus provided can be saved to all without trenching upon the jurisdiction conferred by the attachment laws of the state. The question

to be decided is not one of the jurisdiction of the court, but of the right of the family to wages earned, a right to be settled by the law of the place where the workman lives and performed the work which created the debt.

I have been drawn into this lengthy discussion of this question because of the conviction that the rule deduced from the *Mooney Case*, if carried out to its fullest extent, will work an unnecessary hardship to the very class of Iowa citizens which the Iowa statute was enacted to protect. For this reason I have argued the proposition at length, when it might have been sufficient, for the purpose of the present case, to have held that in a controversy in fact between non-residents of Iowa this court was free to determine the rights of the parties according to the law of the place where the wages were earned, it not being a question arising under any statute of Iowa. If, then, it be held that in fact the sums paid weekly to Mrs. Rice, by the garnishee, were so paid as wages earned by her husband, according to the contention of plaintiff, yet as it also appears that the wages were earned in Illinois, at the place of residence of Rice and his family, the conclusion would be that under the Illinois statute such wages are exempt from execution, and the garnishee is not liable to respond to the plaintiff herein for the amounts thus paid. For these reasons the garnishee is discharged.

TELANDER v. SUNLIN *et al.*

(Circuit Court, D. Minnesota, Fourth Division. January 13, 1891.)

1. MASTER AND SERVANT—NEGLIGENCE—FOREMAN'S AUTHORITY.

Where an employer places an employe as foreman in charge of a piece of work requiring several days' labor, away from his own factory, and of such a nature as may reasonably be supposed to require the use of appliances for raising and lowering a heavy piece of iron, but does not furnish such appliances, the foreman has implied authority to provide blocks and tackle by borrowing or otherwise, and if he obtains and uses insufficient ones, whereby a workman under his control, without fault on his own part, is injured, the employer is liable.

2. SAME.

The fact that at the commencement of the work sufficient blocks and tackle were in the required position, and were used by the foreman in doing part of the work, does not rebut the presumption of authority to procure what was needed, when such blocks and tackle were placed there by a third person, who had borrowed them for his own use in doing a different part of the work, and who afterwards removed them.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff was working in a dark place, on the interior of a large iron hoop, when the latter was raised and held suspended by rope and tackle, and he was directed to remove some dirt and stones from underneath it. While doing so the rope broke, and his hand was injured. He testified that he had a monkey-wrench in his hand, but it was crooked, and he could not use it, and that he was removing a stone weighing four or five pounds with his hands when the injury occurred. Held no sufficient proof of contributory negligence to warrant the court in directing a verdict.

At Law. On motion for a new trial.

This action is brought to recover damages for personal injuries. It was tried before a court and jury at the September term of the court, at Minneapolis, for 1890. The plaintiff had a verdict for \$1,000, and a motion for a new trial was made by the defendants in due time, and heard before Judge NELSON and myself on the 10th day of November, 1890.

The leading facts developed at the trial are as follows: The defendants are boiler-makers, doing business in Minneapolis, and were at the time of the injury engaged in putting an intake pipe in position over a turbine wheel case for the Humbolt mill at Minneapolis. The intake pipe is a cylinder of boiler iron, weighing about 3,500 pounds, and large enough to permit four or five men to work inside of it. When in position it rests on and is riveted to the wheel case, which is outside, and surrounds, the turbine wheel. The intake serves as a conduit for the water passing in and over the wheel. There is an iron shaft from the center of the turbine wheel, extending up to the top of the platform in the wheel-house. The defendants had the contract of putting in this intake and riveting it to the wheel case. One Peterson was a boiler-maker in the employ of the defendants, and was placed by the defendants in charge of that work. The plaintiff was also in the employ of the defendants, and was furnished by them as one of the helpers to Peterson, and assisted him. He, (the plaintiff,) and the others with him, were under the control of Peterson, and were subject to his orders. The intake pipe was resting on uprights, five or six feet above the wheel case, and it was necessary to put an iron ring on and around it at the lower end. Through this ring the bolts are placed by which the intake is riveted to the wheel case when in position. The defendants instructed Peterson, a boiler-maker, to go down and put the ring onto the intake, and put the bolts in, and let the intake down and rivet it to the wheel case. Plaintiff and one or two others were sent to assist him as helpers. Pursuant to instructions, Peterson put the ring on the intake, and let the intake down onto the wheel case, and, after putting the bolts in and moving the intake around so as to bring the holes of the intake and the wheel case in corresponding position, found it necessary to raise the intake for the purpose of removing dirt and stones which had fallen in between the intake and the wheel case, thereby preventing the smooth surfaces from coming together. Plaintiff and others assisted in doing this work, as helpers, and worked under Peterson's orders, and subject to his control. When Peterson was ready to raise the intake, for the purpose of cleaning out the stone and dirt, he found that there was no rope and tackle, or other appliance, for doing the work. The one that had been used by him in letting down the intake had been taken away. Peterson looked around and found a rope and tackle lying down in the tail-race on the platform belonging to the defendants, but, as he says, it was too short and too small; therefore he did not use it. Defendants had no other, and owned no other, rope and tackle, except this one that was lying in the tail-race at the time. Peterson, after looking about, found a rope and tackle in the wheel-house of the Humbolt mill, and borrowed it of one Spillman, who was in charge of the mill, and, by using a chain in connection with

it that belonged to the defendants, he rigged up an apparatus by which an attempt was made to raise and hold suspended the intake while the dirt and stones were being cleaned out. The plaintiff, during this time, was down in the wheel case, where it was dark, and did not assist in putting up the apparatus, and did not see it, and could not from where he was at work. After getting the apparatus for raising the intake ready, Peterson placed some parties at the windlass to raise the intake, and gave orders to plaintiff and one Goula, who was in the wheel case with plaintiff, to clean out the stones when the intake should be raised. Peterson then ordered the intake to be raised, and as soon as it was lifted four or five inches plaintiff commenced to clean out the stones and dirt with his hands. The rope broke almost immediately after the intake was raised five or six inches, and the intake came down on plaintiff's hands while he was in the act of removing stones, and he sustained a permanent injury. Plaintiff says he had in his hand a monkey-wrench, but could not use it, as it was crooked, and he could not pick the stones out with it, and that he attempted to take them out with his hands, and he had his hand on a stone weighing four or five pounds that was between the surfaces when the intake fell. The other helper, Goula, used a stick, but plaintiff says that he did not see him, and that he received no instructions as to the means to be used. There was evidence tending to show that the rope was old and defective, and not of sufficient strength for the purpose, and that its defective character could be easily detected on inspection. There was also evidence tending to show that the iron shaft extending from the turbine wheel up through the intake to the wheel-house had a joint, or what is termed in the evidence a "nigger-head," on it, about three feet above the intake, and that the nigger-head rested on the plate that projected horizontally from the shaft about seven inches. Also evidence was given tending to show that the accident would not have happened if the chain by which the intake pipe was attached to the rope block had been so fastened as to come up over this obstruction on the shaft. Peterson made the attachment or hitch by doubling the chain. This had the effect of making an extra strain upon the rope by reason of the projection upon which the nigger-head rested. Peterson doubled the chain in making the attachment, instead of using it single, because, as he says, he thought that the chain was not strong enough unless it was doubled. Evidence was given to show that the chain, if it had been used single, would have come above the nigger-head, and thereby the extra strain would have been prevented, and that the chain was of sufficient strength to have been used single. When Peterson let the intake down at the time he removed the bolts, he used the rope and tackle that was then in position above the intake. This rope and tackle had been placed there by one Spillman, who was there in charge of the Humbolt mill, for the use of the mill. It belonged to the Twin City Iron-Works, and was borrowed by Spillman. It was placed in position by Spillman, and used by him in connection with another rope and tackle in letting the wheel down some two or three days before the accident. Defendants had nothing to do with letting this

wheel down, and it was no part of their work. It was work that belonged to the Humbolt mill alone. After the wheel was let down by Spillman, he left the rope and tackle in position, where he used it for a short time, and while it was there Peterson made use of it to let the intake down at the time he took the uprights out, and the defendants used it once to raise and lower the wheel case. Spillman, having no further use for this rope and tackle, returned it to the Twin City Iron-Works from where he borrowed it. It does not distinctly appear how long the rope and tackle was in position above the intake, but it does appear that the wheel was let down about two days before the accident; that this rope and tackle was obtained and placed in position for that purpose; and Spillman testifies that he took it home about two days before the accident. It could have been in position but a short while.

Spillman, a witness produced on the part of the plaintiff, testified in relation to the borrowing of this rope and tackle, as follows. Speaking of the Twin City Iron-Works tackle he says:

"*Answer.* It belonged to the Twin City Iron-Works. *Question.* You had sent it back? *A.* We had borrowed it for our own use, and when we got through with it I sent it back. *Q.* Borrowed it for your own use? *A.* Borrowed it for our own use. *Q.* It was not defendants that had it, then? *A.* No, sir. It was not the defendants. We had it. *Q.* Do you know whether Mr. Cour or Mr. Sunlin obtained permission to use the Twin City tackle? *A.* No, sir. I don't know anything about that. When I borrowed the Twin City tackle— That man there, Cour's partner, is the man I got it from; that is, he went and dug them up for me in the Twin City Iron-Works. *Q.* Mr. Sunlin got it for you? *A.* Yes. I borrowed it from him; that is, he got it for me. I borrowed it from him before, and I went down there to borrow them, and he is the man that helped me dig them up and find them. *Q.* Mr. Sunlin went down with you to get them? *A.* That is, I went into the boiler-works, and was looking around. I was a stranger, and went in and happened to find him, and I asked him where the rope block was, and he helped me find it. *Q.* You had permission before that to go and get it? *A.* Permission from somebody. I don't know. Scott got permission. *Q.* Did you prohibit the defendants from using that tackle for their work? *A.* No, sir. *Q.* Was this the first morning that Peterson was there at work? *A.* No, sir. He had been there before. Peterson had been there trying to put on the rim for three or four days, I guess."

Sunlin, one of the defendants, testified to the borrowing of this tackle, as follows:

"*Q.* Do you remember going with Spillman for the purpose of getting the Twin City tackle? *A.* Yes, sir. He came down to the shop— First I seen the man that I was figuring with on the work, and he says, 'Can I get the rope?' And I says, 'Yes.' And he says, 'I will send the men down.' And this man that was up here gave his name as Spillman. He came with another man, and he came to me and says, 'I want to get that rope.' I says, 'All right. I will get it for you.' And I took him into the machine-shop. *Q.* What machine-shop? *A.* In the Twin City Iron-Works machine-shop. First I went to the president, and the man that acts as superintendent, and asked him if I could get the rope and tackle, and he says, 'Yes.' And I says, 'I want to show this man where the rope was.' And I says, 'You can take it, because I will want this rope myself down there on this work.' *Q.* How long before the accident? Do you know? *A.* That must have been some—we

had four weeks to complete the job—it must have been some three weeks,—three or four weeks. Q. Did you have charge of this job yourself? A. No, sir. I just took and gave the man the price of the job, and he says the job was accepted, and that my price was accepted. Q. So Mr. Cour had charge of it, did he? A. Yes. Mr. Cour has charge of all the work. I did the figuring and took the contracts, and he attends to the work."

Defendants, or one of them, were at the place of work almost daily.

Arctander & Arctander, for plaintiff.

Ketchell, Cohen & Shaw, for defendants.

THOMAS, J., (*after stating the facts as above.*) At the close of the evidence defendants' counsel requested the court to direct a verdict for the defendants. The court overruled the motion, and the defendants took an exception. Upon the argument of the motion for direction at the trial, a number of points were made by counsel for the defendants. Without abandoning those made at the trial, only two propositions were argued and presented on this motion: *First*, that Peterson, the boiler-maker in charge of the work, had no express or implied authority to furnish or provide rope and tackle or other appliance for raising the intake when he found that the rope and tackle which he had used had been taken away, and that in borrowing, providing, and rigging up a defective rope and tackle, without instructions from the defendants, and without informing them that the other had been taken away, he was acting as a fellow-servant of the plaintiff; *second*, that the plaintiff was guilty of contributory negligence in using his hands in removing the stones and dirt, instead of a stick or some other implement.

The second proposition clearly cannot be maintained. The evidence does not present such a clear case of contributory negligence as would warrant the court in taking the case from the jury. The court could not say, in view of the facts and circumstances of the case, that the plaintiff's injury substantially resulted from a danger in using his hands to remove the stones and dirt that was so obvious and threatening that a reasonably prudent man, under similar circumstances, would not have so acted. Different minds might honestly draw different conclusions from the facts. *Railroad v. Stout*, 17 Wall. 657. The plaintiff had worked under the control of Peterson for several days. Nothing had occurred to indicate that he was not a careful and competent man. He had been with him and worked with him before he commenced to work upon this intake. The intake had been raised to remove the uprights and lowered safely under Peterson's directions. It was dark in the place where the plaintiff was at work, and he was directed to act and remove the stones when the intake should be raised; and in obedience to orders he immediately entered upon the discharge of his duties without any apprehension of danger. I think it was proper to submit this question to the jury. *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16.

The first proposition presents a more serious question. Upon well-settled principles of law the master is bound to use all reasonable care and precaution for the safety of those in his service by providing them

with machinery and appliances reasonably safe for their work, and keeping them in a reasonably safe and serviceable condition, and by providing them with a reasonably safe place to work, and by the observance of such care as will not expose the servant to unusual dangers or perils, which may be guarded against by proper diligence. These are duties which the master, as such, is bound to perform, and cannot be delegated so as to exonerate the master for liability to the servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent, or servant, or of a subordinate or inferior agent or servant, to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not the mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury. If the employe himself has been wanting in such reasonable care or prudence as would have prevented the accident, he is guilty of contributory negligence, and the employer is absolved from responsibility, although it was occasioned by the defect of the machinery through the negligence of the employer. *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; *McKinney*, Fel. Serv. p. 87, and cases cited. Applying these principles to the facts of this case, and all the legitimate inferences to be drawn therefrom, did the court err in refusing to direct a verdict for the defendants? It is the province of the court to determine whether an inference can be drawn, and of the jury to say whether it ought to be drawn. *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. The contention of the learned counsel for the defendants is that the defendants did supply rope and tackle amply sufficient for the work, and that no inference of authority to Peterson to supply other rope and tackle, or other apparatus, can be drawn from the facts. If, upon all the facts and circumstances of the case, an inference of authority to Peterson in the premises cannot be fairly and reasonably drawn, the exception is well taken, and this motion must be granted. Peterson was a boiler-maker of experience. He seems to have had the confidence of the defendants as a man competent, and possessed of the requisite skill, for the work intrusted to him, and they placed him in the entire charge of the work of putting the rim onto the intake, and letting it down and riveting it to the wheel case. Plaintiff and the other common laborers were placed under his control. There were no express limitations or qualifications in their instructions to him as to the work to be accomplished or the means to be used. His express authority clearly implied the authority to use or adopt such means as might, in the exercise of ordinary care, seem to be requisite to the full performance of the work. Were the physical facts developed at the trial sufficient to exclude any implied authority to Peterson to furnish or supply the appliances used, or any appliances, for raising or moving the intake? The defendants knew, or were bound to know, that the intake was too heavy to be raised and lowered by hand, and without the assistance of

appliances suitable for the purpose; that in carrying out the instructions Peterson might, and probably would, be engaged in the work several days; and that he would, or reasonably might, require the frequent use of appliances by which to move or raise and lower the intake safely. What provisions did the defendants make for supplying the requisite appliances? The rope and tackle that were lying in the tail-race were not furnished by them for that purpose. It was lying there; but it does not appear for what purpose it was left there, nor how it came to be there. It does not appear that it was contemplated that it was to be used in or about that work at all. Peterson examined it when he found that the other rope and tackle had been removed, and found that it was too short and too small; and there is no evidence tending to show that such was not a fact. It does not appear that the defendants owned any other rope and tackle. They owned the chain which Peterson found near the work and used; but that was insufficient except in connection with a rope and tackle. Does the fact that there was a rope and tackle suspended over the intake at the time Peterson took the uprights out, together with all the facts and circumstances connected with the obtaining and placing of that tackle in position, exclude any inference of authority to Peterson to supply other rope and tackle in any event? This rope and tackle was not owned or under the control of the defendants, and was not placed in position by them. It was borrowed from the Twin City Iron-Works, and placed in position by one Spillman, who was in charge of the Humbolt mill, for the use of that mill; and when Spillman was through with it he returned it to the owners. While the rope and tackle was suspended there the defendants used it in raising the wheel case, and Peterson used it in letting the intake down at the time he took the uprights out, without objection. They made no arrangements for the continued use of it, though they knew that the work was not completed. Defendants were about there almost daily, and although it is reasonable to suppose that they knew that the Twin City rope and tackle had been taken away at least two days before the accident, they gave no instructions to Peterson about supplying other rope and tackle or appliances, or made any provisions whatever for supplying rope and tackle to be used in the completion of the work. It is claimed that the defendants, or one of them, had assisted in procuring the Twin City tackle for their own use. But it is evident that the jury found from the evidence, as they legitimately might, that defendants did not borrow it, and had no control over it, and that they did not understand that they had any right to use it at the time it was borrowed by Spillman, or at the time they gave Peterson his instructions. While it was hanging there they used it, it is true, without objection. Then Peterson used it, but they knew that they had no control of it, and had made no arrangements for using it; that it was liable to be taken away at any time; and yet did nothing respecting rope and tackle or appliance. Sunlin, who assisted in borrowing the rope and tackle for Spillman, was not the member of the firm who did or looked after the work. He did the figuring, took the jobs, and Cour, his partner, had charge of the work; and yet Cour does not seem to have given any

attention to appliances for lifting or moving the intake. The jury probably inferred that the assistance of Sunlin was simply for the purpose of finding the rope and tackle for Spillman, and that he did not borrow or assist in obtaining it for the use of himself or his firm in that work. The evidence discloses that there were two ropes and tackle, or "blocks," as they are sometimes called, used by Spillman in letting the wheel down. One was the Twin City tackle and the other one was that used by Peterson at the time of the accident, which belonged at the Humbolt mill. Spillman attempted to raise the wheel a little with his own rope and tackle, and it broke; but it was there at the mill when Peterson went to the work, and so was the Twin City tackle. They were both there, it would seem from the evidence, when Peterson received his instructions, though neither was in position, and neither of them was under the control of the defendants. Taking all the facts and circumstances into consideration, I am of the opinion that it might reasonably be inferred that the defendants intended to invest Peterson with full power and authority to do all that in the exercise of ordinary care might be requisite and necessary to complete the work, and to select, use, or provide such means as might be at hand or reasonably obtainable for that purpose. No fault seems to have been found with Peterson by the defendants because he used the Humbolt mill rope and tackle instead of applying to them for instructions, or informing them that the Twin City rope and tackle had been taken away. I do not think that the court would be justified in holding that no inference of authority to supply tackle or some appliance could be drawn from the instructions to Peterson, in view of all of the evidence and circumstances of this case.

The court charged the jury as follows in respect to this question:

"In this case it was the defendants' duty towards the plaintiff to use reasonable and ordinary care and diligence to see that the tackle used in hoisting the intake was safe and sufficient for that purpose. It was the personal duty of the defendants to furnish a reasonably safe and sufficient tackle. If they failed to furnish such reasonably safe and sufficient tackle, they were guilty of negligence, and if, by reason of such failure on their part, plaintiff was injured, without fault on his part, he is entitled to recover in this action. If you find from the evidence that the defendants left the work in question in charge and control of the boiler-maker Peterson, and left it to him to find and provide the necessary tackle, and he, in providing the tackle to hoist the intake, was guilty of negligence, either in having too short a chain, or in using a rope which was unsafe, unsound, worn out, and insufficient for lifting the weight, such negligence on his part would be the negligence of the defendants, for the consequences of which they would be responsible to this plaintiff. In that connection you will see that I have left you to find whether or not the defendants authorized the boiler-maker Peterson to furnish and provide this tackle and rope and apparatus. That is left to you. If they did not authorize him to do so, within the rules which I shall give you; if he had no authority, either direct, or which you may infer from the testimony, but he found this tackle and used it himself as a voluntary act on his part, without authority from the defendants,—then the defendants would not be liable for his negligence in furnishing it. It would be the negligence of a co-servant, and the plaintiff could not recover in this action. So you must determine the question from the evidence, under the rules which I will give you

further along, whether or not he was authorized to find and provide the necessary tackle with which to raise this intake. This is a question of fact that is submitted to you."

The case of *Wilson v. Quarry Co.*, (Iowa,) 42 N. W. Rep. 360, cited and relied upon by defendant's counsel on this motion, is distinguishable from the case at bar. In that case there were no facts from which any inference could be drawn that Horner, who rigged up the defective appliance, had any authority whatever in respect to the machinery. The defendants undertook the construction of a double tramway down the incline, for the purpose of running cars thereon to carry off the strippings and other refuse of the quarry down in the direction of the Des Moines river, where it was to be dumped from the cars. Before the work of constructing the tramway was completed, one Stuart, who was the superintendent of the quarry, went away temporarily. During his absence the force of men at work in the quarry rigged up a tackle and snatch-block fastened to a tree to let down loaded cars. One Horner, an employe, who was below, called up to plaintiff to go on top of the hill and get a scraper. The plaintiff brought the scraper to the upper end of the tramway, put it on one end of a car, and he and another party got onto the car and commenced to make the descent. When the weight of the car came upon the tackle rigged and fastened to the tree, the pin in the snatch-block broke, the cars descended the incline at a great speed, which resulted in their jumping from the track and greatly injuring plaintiff. The action was founded upon the alleged negligence of defendants in using defective and dangerous machinery and appliances, by reason of which the plaintiff was injured. The defendants, in their answer, denied that any defective machinery or appliances were in use by its order, etc. It appears that Stuart was the superintendent, and in charge of the quarries, and that one Washer was the foreman under Stuart, and that he was also absent at the time, but that Horner was an employe, who worked where he was directed. He sometimes gave directions to other employes in regard to work in which they were engaged, and he had charge of the tools, and kept the time of the men. There was no evidence that Horner had been invested with authority respecting the work on hand, or that he had any authority to carry on the work, in the absence of the superintendent and foreman. The court, speaking by ROTHROCK, J., says:

"It is not claimed that the defective snatch-block was put in position for use by the direction of the superintendent, nor by Washer. It is claimed, however, that, as both were absent, Horner acted in the place of the superintendent, or, in other words, acted as and for the defendant, and that the snatch-block was used by his direction, and the jury all through the instructions given them by the court were charged upon the theory that there was evidence from which such a finding could be made. We do not think these instructions were proper under the evidence, * * * because there is no evidence that Horner had authority to direct what machinery or appliances should be used. He had neither the authority of selecting nor the power to put machinery in place, and we may say, further, that there is no sufficient evidence that Horner had any agency whatever, in fact, in putting the defective snatch-block in use."

The facts of that case preclude the possibility of an inference being drawn that the defendants, either personally or through their superintendent or foreman, did, or intended to, invest Horner with authority to perform any of their personal duties respecting machinery or appliances. The case of *Lund v. Lumber Co.*, 41 Fed. Rep. 202, is cited by both parties on this motion. In that case, Campbell, the superintendent, was the *alter ego* of the corporation, and ordered Lynch to haul a barge out of the water; and no special instructions were given him as to the machinery for hauling it out, or as to the appliances to be used. Defendants had in their saw-mill near the barge chains and ropes, old and new, and blocks and tackle, and Lynch selected an unsafe rope, and on account of its defective condition plaintiff was injured. It was held that Lynch had authority to select the rope, and that he was negligent in so doing, and that the negligence consisted in performing the personal duty of the master. In the case at bar Peterson was given general instructions to let the intake down and rivet it onto the wheel case. This direction carried with it, by necessary implication, the authority to select and use appliances appropriate for that work, unless the fact that the Twin City Iron-Works tackle being there at the work, as disclosed by the evidence, was a full compliance on the part of the defendants with their personal duty in furnishing suitable machinery for that work. For reasons before stated, I do not think that fact, in view of the evidence in this case, was such a compliance with the defendants' personal duty as to relieve them of responsibility.

The case of *Felch v. Allen*, 98 Mass. 572, cited by the defendant, is not applicable. A brief statement of the case, and a single extract from the opinion, is sufficient to distinguish this case. The defendants were transferring their chair factory from the basement to the attic. Plaintiff and one Hussey, common laborers employed by defendants, were directed by the foreman to move the stock. They carried up several loads of chair-stuff in baskets, when Hussey proposed that in order to relieve them from all fatigue in going up and down stairs they should use the elevator, which ran from the basement to the attic. It was an unsafe elevator, and the rope by which it was raised and lowered was worn and defective. The rope broke while plaintiff and his co-laborer were so using it, and the plaintiff was injured. It was not used by order of the foreman or defendants, and they did not know that it was being used. It was not provided for their use, and it was not necessary to use it. The plaintiff and the other co-laborer used it simply for their own convenience, and without the knowledge or authority of the defendants or their representative. On page 574 of the opinion, HOAR, J., says:

"The case, then, is simply this, that two servants of a common master are employed upon the same work; that one of them, without authority from his master, directs the other to use a machine for a dangerous and improper purpose, for which it was not intended and provided; that he complies, and receives an injury. There is no principle of law which will make the employer answerable for the damages in such a case."

The jury have found, under the instruction of the court, that Peterson was acting under the authority of the defendants in selecting, providing, and placing the defective rope and tackle; that he negligently performed the duty; and that the plaintiff, by reason thereof, was injured. Peterson stood in the place of and represented the defendants in respect to these personal duties that rested upon them, and his acts and omissions in respect thereto were the acts and omissions of the defendants, and they must abide the result. *Anderson v. Bennett*, (Or.) 19 Pac. Rep. 765. The motion for a new trial is denied.

NELSON, J., concurs.

GRIFFITH v. BALTIMORE & O. R. Co.

(Circuit Court, S. D. Ohio, E. D. December 17, 1890.)

1. **RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—NEGLIGENCE—BURDEN OF PROOF.**
The mere fact that plaintiff was injured by a train at a railroad crossing is not of itself sufficient to entitle him to recover damages therefor against the railroad company, but the burden is on him to show by a preponderance of evidence that the accident was due to some negligence on the part of the company.
2. **SAME—PREPONDERANCE OF EVIDENCE—WHAT CONSTITUTES.**
By the requirement that negligence shall be established by a preponderance of evidence, it is intended that the evidence adduced to show such negligence shall make a stronger impression on the jury than that produced to rebut it, without regard to the mere number of witnesses who testify to the facts on either side.
3. **SAME—CONTRIBUTORY NEGLIGENCE.**
Though it should be shown that defendant had been negligent in failing to blow the whistle and ring the bell on approaching the crossing, plaintiff cannot recover where the accident was due to his own negligence in not looking and listening for the train with a degree of care proportioned to the likelihood of such train passing at that time, and the difficulty of seeing and hearing it.
4. **SAME—SIGNALS—AFFIRMATIVE AND NEGATIVE TESTIMONY—RELATIVE WEIGHT.**
Other things being equal, the testimony of the engineer and fireman of the train that the whistle was blown and the bell rung as it approached the crossing is entitled to more weight than the negative testimony of other witnesses that they did not hear either or both.
5. **SAME—EXCESSIVE SPEED.**
Forty or forty-five miles an hour is not an excessive speed at which to approach a railroad crossing in the country, where the train which is running at that speed has a whistle and a bell which can be heard at the distance of a mile at least.
6. **SAME—DAMAGES.**
Where there is no evidence that the injury was inflicted on plaintiff willfully and intentionally, none but compensatory damages are to be allowed.
7. **SAME—PERMANENT INJURY—EVIDENCE.**
Evidence that plaintiff suffered from convulsions and epileptic fits after the injury, which he had never done before, is competent to be considered as tending to show that the injury is permanent.
8. **SAME—NEGLIGENCE OF DEFENDANT—EVIDENCE.**
Evidence that after striking plaintiff the train ran to the next station without stopping is immaterial on the question of negligence before the accident, where the engineer and fireman testify that they did not see plaintiff, and there is no evidence of wanton negligence on defendant's part.
9. **SAME—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.**
Affidavits on behalf of defendant that certain persons would testify that plaintiff had suffered from epileptic fits, which were sought to be attributed to his injuries, before the accident as well as afterwards, are no ground for a new trial, where those persons themselves make affidavit that such is not the fact, and that they will not so testify.

10. SAME—DIRECTION OF VERDICT.

Though there is positive evidence that the whistle was blown before the train reached the crossing, the court cannot direct a verdict for defendant where some of the witnesses testify that the whistle was blown more than 2,000 feet from the crossing, instead of within 80 or 100 rods of it, as required by Rev. St. Ohio, § 8336.

11. JUDGMENT—AMOUNT—INTEREST ON VERDICT PENDING STAY.

Where in such case there was after verdict a stay of proceedings pending motion for new trial, which motion was overruled, judgment will be entered for the amount of the verdict, with interest from the date of the verdict to the date of the judgment; such allowance being within the equity of the statute, (Rev. St. U. S. § 966.)

12. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—IMPUTED NEGLIGENCE.

In an action against a railroad company for personal injuries at a crossing, it was shown that plaintiff, a young girl, was in a carriage with her mother, and that the latter was driving when the accident occurred. *Held* that, while the mother's negligence cannot be imputed to plaintiff, it was as much the latter's duty to suggest the necessary precautions, and to protest if they were not taken, as it was the mother's duty to take them.

At Law. Charge to the jury.

S. M. Hunter, for plaintiff.

J. H. Collins, for defendant.

SAGE, J., (*orally*.) This action is to recover damages against the Baltimore & Ohio Railroad Company for injuries received on the 1st of August, 1888, at Locust Grove crossing, about four and one-half miles south of Newark, by the collision of a train with the horse and buggy in which the plaintiff was then riding with her mother, who was driving. The accident occurred about 12 o'clock at noon of that day. The testimony of the mother is that, between 10 and 11 o'clock, she started with her daughter from their home, 12 miles from Newark, intending to go to that city. They were in a phaeton buggy, the top of which was up, and the side curtains off, so that the view was unobstructed. When they reached "Hog Run Bridge," as it was called in the testimony, which is about a quarter of a mile from the crossing, they began, according to her testimony, to watch for the train. She states that they were watching for the noon train. They drove very carefully, according to her evidence. There was no sign of the train. Passing from the bridge, they went up a little hill, where they could see the track, and could have seen the train if it had been there; but they saw no train. Passing on up to the top of the hill, they drove carefully. Saw no sign of the train. At the top they stopped and listened, but heard nothing, and then drove slowly down the hill. She testifies that at the top of the hill they were about 50 yards from the crossing; that it was near train time, or, as she expresses it, "it was very close." Must have been 12 o'clock, she testifies, and that the noon train was due at 12. According to this testimony, gentlemen, the mother knew that the time for the approach of the train was at hand. Then, according to her testimony, they went down the hill slowly. On the right-hand side, which was the side from which the train from the south would approach, there is a bank, and a field of growing corn, 10 or 12 feet high, which, she states, shut out any view of the train; that by reason of these obstructions they could not see the track nor an approaching train until, as she expressed it in her testimony, they were within a very short distance

from the track. You will remember the testimony, gentlemen, indicating, perhaps, as far as where I am sitting to that corner of the window,—about 40 feet. When the horse's two fore feet were upon the track, they saw the train coming, as she expresses it, "like lightning," within a few yards of them. Her daughter threw up her hands and said: "Oh, ma!" and that was all that was said. Instantly the horse was struck in the neck and shoulder, and thrown some 60 feet, the phaeton some 30 feet, the daughter underneath, the mother rendered unconscious. She first regained her consciousness, and then managed to assist her daughter to a house near by. It is admitted that the daughter would testify that she had no recollection whatever of any of the facts that occurred. That is not a remarkable circumstance, gentlemen. It seems to be a merciful dispensation of Providence to paralyze the faculties and the feelings, so that, so far as it has been possible to investigate the matter, the general opinion of those who have given attention to it is that, even in the most dangerous and apparently painful accidents, there may be little actual pain or suffering at the time, but rather an unconsciousness, which renders the sufferer unable, in most instances, to recollect anything that occurred. At all events, it is admitted that this plaintiff would testify that she remembered nothing whatever of the circumstances. The mother testifies that they heard no whistle; that they were listening for it; and that they heard no bell. Now, upon cross-examination, she testified that from the end of the field of growing corn,—that is, from the lower edge of the growing corn,—to the track, the distance was about equal to that from one corner of the courtroom on the other side of the hall to the corner diagonally opposite,—I suppose 40 or 50 feet; and one witness (Mr. Holtzberry) testifies for the plaintiff (he was sitting in the smoking-car as the train approached, and the window of the car where he was sitting was up) that he remembers the approach of the train to that crossing on that day; that there was a whistle just when the train crossed Hog Run bridge, (railroad bridge,) and that was all the signal that he heard; that he did not hear the bell ring. There was the testimony of other witnesses that while the train was in rapid motion it would not be possible to hear the ringing of the bell on the train, even in the smoking-car. This witness, however, testified that he put his head out; was going to look to see whether he could see a coal train, which was following the passenger train, coming behind them, with reference to which you have heard the testimony. When he first put his head out, he looked in front, and saw the horse just coming down the steep bank onto the railroad track, and then the collision occurred, and he saw two persons,—one thrown towards the train, and the other towards the side of the hill; that it was about 75 yards from the crossing that he saw what I have stated to you. If that was true, gentlemen, why, it necessarily follows, it seems to me, that those in the buggy could see him,—that is, could see at least as far back on the train as to the smoking-car,—for the very obvious reason that if I, sitting here, can see the juror sitting in the corner, he, sitting in the corner, must be able to see me; and therefore,

according to this testimony, the train was visible to the occupants of the phaeton before the phaeton reached the track. Now, gentlemen, as to the testimony in this case, you are to be the judges. It is my duty to give you such instructions concerning the law as may be necessary for the proper understanding and construction of the testimony. Whatever I may say about the testimony will be only for the purpose of enabling me to make more clearly understood what I have to say about the law, leaving to you to decide, not by what I may say, but by your own recollection, what the facts are.

The ground of recovery in such an action as this must be the negligence of the defendant. That is not to be inferred as matter of course, nor from the mere fact of the occurrence of the accident; in other words, the happening of the event does not raise the presumption of negligence on the part of the defendant. The burden of proof is upon the plaintiff, by which it is meant that it is necessary for the plaintiff to establish, by a fair preponderance of testimony, that the negligence which is required to entitle a recovery occurred. By a preponderance of testimony is not meant, necessarily, by a greater number of witnesses, but that the testimony shall fairly preponderate,—that is, make the stronger impression upon your minds. For instance, one witness may create a stronger impression upon a jury, and properly so, than half a dozen witnesses testifying to the contrary, because by the manner, candor, and intelligence of a witness his or her testimony may so impress itself upon the jury as to overcome in weight the testimony of half a dozen other witnesses. That is what is meant by a preponderance of evidence,—that it shall produce a stronger impression. Ordinarily, witnesses being equal in other respects, the number of witnesses would control; but, as I have just stated, it is not necessarily so. Now there are mutual duties attending the approach of a train and the approach of travelers where the railroad crosses the highway at grade. The law requires that the railway company, under such circumstances, shall sound its whistle at a distance of at least 80 rods, and not more than 100 rods, from the place of crossing, and that the bell shall be rung continuously until the engine passes the crossing; and the law of Ohio expressly provides that, if either or both these signals are omitted, the railroad company shall be liable for any injury or accident happening by reason thereof. I will have occasion to speak of this further on. There is a duty also upon the plaintiff in every case, and that is to exercise ordinary care and prudence in approaching a crossing, taking into account the perils to be encountered, and all the other circumstances attending the approach. The degree of care required is that which persons of ordinary care and prudence are accustomed to employ for safety under like circumstances. It is the duty of a person approaching such a crossing to look and listen, whether he be in a vehicle or on foot,—to watch for the approach of the train; and especially, gentlemen, if the person approaching knows that a train is to be expected at or about the time, is this duty of watching and of listening and of care increased, because, manifestly, the care must be according to the circumstances; and if the crossing be a dangerous

one, that only makes it incumbent upon the traveler approaching to exercise greater care. At the same time, the person approaching has a right to expect that the whistle will be sounded, as required by law, and the bell rung; and yet the failure to sound the whistle or to ring the bell would not necessarily determine the case, because there is a rule relating to what is termed "contributory negligence" that must always be kept in view in passing upon cases of this character. If the party injured and claiming damages has, by his own carelessness or negligence, contributed materially to the injury, that is fatal to a recovery, because the law will not apportion the negligence. If the injury is chargeable in part to the negligence of the plaintiff, and in part to the negligence of the defendant,—in other words, if the negligence of the defendant, although it actually existed, would not have caused the injury but for the contributory negligence of the plaintiff,—then the plaintiff cannot recover, because the law does not recognize that there can be any division,—that there can be any computation and apportionment of the degrees of negligence in such case. There is a department of the law, in admiralty, where collisions occur between vessels at sea, where it is held that, if both parties be in fault, the damages shall be apportioned; but that is an exception. On the land, whenever both parties are in fault, that circumstance is fatal to a recovery, unless it appear that, notwithstanding the negligence of the plaintiff, the defendant might have avoided the injury; and there is no testimony in this case which makes that portion of the rule applicable, so far as I remember the testimony. Now whether the whistle was sounded depends upon the weight which you give to the evidence of the witnesses in the case, *pro* and *con*. I think that the mother of the plaintiff does not testify that it was not sounded, but she does testify that she did not hear it. I do not remember myself, gentlemen, that there is any other witness in the case who testifies that the whistle was not sounded. On the contrary, according to my recollection, every witness who testified upon that subject testifies that it was sounded. Some testify that it was sounded just as the locomotive came upon the Hog Run bridge; others, and perhaps a majority, that it sounded after the locomotive left the Hog Run bridge, and was approaching the crossing; that it was a whistle of about five seconds,—one long whistle. Upon the subject of the ringing of the bell, the testimony of the plaintiff is that she did not hear it. The testimony of several witnesses is that they did not hear it. The testimony also is that it was not possible to hear that bell on the train while it was in rapid motion; the general testimony in the case being that the train was moving at from 40 to 45 miles an hour. The engineer and the fireman testify positively that the bell was rung, and, other things being equal, that testimony is entitled to greater weight than the negative testimony, because there is a rule of evidence or presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to the negative may have forgotten. It is possible to forget a thing that did happen; it is not possible to remember a thing that never happened. That is a rule

recognized in the text-books, and it has been expressly recognized by the supreme court of the United States. But, after all, gentlemen, it is for you to decide whether the whistle was sounded, whether the bell was rung.

Something has been said in the course of argument with reference to the speed of the train. Gentlemen, I do not understand that it is the duty of those in charge of a railroad train to slow up upon approaching a crossing. One object of railroad passenger transportation is to accomplish a high rate of speed. The statute has prescribed the signals which are to be given, and they furnish the precaution which is ordinarily to be observed in approaching a crossing. There is a rule that when a train is passing through the streets of a city or town,—and it may apply in the immediate vicinity, where a large number of persons may be expected to be passing,—that the speed shall be slacked according to circumstances; but ordinarily the rule requires only that the proper signals shall be given. For instance, in this case, the testimony is that the whistle could be heard a distance of two or three miles, (as I recollect the testimony, certainly a distance of a mile,) which is greater than the distance between the train, when, according to the testimony, the whistle was sounded, and the plaintiff and her mother in the buggy. There is testimony that the bell could be heard for at least as far, and in the country, where ordinarily everything is quiet, and but few persons passing, the road not crowded, these signals would generally be sufficient to properly guard against danger at the crossing, if they were sounded. Now, gentlemen, I have to say to you, with reference to the approach of the plaintiff and her mother to this track, that if at a distance equal to that indicated by the mother (the line across the courtroom) from the place where the horse was struck the track could be seen, and if they knew, as the mother testifies they did, that it was about the time for the train, it was unquestionably their duty to stop and listen there. The fact that between the top of the hill, at a distance of 50 yards from the track, they were at the last point where they could see the train, and from there down to the end of the corn-field they had been passing over a little piece of road where the track and the train were not visible, would make it the more necessary to stop and take the precaution of looking and listening before going on the track. Now is there any evidence in the case that they did stop, or is the evidence, on the other hand, that they continued, slowly, it is true, but nevertheless without stopping, from the top of the hill right onto the track? If that was the case, gentlemen, why, sad as the results were, the claim against the railroad company could not be maintained. It is not the mere fact of the happening of the accident that lays the foundation for a recovery. It must be based upon satisfactory proof that there was not only negligence on the part of the defendant, but that there was no contributory negligence on the part of the plaintiff. With reference to the proposition that there was contributory negligence, the burden of proof is upon the defendant, and you must be satisfied of that by a preponderance of evidence before you find that there was contributory negligence.

If you find that this accident occurred by reason of the negligence of the defendant, and that there was no contributory negligence immediately contributing to the injury on the part of the plaintiff, then you come to the question of damages. The damages in such a case as this should be compensatory; that is, they should be sufficient to make the plaintiff whole,—to compensate for the injury,—not beyond that. Nothing beyond that should ever be allowed unless the evidence satisfies a jury that there was a willful or intentional commission of the injury; and there is no testimony in that direction in this case. A proper compensation for the pain and suffering should be made, and, if damages be claimed for permanent injury, as they are in this case, the rule is that it must be reasonably certain that the injury is permanent, and that it resulted from the accident. I must say to you, gentlemen, that the facts, if they exist, that this plaintiff is suffering from convulsions, to which she never was subject before this injury; that they are brought on by any excitement, (and I think that the only testimony upon this point is to that effect;) that they continue without any sign of improvement,—would be very strong indications that the injury is permanent. There is no testimony upon that subject excepting what is offered on behalf of the plaintiff. It is said that probably the permanence of the injury can still be avoided by the operation of "trephining," as it is called, which consists in cutting out a section of the skull, lifting it, and remedying the depression of the inner table of the skull, which is supposed to cause the pressure against the brain at that locality, and to be the cause of the convulsions to which this plaintiff, according to the testimony, is subject. But, gentlemen, I need scarcely say to you that if you come to this question of damages, your finding ought to be exclusively upon the testimony; and that there is no rule of law or of reason or of right which makes it proper to give any greater damages against a railroad company than should be given against an individual in like circumstances. Your duty and mine in this case is entirely apart from any feeling of sympathy or pity. It is simply and only to do what is right under the circumstances.

But before you come to the question of damages, you must be satisfied that there is a case for damages. If, upon the testimony, you find that the whistle was sounded and that the bell was rung, that there was no negligence on the part of the defendant, why, of course, that is the end of the case. And if you find that either of these was omitted, and that nevertheless the plaintiff, or her mother without remonstrance from her, suffered or moved onto that track without stopping to look or listen, why that would be the end of the case. It is said, and said very truly, that the plaintiff would not be responsible for the negligence of her mother, who was driving. That is true, but in that event it was just as much her duty to look and listen as it was the duty of the mother, and just as much her duty to suggest that they should stop and look and listen as it was the duty of the mother to stop and look and listen, and her duty to protest if that was not done.

I have been asked to give you some charges, a portion of which I will give you.

With reference to the speed of the train, I do not think, gentlemen, that that, of itself, can be considered as tending to sustain the charge of negligence in the management of the train, as alleged in the petition. I think, as I said to you before, that they have the right to move the train rapidly. They are under the requirement, however, to give the proper signals. Of course, where the crossing is very dangerous, and the surroundings are such that the whistle is not likely to be heard, the train ought to be slowed up.

The testimony is that the train did not stop after the accident, but proceeded directly on to Newark. With reference to that, the engineer says that he did not see the horse or the wagon; did not know anything about the accident until some time after they had passed. The fireman just at the moment of striking did see the horse, and saw a piece of the shaft of the buggy fly past the window. He communicated it to the engineer. Well, gentlemen, if it were a question whether this injury was wantonly inflicted, I think that testimony would be significant. If there were anything indicating that there was any intention or any wanton disregard of the safety of these people, the fact that the train was moved right on by, without stopping it, would be proper to be considered. There is no such testimony, and therefore what occurred after the accident could hardly be said to have any bearing upon the question of negligence before the accident.

"If the plaintiff, immediately before the horse stepped on the track, could have seen the approaching train in time to stop, had she looked, the presumption is that she did not look, or, if she did look, that she did not heed what she saw, and in either case she was negligent, and cannot recover." That I give to you. It is in substance what I have already given you in charge.

"If the plaintiff could have heard the whistle sounded, and did not hear it because she did not listen for it, or, having heard it, did not heed it, she was in either case guilty of contributory negligence, and cannot recover." That is correct, also.

With reference to the sounding of the whistle, gentlemen, I think it proper to call your attention to the consideration that this was a crossing which, according to the testimony of the mother, both the plaintiff and her mother were well acquainted with. It was on the road between their home and Newark, and they passed over it frequently. Now we all know that sounds to which we are accustomed we sometimes hear without being conscious thereof,—without taking note; and in weighing the testimony as to the sounding of the whistle and the ringing of the bell it is fair to take that into account; but, on the other hand, take also into account the testimony of the mother that they were looking and watching for the train, which would tend to cause them to notice the sounding of the whistle, if it was sounded.

"The fact that this was a dangerous crossing increased the care required of the plaintiff in approaching and driving over it in proportion to the danger to be apprehended. If the crossing was extraordinarily dangerous, it required extraordinary care and caution on the part of the

plaintiff to ascertain if a train was approaching, and, failing in this, she cannot recover." That is correct, also, and you are to take into account in connection with what I have already said with reference to the fact that they were aware that it was about the time when the train was to be expected, and that that imposed upon them still greater care and caution. And then there is another instruction which I have already given you, in substance, and which I need not repeat.

These, gentlemen, are all the suggestions that it occurs to me to give to you. You may take the case, gentlemen.

ON MOTION FOR NEW TRIAL.

(December 12, 1890.)

SAGE, J. The first ground upon which a new trial is asked is newly-discovered evidence. It appeared upon the trial that the plaintiff has been, since the accident which caused the injury for which she seeks recovery, subject to epileptic fits. The testimony of the physicians on her behalf tended to prove that these were caused by the depression of the inner table of the frontal bone of the skull, by concussion at the time of the accident, and consequent pressure upon the brain. The defendant now produces affidavits that several persons (naming them) have stated, and will testify, that the plaintiff was subject to epileptic fits before the time of the accident. But, on the other hand, the plaintiff produces affidavits from each one of the persons named, denying having made such statements, and denying that the facts existed to which it was said they would testify. This ground for new trial is therefore not sustained.

The next ground is that the court erred in not directing a verdict for the defendant. It is argued in support that the only negligence alleged or sought to be proven against the defendant was the failure to sound the whistle of the locomotive and to ring the bell, and that the proof was all the other way so clearly that the verdict should have been directed as asked. With reference to the sounding of the whistle, several witnesses, including the engineer and fireman, did testify that it was sounded, and, while quite a number of persons testified that they did not hear it, no one testified that it was not sounded. But some of the witnesses testified positively that the sounding of the whistle was at Hog Run bridge, which; according to the testimony, is 2,430 feet from the crossing where the accident occurred, and that it continued about five seconds, the train running at the rate of 40 miles an hour, or 56 feet per second. From the whistling-post to the crossing the distance is 1,080 feet, so that, according to that testimony, the whistle was not sounded when the train was nearer than 2,150 feet to the crossing. Section 3336, Rev. St. Ohio, provides that the engineer or person in charge of the locomotive in motion, approaching a road-crossing at grade, (and such was the crossing where the accident in this case occurred,) shall sound the whistle at a distance of at least 80 and not further than 100 rods from the place

of crossing, and ring the bell continuously, until the engine passes the crossing. Section 3337 makes the company liable in damages to any person injured in person or property by failure to give the signals as provided in section 3336. Now as to the ringing of the bell the testimony is conflicting. There were witnesses who testified that the bell was rung, and others who testified that it was not rung, and still others who testified that they did not hear it. The plaintiff and her mother, according to the mother's testimony, were looking and listening for the train as they approached the track. They knew that it was about due, and they were anxious about the crossing. They would, therefore, have been likely to hear the whistle, if sounded, or the bell, if rung. As to the sounding of the whistle, the jury were charged, in accordance with the rule laid down in the text-books and in *Stitt v. Hvidekopers*, 17 Wall. 394, that "ordinarily, a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is not possible to remember a thing that never existed." But, after all, that is only the statement of a rule with reference to the weight of testimony, and it would not authorize a court to determine the fact where the case was being tried to a jury. There was affirmative testimony that the sounding of the whistle was not within the distance required by the Ohio statute, and therefore not the signal required to be given to relieve the company from the charge of negligence; and there was also positive testimony that the bell was not rung as the train approached the crossing. The case was not one, therefore, in which the court could rightly have directed a verdict for the defendant.

The next ground for new trial is that the court erred in charging that the burden of proving contributory negligence was upon the defendant. It is admitted that the charge was in accordance with the general rule in the United States courts; but it is urged that this action is one under and by virtue of sections 3336 and 3337 of the Ohio Statutes. Section 3336 makes every engineer or person in charge of a locomotive engine moving upon its road, who fails to comply with the provisions of section 3337, personally liable to a penalty of not less than \$50 or more than \$100, and also makes the company liable in damages for such neglect, where the injury results therefrom. Counsel for defendant claims that therefore the rule of evidence must be as recognized in the state courts; that to warrant a recovery it must be shown that the failure to give signals was the proximate cause of the accident, and that the burden of proving contributory negligence is on the plaintiff. *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 72. The answer to this proposition is twofold: *First*. This is not a statutory action. It is true that the failure to sound the whistle and to ring the bell is alleged as negligence on the part of the defendant. But the case stated in the petition is clearly upon the common-law liability of the defendant. The statute, however, may be referred to to determine what constitutes negligence in Ohio as to giving signals on approaching a crossing. *Second*. If it were an action under the statutes; I do not think the rule relating to the burden of proof would thereby be

changed. The contrary has been held by the supreme court of the United States. *Railroad Co. v. Mares*, 123 U. S. 710-721, 8 Sup. Ct. Rep. 321.

The next ground for motion for a new trial is that the jury disregarded the charge of the court. I do not think this is sustained. It was conceded upon the trial that the plaintiff herself had no recollection of what occurred at the time of the accident, and therefore could not testify. She was placed upon the stand, and a question put to her; but the excitement of the situation brought an epileptic fit upon her, and it was necessary to take her from the stand, and away from the court-room. It was then stipulated that she could remember nothing about the accident. The mother, however, who was riding with her daughter, and driving, testified that they drove very slowly as they approached the track, and that both she and her daughter were continuously looking and listening. A short distance before they reached the crossing, according to her testimony, they stopped, and looked and listened. Her testimony therefore tended to prove that all the precautions that were necessary were taken by her and by her daughter, and therefore that the negligence complained of on their part did not exist.

It is further urged that the verdict is against the weight of the evidence. I have examined the stenographer's report, and am satisfied that the case was one for the determination of the facts by the jury, and that, whatever may be my own opinion as to the correct findings of fact to be made, it is my duty to leave the parties to abide by the verdict. The motion for a new trial will be overruled.

This case was tried at the June term. The motion for new trial was argued at Cincinnati, just before the present term of the court at Columbus. The verdict was for \$5,000. The counsel for the plaintiff, desiring that there should be no review of this case by the supreme court, now moves for judgment for the amount of the verdict, without interest. Counsel for the defendant, on the other hand, insists that the judgment shall be with interest from the date of the verdict until the entering of the judgment. Counsel for the plaintiff claims that this court should follow the law and procedure of Ohio in matters not otherwise provided for by the laws of the United States, including the entering of judgments in cases of tort, and refers to the Revised Statutes of the United States, section 966. He refers also to section 3181 of the Revised Statutes of Ohio, which provides for interest upon all judgments, decrees, and orders of any judicial tribunal for the payment of money, but not for interest upon verdicts; and he insists that the judgment should be for the amount of the verdict, without interest. The contention of counsel for the defendant is that the provisions of section 966 of the Revised Statutes of the United States, and of section 3181 of the Revised Statutes of Ohio, with regard to interest on judgments, are substantially the same, and that the construction of the statutes should be the same. Also that, under section 5375, Rev. St. Ohio, a judgment becomes a lien on the lands of the judgment debtor within the county from the first day of the term; and so in the federal courts the judgment

becomes a lien on the lands of the judgment debtor within the jurisdiction of the court from the first day of the term at which it was rendered. *Massingill v. Downs*, 7 How. 760. His argument is that in Ohio, under this statute, judgments have always drawn interest from the day they become liens; quoting from the decision of the Scioto district court, 1859, (*Knible v. Connolly*, 1 West Law Month. 402,) as follows:

"A judgment rendered in an action pending at the first day of the term draws interest from that day, and includes interest on the debt up to that day. Judgments on confession, in actions commenced during the same term, take effect only from the day of entry, drawing interest from that day, and include interest on the debt up to that day."

Sproat's Ex'r v. Cutler, Wright, 157, (1832:) "Interest will be allowed on awards and verdicts, where payment is delayed, up to the time of judgment."

He also cites *Redfield v. Iron Co.*, 110 U. S. 177, 3 Sup. Ct. Rep. 570; *Owens v. Railroad Co.*, 35 Fed. Rep. 715; *Steam-Ship Co. v. Merchant*, 133 U. S. 375, 379, 10 Sup. Ct. Rep. 397; *New York El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608, 7 Sup. Ct. Rep. 23; *The Patapsco*, 12 Wall. 451.

Counsel for the plaintiff, in answer to the citation of *Steam-Ship Co. v. Merchant* and *New York El. R. Co. v. Fifth Nat. Bank*, cites *Bailey v. Mayor, etc.*, 7 Hill, 146, and refers to the fact that in the state of New York interest is by statute allowed from the date of the verdict. I have conferred with the circuit judge upon this question, and the conclusions in which we concur are as follows: That it is proper to allow interest on the verdict from the date of its rendition up to the entry of judgment. This was done below in *Steam-Ship Co. v. Merchant*, 133 U. S. 376, 10 Sup. Ct. Rep. 397, and the supreme court sanctioned it, and entertained jurisdiction. It does not appear that the practice was rested upon any New York statute. See, to the same point, *Gunther v. Insurance Co.*, 10 Fed. Rep. 830, where BENEDICT, J., says: "The item of interest on the judgment from the day of the rendition of the verdict to the day of entry of the judgment, amounting to some \$500, may be allowed. The delay was caused by a stay of proceedings during the pendency of a motion for a new trial. This delay should not be at the plaintiff's expense. The payment of interest meanwhile may properly be deemed a condition attached to the stay, or, if not, an entry of the judgment as of the date of entering the motion for new trial, might, if necessary to avoid damages to the plaintiff, be permitted; but I consider the item of interest on a verdict within the equity of the statute, (section 966,) and for that reason taxable." See *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 439, and *Dowell v. Griswald*, 5 Sawy. 24. To the same effect see *Gunther v. Insurance Co.*, 20 Blatchf. 390, 10 Fed. Rep. 830. In *Gibson v. Cincinnati Enquirer Co.*, 5 Cent. Law J. 446, (this circuit, Ohio,) the rule was laid down that where entry of judgment is delayed by acts of the opposite party, interest on the verdict is proper, whether the action is in contract or tort. If the action is upon contract, the verdict should draw interest from the first day of the term; if *ex delicto*, from the date of the rendition of the verdict.

The judgment will be entered, with interest from date of verdict. This will give the defendant the right to sue out its writ of error. Where the law will sanction it, we should so apply it as to give the losing side an opportunity of review.

BUTLER v. POOLE.

(Circuit Court, D. Massachusetts. December 30, 1890.)

LIMITATION OF ACTIONS—NATIONAL BANKS.

Actions by the receiver of a national bank against stockholders for assessments on the stock are subject to the state statutes of limitations.

At Law. On motion to quash the writ of *scire facias*.

Ambrose A. Ranney, for plaintiff.

John Lowell and *George S. Hale*, for defendant.

COLT, J. This is an action at law, brought by the receiver of the Pacific National Bank against Seth B. Poole, to recover an assessment on certain shares of stock owned by him at the time of the failure of the bank. The writ is dated March 14, 1883. On the 9th day of February, 1884, the defendant Poole died, and on November 16, 1886, his death was suggested of record. January 28, 1887, the plaintiff's counsel filed a petition for a *scire facias* to summon in the executors of defendant's will, which was granted and issued without notice. Counsel for the executors now appear specially, and move to quash the *scire facias* and dismiss the suit, upon the ground that the action is barred by the following provision of the Public Statutes of Massachusetts, (chapter 165, § 8:)

"The citation [to executors to appear and defend] shall not be issued after the expiration of two years from the time such executor or administrator has given bond for the discharge of his trust, if he has given notice of his appointment, as required by law."

The executors gave bond on the 4th day of March, 1884, and gave the notice required by law. The only question upon the present motion is whether the Massachusetts statute of limitations is applicable to this case. Section 914 of the Revised Statutes provides that the practice, pleading, and forms and mode of proceeding in the federal courts shall conform, as near as may be, to those of the state. In actions of this character it has been held that state statutes of limitation, where no special provision has been made by congress, form the rule of decision in the courts of the United States. *McCluny v. Silliman*, 3 Pet. 270; *McElmoyle v. Cohen*, 13 Pet. 312; *Ross v. Duval*, Id. 45; *Taylor v. Holmes*, 14 Fed. Rep. 498, 511; *Price v. Yates*, 19 Alb. Law J. 295, (1879); *Bank v. Dalton*, 9 How. 522; *Amy v. Dubuque*, 98 U. S. 470; *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. Rep. 170. The authorities cited

by the plaintiff, taking a contrary view, are cases where the subject-matter is within the exclusive jurisdiction of the federal courts, like patents, and they are not applicable to cases where the jurisdiction is concurrent. The position taken by the plaintiff that this is, in substance, an action brought by the government, and that therefore the statute does not run, is not tenable. The fact that the receiver in this suit is proceeding under certain provisions of an act of congress establishing a national banking system does not make this in any proper sense a government case. The government has no pecuniary interest in this suit. It is in fact a contest between creditors and a stockholder of the bank.

It is further urged by the plaintiff that section 955 of the Revised Statutes provides *scire facias* as the process to be issued, without any limitation as to the time when the writ may issue. But it has been decided that section 955 is governed by the statute of limitations of the state. *Barker v. Ladd*, 3 Sawy. 44; *Price v. Yates*, 19 Alb. Law J. 295. That the Massachusetts statute provides one mode of bringing the parties before the court, and the federal statute another, is not material in this connection. Congress might adopt a totally different system of pleading from that of the states, and yet the state statute of limitations would apply. Motion granted.

LAKE SUPERIOR SHIP-CANAL, RAILWAY & IRON CO. v. CUNNINGHAM.

SAME v. DONAHOE. SAME v. FINAN.

(Circuit Court, W. D. Michigan, N. D. July 27, 1890.)

1. EJECTMENT—WHEN MAINTAINABLE—GRANTS OF PUBLIC LAND—VOID SELECTION—CONFIRMATION.

Where, under a grant of public lands to aid in the construction of a canal, a selection is made of lands which had been appropriated under a prior grant, and so were not subject to selection under the later one, a subsequent act of congress confirming the lands to the canal company does not relate back to the date of selection so as to enable that company to maintain ejectment for the lands brought before the passage of the confirming act.

2. PUBLIC LANDS—RAILROAD AID—OVERLAPPING GRANTS—SURRENDER BY ONE GRANTEE.

Where the limits of lands granted in aid of the construction of two branches of a railroad by the act of congress of 1855 overlap, a release and surrender of the lands in the common limits by descriptions, by a railroad company which has acquired the rights of both the original companies on those branches and by the governor of the state, in its behalf, to the United States, is a valid surrender of all the lands within the common or overlapping limits.

3. PUBLIC LANDS—GRANTS—FORFEITURE—CONFIRMATION TO INTERVENING CLAIMANTS.

Act Cong. March 2, 1889, declaring a forfeiture of certain lands theretofore granted to the state of Michigan, in aid of certain railroads, provides, in section 2, that "this act shall not be construed to prejudice any right of the Portage Lake Canal Co. * * * to apply hereafter to the courts or to congress for any relief, legal or equitable, to which they may now be entitled." *Held*, that this special provision for the claims of the canal company excludes it from the benefit of the general provisions of section 3, which confirms the titles of all persons to whom any of such lands have been disposed of under color of the public land laws, where the government retains the consideration.

At Law. Action of ejectment.

The act of congress of June 3, 1856, granted certain lands in the upper peninsula to aid in the construction of certain railroads, one of them having two branches, running from the Wisconsin line to Marquette and Ontonagon, respectively. The later act of July 5, 1862, authorized the relocation of the route of said railroad on a line from Marquette to the south much further east, and made another grant in aid of its construction, upon condition that the lands originally granted along the route thus changed should be surrendered by the railroad company, upon whom they had been conferred, and by the state of Michigan to the United States. The Peninsula Railroad Company, to which the lands on the Marquette branch had been assigned, executed such a surrender. After this, the Chicago & Northwestern Railroad Company, having acquired the rights of the companies upon both said branches to the lands along their lines, executed a surrender and release of all the lands, by descriptions, on the Marquette branch from the Wisconsin line, and the governor, in behalf of the state, executed to the United States a surrender of the same lands. This being regarded by the interior department as not filling the requirements of the act of 1862, the last-named railroad company and the governor, upon the demand of the interior department, executed a further release and surrender of the lands on the Ontonagon branch. The present suits involved the validity and effect of the first release by the Chicago & Northwestern Railroad Company and the governor upon the lands in the common limits of the branches, and also of the later releases of the lands in the clear limits of the Ontonagon branch. Act Cong. March 2, 1889, relating to the forfeiture to the United States of lands theretofore granted to the state of Michigan, including those granted by the act of congress of June 3, 1856, in aid of certain railroads, which lands plaintiff herein claims by virtue of selection under a subsequent grant in aid of its predecessor, (the Portage Lake Canal Company,) provides in section 2 that "this act shall not be construed to prejudice any right of the Portage Lake Canal Co. * * * to apply hereafter to the courts or to congress for any legal or equitable relief to which they may now be entitled." Section 3, in general terms, confirms the titles of all those to whom any of such lands had been disposed of by the proper officers of the United States, or by selections of the state of Michigan, under color of the public land laws, in all cases where the government retains the consideration for such disposal.

D. H. Bull and John F. Dillon, for plaintiff.

B. Vooper and D. M. Dickinson, for defendants.

SEVERENS, J. In the Cunningham case it would be unprofitable to restate our own views upon the principal questions. The court is constrained by the obligations of judicial decorum to hold that the release of the title to the clear lands on the Ontonagon & State Line Road, in which this tract was situated, executed by the Chicago & North-Western Railway Company, and by the governor of the state of Michigan to the United States, was unauthorized by law; and the selection of such lands

for the canal company, and the certification thereof by the secretary of the interior, were void. If this land was confirmed to the present canal company by the act of 1889, while it might relate back to the date of selection for some purposes, it would not do so for the purpose of maintaining an action brought in the mean time. To sustain the action of ejectment, the plaintiff must have had title at the commencement of the suit, and if it had not then a title it cannot succeed upon a right subsequently perfected. The verdict in that case must therefore be for the defendant.

In the Donahoe case the land lies in the common limits of the Marquette & State Line and the Ontonagon & State Line branches. It may be that the release by the Peninsula Railroad Company did not operate to release these lands, or a moiety thereof. But the first release of the Chicago & North-Western Railway Company and the first release by the governor surrendered all the lands in those common limits. This action was never repudiated by the state, nor, so far as appears, ever questioned. The land department has since acted upon the validity of that surrender, and we think its validity cannot be questioned by the defendant in this suit. This land was selected for the canal company. The selection was approved by the secretary of the interior, and the land certified by him to the canal company. In that case the verdict must be for the plaintiff.

In the Finan case the land, as in the Cunningham case, is in the clear limits of the Ontonagon & State Line branch. The title stands in the same plight as in the Cunningham case. But, the suit was commenced since the act of March 2, 1889, was passed, and it becomes necessary to decide whether the third section of that act operated to confirm the title of the canal company to the land in question. If it were not for the express mention of the claims of the canal company in section 2, we should be prepared to hold, upon the liberal construction which should be given to statutes of this character, that the title of the plaintiff was confirmed by the provisions of section 3. It is hard to understand why congress should have excluded one party from the scope of the justice which it was endeavoring to secure to those who had purchased the forfeited lands for value, under color of lawful authority, supposing they were acquiring a valid title, and have laid the scourge upon that one. But it is a question of construction, and my Brother SAGE is of opinion that the specific mention of the canal company's claims in section 2 brings the subject under the rule which excludes the particular matter from the operation of the general provision; and while I have serious doubt whether the claim of the canal company in respect to these lands is so specifically dealt with and disposed of by the second section as to exclude it from the equity generally accorded by section 3 to all persons coming within the conditions there mentioned, I shall, with considerable hesitation, however, concur in his construction. This conclusion leaves this case exposed to the opinion of the circuit judge in the Cunningham case, and there must be a verdict for the defendant in this case also.

SAGE, J. I concur.

UNITED STATES *ex rel.* SIEGEL *v.* CITY OF NEW ORLEANS.

(Circuit Court, E. D. Louisiana. December 25, 1890.)

MUNICIPAL CORPORATIONS—LIABILITY FOR DEBTS.

Act La. 1877, (Extra Sess.) No. 30, p. 47, provided that no municipal corporation should appropriate or expend any money in any year in excess of the actual revenue for the year; that the revenue for each year should be devoted to the expenditures for that year; and that any surplus might be used to pay the indebtedness of former years. Act La. 1886, No. 109, p. 205, provided that the council of the city of New Orleans should each year reserve 20 per cent. of the revenue for that year for the purpose of public improvement. *Held*, that a creditor of said city could not compel the council to pay him out of said reserve fund for debts contracted after 1877, since such reserve fund did not constitute a surplus, nor did the former act apply to debts contracted after its passage.

At Law.

J. R. Beckwith and *H. L. Lazarus*, for plaintiff.

F. B. Lea, for defendant.

Before PARDEE, Circuit Judge, and BILLINGS, District Judge.

PER CURIAM. The following the court finds as the facts in this case: The judgments of the relator against the respondent amount in the aggregate to \$——, and are founded on indebtedness arising in the years 1879, 1880, 1881, and 1882. The evidence establishes that for the year 1888, as well as the year 1889, the common council of the city of New Orleans appropriated, out of the 20 per cent. reserved for public improvements by Act No. 20, p. 35, § 66, of the Acts of 1882 and 1886, No. 109, p. 205, § 1, for the payment of debts not in the budget of those years, and not contracted in those years, an amount greater than the aggregate of relator's judgments; and that of the said 20 per cent. reserved by the statute for public improvements there is now, for those years, more in the treasury of the respondent than would be sufficient to pay the entire amount of relator's judgments. The statutes necessary to be considered are the first three sections of Act No. 30, p. 47, Acts 1877, (Extra Sess.) section 1, Act No. 38, p. 58, Acts 1879, and Act No. 109, p. 205, Acts 1886.

No. 30, Act 1877: "Section 1. That no police jury of any parish, nor any municipal corporation in this state, shall make any appropriation of money for any year which appropriation separately, or together with any other appropriation or appropriations of the same year, shall be in excess of the actual revenue of said parish or municipal corporation for that year. Sec. 2. That no police jury of any parish, nor municipal corporation in this state, shall approve any claim or make any expenditure which shall separately, or together with other claims approved or expenditures made, be in excess of the actual revenues of that year. Sec. 3. That the revenues of the several parishes and municipal corporations of this state of each year shall be devoted to the expenditures of that year: provided, that any surplus of said revenues may be applied to the payment of the indebtedness of former years."

No. 38, Act 1879: "Section 1. That it shall be the duty of the board of administrators or common council of the city of New Orleans, on or about the second Tuesday of December, 1879, and upon the second Tuesday of December of each and every year thereafter, or thereabout, to propose a detailed

statement exhibiting the amount of revenues for the ensuing year expected to be derived by the said city from taxes and licenses, and, with such estimate of receipts as aforesaid, it shall be the duty of the aforesaid board of administrators or common council to propose a detailed statement or estimate, exhibiting the several items of liability and expenditure on the part of said city for the year aforesaid, including the requisite amount for contingent expenses during that time. Such estimate of liabilities and expenditures shall not, however, in the aggregate amount thereof, exceed four-fifths of the estimated amounts of revenues or receipts therein above provided for."

No. 109, Acts 1886: "That section 66 of Act No. 20, approved June 23, 1882, entitled 'An act to incorporate the city of New Orleans, provide for the government and administration of the affairs thereof, and to repeal all acts inconsistent and in conflict with its provisions,' be amended and re-enacted so as to read as follows: The council shall not, under any pretext whatever, appropriate any funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent. of said revenues, which reserve, and all sums, rights, interests, and credits received from miscellaneous or contingent sources, shall be appropriated by the council for the purpose of permanent public improvement, as herein provided for."

The claim of the relator is that, when properly defined, there is shown to be a surplus for the years 1888 and 1889, and that, under the act of 1877, since the debts of the city to him were contracted while that act was in force, he has a right to that surplus. As to the existence of a surplus for the years 1888 and 1889, that which is claimed to be a surplus is an unexpended but appropriated amount of the 20 per cent. But the legislature has dedicated this to the purpose of permanent public improvements. This dedication is conclusive upon the relator's claim, unless the act of 1877 has given him a right to a surplus, which the act of 1886 could not qualify.

This brings us to the question whether the act of 1877 gave any future creditor any fixed right to any surplus. That act was passed under these circumstances: The legislature had been endeavoring by every legislative mandate to prevent the city of New Orleans from increasing its floating debt. Up to the date of that statute their efforts had been in vain. Then it was enacted that no appropriation should be made and no claim approved by any municipal corporation during any year in excess of the actual revenues of that year; that the revenues of each year should be devoted to the expenditures of that year; and, since a large floating debt for former years already existed, a provision was added that any surplus of revenues might be applied to the payment of the indebtedness of former years. In our opinion the "former years" mean years former to 1877, for any outstanding indebtedness for any year after 1877 had been rendered impossible, if the statute which contains this provision as to power to appropriate was obeyed. There could, of course, be no surplus unless there remained some amount not appropriated. Section 3, Act 1877, was not meant to guaranty that there would be any such amount, nor to limit the discretion of the appropriating power to provide for all necessary expenditures either on the part of the legislature or on the part of the common council. It simply provided that if, after the discretion of the appropriating power had been exercised, there re-

mained a surplus, it might be used in paying indebtedness of former years. The amended charter of 1886 expressly dedicated 20 per cent. of the proceeds of the taxes, even before they were levied, to the highly meritorious purpose of permanent improvements. This dedication, in our opinion, was in violation of no right of the relator, and it is not a surplus, but a legally appropriated sum, which the relator asks should be applied to the payment of his judgments. Our opinion, therefore, is that there is no surplus shown, but that the amount remaining unexpended is destined by the legislature to the purpose of permanent public improvements, and cannot be diverted from that purpose either by the city or its creditors; and that there was no intention on the part of the legislature to guaranty or pledge to any of its creditors any surplus; certainly not to the creditors whose debts arose after 1877.

UNITED STATES *v.* WOODWARD.

(District Court, E. D. South Carolina. January 6, 1891.)

OBSTRUCTING MAILS—INTENT.

A postmaster carried the mail to a station in a bag, and, while waiting for the train, laid it on a truck, and walked down the track to see some bricks unloaded from a car. On his return he met defendant, the owner of the bricks, who began quarrelling with him as to the manner of unloading them, and finally struck him. By-standers separated them, and the mail was duly delivered to the train on its arrival. *Held* that, before defendant could be convicted of obstructing the mails, the jury must believe that he knew his acts would have that effect, and intended that they should.

Information for Obstructing the Mail.

Abial Lathrop, U. S. Atty.

M. B. Woodward and *W. Q. Davis*, for defendant.

SIMONTON, J. The defendant was on trial for knowingly and willfully obstructing or retarding the passage of the mail. The evidence for the prosecution was to this effect: The postmaster at Monticello, S. C., who is also railroad and express agent at that point, had carried the mail-bag to the station to meet a train. He was about 10 minutes ahead of train time. He placed the mail-bag on a truck, and went about 100 feet down the track, to see some bricks unloading from a car. On his return towards the bag he met the defendant, the owner of the bricks, who began quarrelling with him about the manner of unloading them. During the quarrel defendant struck the postmaster. By-standers interfered, and they were separated. The train coming up shortly afterwards, the mail was duly and safely delivered. The defendant, having taken the stand, told his side of the quarrel. Being asked by the district attorney if he did not see the mail-bag, and did he not know that the postmaster was there on his official business, and that he was obstructed in it, he answered that he did not know or think anything of the mail. The jury

were instructed that in order to convict the defendant they must believe from the testimony that he knew that his acts on that occasion would have that effect, and that he performed them with the intention that such would be their operation. *U. S. v. Kirby*, 7 Wall. 486. The jury found defendant not guilty.

UNITED STATES v. WILSON.

(District Court, E. D. South Carolina. January 6, 1891.)

STEALING LETTERS FROM THE MAIL—INTENT.

Where a boy under 12 years is tried under Rev. St. U. S. § 5469, for stealing letters from the mail, and it appears that he took them from boxes in the post-office, carried them home, threw them carelessly aside, without opening or mutilating them, and, when asked about them by the postmaster, at once brought them back, it is a question for the jury whether he took them with criminal intent, or from a spirit of boyish mischief, and they may convict him or acquit him accordingly.

Indictment. Larceny from the mails.

Abial Lathrop, Dist. Atty.

S. J. Lee, for defendant.

SIMONTON, J., (*charging jury*.) The defendant is indicted under section 5469, Rev. St., for stealing letters from the mail. You have heard the testimony. The defendant went into the post-office at Orangeburg, and took from an open box, and the locked box next to it, several letters. He carried them home without opening them or mutilating them in any way. He threw them carelessly aside. When asked about them by the postmaster, he went at once and brought them back. He is charged with stealing the letters. If the testimony satisfies you that he took these letters with criminal intent,—that is to say, with the intent of converting them to his own use,—he is guilty. But if, because of his extreme youth, (he is under 12 years of age,) you come to the conclusion that he took them in a spirit of boyish mischief, either not knowing or not realizing the criminality of the act, you may acquit him. *Rex v. Owen*, 4 Car. & P. 236. The jury found him guilty, with a recommendation to mercy.

UNITED STATES v. McEWAN.

(Circuit Court, S. D. New York. December 29, 1890.)

ASSAULTING INSPECTOR OF CUSTOMS.

An inspector of customs, whose official duties require him to be at a particular dock, there to await the arrival of a vessel, so as to watch the discharge of her cargo or superintend it, if at such a place for that purpose, is there in the discharge of his duties as such inspector, and an assault made on the inspector under such circumstances is such an interference with the discharge of his official duties as to bring the offender within the provisions of section 5447 of the Revised Statutes of the United States.

Petition for Writ of *Habeas Corpus*.

The defendant was arrested on complaint of one Hovell, an inspector of customs, which charged the defendant with having assaulted him while he (complainant) was at pier 25 North river, in the discharge of his duties as such inspector. On the examination the following facts appeared: That the complainant was an inspector of customs, detailed to pier 25 North river, there to await the arrival of a certain vessel, to watch the discharge of her cargo, and to superintend the same. The complainant was sitting in a small frame house at the head of the dock, which the defendant entered. As he went in, the complainant was reading a newspaper, and at that particular time was not engaged in performing any of his duties as inspector of customs. Some discussion took place between the complainant and the defendant, when the latter struck the complainant. At the close of the case for the government, defendant's counsel moved for the discharge of the defendant, upon the ground that the assault was not committed on the complainant while he was acting in the discharge of his duties as an inspector of customs, and therefore the case did not come within the provisions of section 5447 of the Revised Statutes of the United States. The commissioner denied the motion. No evidence then being offered in behalf of the defendant, the commissioner held the defendant in bail, to await the action of the grand jury. This is a proceeding to review the action of the commissioner by writ of *certiorari* and *habeas corpus*.

Maxwell Evarts, Asst. U. S. Atty.

Hess, Townsend & McClelland, (Charles A. Hess, of counsel,) for defendant.

LACOMBE, Circuit Judge. The facts of this case seem clearly within the phraseology of section 5447. The officer was, during the hours devoted to the discharge of his official duty, at the place where he was assigned to discharge that duty. He was as much engaged in that service while sitting at his post waiting for the arrival of the ship, or the discharge of the cargo, as he would have been if superintending such discharge. Moreover, at the very moment the physical assault was committed he was actually engaged in an examination of papers officially before him, and inquiring as to the disappearance of certain

cases, the disposition of which it was his duty to know about. Where an assault is made under such circumstances, it will be presumed that its result—an interference with the discharge of such duty—was intended. Writ of *habeas corpus* dismissed.

FOOS MANUF'G CO. v. SPRINGFIELD ENGINE & THRESHER CO.

(Circuit Court, S. D. Ohio, W. D. January 3, 1891.)

1. PATENTS FOR INVENTIONS—GRINDING MILL—INVENTION.

Letters patent No. 359,588, issued March 15, 1887, to James F. Winchell, for a crushing and grinding mill, consisting of the "combination with a main shaft and grinders and a moving conveyer of a plurality of intergeared crushers mounted to crush the material for the conveyer, and having protuberances which extend approximately in line with each other, one of said crushers being geared with the main shaft," are void for want of invention since all the elements of the device are old, and their combination is merely the exercise of mechanical skill.

2. SAME—INFRINGEMENT.

Said patent is not infringed by a mill in which the projections on the crushers are not in line with each other, and the crushers, instead of being geared to the main shaft, are geared to a counter-shaft which derives its motion from the main shaft by means of a belt.

In Equity. Bill for infringement of patent.

H. A. Toulmin and Wood & Boyd, for complainant.

Bowman & Bowman, for defendant.

SAGE, J. The complainant is the assignee of James F. Winchell, to whom the patent in suit, No. 359,588, was issued for a crushing and grinding mill, March 15, 1887. The mill consists of three devices: First, and immediately under the hopper, are two crushing cylinders, mounted horizontally, in suitable bearings, side by side, each having crushing protuberances. These cylinders are near enough to each other to cause their crushing protuberances, in the language of the specification, "to stand in line with each other, or to lap each other, or to not quite reach each other." The shafts of the crushers are provided with pinions, which mesh with each other, and are preferably of the same diameter, while the shaft of one of the crushers is provided, in addition, with a gear-wheel, whereby rotary motion is imparted to both, each rotating towards the other. The material, to be first broken or crushed and then reduced to a granular or finer state, whether it be corn-cobs, roots, bark, bones, or any like substance, passes from the hopper through the crushers to the conveyer, which is immediately below. This consists of a roller or cylinder, constructed with a suitable spiral wing, flange, or worm; the cylinder being mounted horizontally on the main shaft of the machine. On the bottom of the conveying chamber are longitudinal ribs, acting in conjunction with the spiral wing or flange of the conveyer to further crush the material while being conveyed to the grinding disks, which constitute the third device. As shown in the drawings, these

disks are placed vertically at the side of and adjoining the conveyer, one being stationary, the other revolving on the main shaft; but any kind of final grinder is within the specification and claims. The suit is upon the first claim, which is as follows:

"In a mill, the combination, with a main shaft and grinders and a moving conveyer, of a plurality of intergeared crushers, mounted to crush the material for the conveyer, and having protuberances which extend approximately in line with each other, one of the said crushers being geared with the main shaft."

The usual defenses are set up in the answer, but those specially relied on are: *First*. That each element of the complainant's claim is old, and that together they do not constitute a combination, but a mere aggregation. *Second*. That no invention is displayed in the complainant's device. *Third*. Anticipation. *Fourth*. That, even if the patentee's claim is valid, the defendant does not infringe.

These defenses will be considered in their order. Cylinders, with crushing protuberances rotating towards each other, are shown and described in the following letters patent, put in evidence by the defendant: June 26, 1839, to Baldwin, for improvements in mill for grinding and crushing corn. This is referred to in the specification as an improvement in machinery for crushing and grinding corn and cob for stock, and corn and other grains for stock and family use, and it is called the "corn and cob crusher." The crushing rolls in the Baldwin mill are fluted, and seem, as stated by the defendant's expert, "to be constructed for the purpose of acting on corn in the ear, and small grains or cereals, and not for the purpose of reducing bark, bones, and such other refractory substances." The complainant's expert testifies that these crushers would never dispose of an ear of corn, and that the mill was for fine grain only. He is, in the opinion of the court, correct in this view.

October 14, 1851, to Newlove, for improvement in grinding mills. This is described in the specification as an improvement in the corn-cracker and grinder, or the machine for shelling, cracking, and grinding corn in the ear. Here, too, is a plurality of intergeared crushing rolls. The protuberances are described in the specification as teeth.

October 12, 1852, to Nicholls. This patent shows a machine for crushing and grinding cobs and other substances. The crushers are at the upper part of the mill. One of the cylinders contains crushing protuberances which are described as teeth, passing into annular grooves in the other cylinder, and it is specified that the sides of said grooves may be either smooth or corrugated.

May 29, 1855, to Wilson, for improvements in corn crusher and grinder. This patent shows two crushing rolls provided with V-shaped teeth, intended to serve for preparing the corn for the grinding operation. This mill is intended for grinding corn only.

February 1, 1859, to Hope, for improvements in mill for grinding grain. The specification described a portable mill for cutting, crushing, and grinding corn on the cob, grinding all kinds of grain into meal and

flour, and grinding roots, herbs, bark, spices, plaster, oyster-shells, etc. It is provided with horizontal, hollow, cast-iron cylinders, rotating towards each other, "with teeth running the whole length of the cylinder, two and one-half or three inches long, A-shaped, one inch thick at their base, and running to a sharp edge," with a downward inclination on one cylinder and an upward inclination on the other. The specification states that these cylinders are so arranged as to be detached when the mill is not needed as a corn and cob crusher and cutter.

May 5, 1855, to Beall, for grinding mill, intended specially for grinding oil cake. This also shows horizontal crushing rolls with protuberances or projections, the projections of one roller opposing interstices of the other. As shown in the drawings, there are two pairs of crushing rolls, the projections on one being larger than those on the other, but it is set forth that one set of crushers will generally be found sufficient.

Crushing rolls appear in other letters patent in evidence, but the above are those mentioned in argument. The others need not be specially referred to. The gearing of the crushing cylinders, with the main shaft and with each other, is shown in the Baldwin patent, the Newlove patent, the Nicholls patent, and the Beall patent. It is insisted for the complainant that none of the patents offered by the defendant show the peculiar protuberances of the complainant's patent. It is contended that they are all nibblers or grinders; that complainant's initial breakers are the only breakers in the art which grasp, draw in, bite off, and break into large lumps or pieces. On the other hand, counsel for defendant contend that the proper construction of complainant's patent, the claim being broadly for "a plurality of intergeared crushers, mounted to crush the meal for the conveyer, and for protuberances which extend approximately in line with each other," includes crushing rollers with any kind of protuberances, whether disks, ribs, teeth, or any other kind of crushing protuberances, all which are within the meaning of the claim, and therefore, if prior, they anticipate, as they would, if subsequent, infringe, and they cite in support of their contention *Roemer v. Bernheim*, 132 U. S. 103, 10 Sup. Ct. Rep. 12. The words "approximately in line," they say, do not help the claim, for all the letters patent above referred to show crushing protuberances in line, or lapping or nearly meeting, and in the Hope patent the cylinders are made adjustable, and that the argument of counsel for the complainant, based upon the peculiar construction, shape, or effect of the protuberances shown in the complainant's patent, is therefore, in view of the broad claim of the patent, not well founded; also that if complainant intended to rely upon the special construction shown in the drawings of his patent, the claim should have been limited accordingly. Conveyers, also, they say, are old, as appears from letters patent to Wirth, September 17, 1887; to Ames, June 23, 1878; to Pardee, October 20, 1880; and to Gillen, October 28, 1884,—and that as a crusher and conveyer the second grinding device shown in the complainant's patent appears in letters patent to Raymond, September 7, 1886, and to Harnish, August 22, 1871.

The grinding head, which is the third device in the complainant's mill, is shown in the Harnish patent and the Raymond patent, above referred to, also in the Ames patent, April, 1884. But it is urged that the combination is new, and produces new and useful results, and therefore that it is patentable, as was held by the supreme court in *Hailes v. Van Wormer*, 20 Wall. 353, although all the constituents of the combination were known and in use before the combination was made. But it was also held in that case that "the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not an invention." To the same effect is *Pickering v. McCullough*, 104 U. S. 318, where the strong and clear statement of Justice MATTHEWS, so often quoted, is to be found, and is strongly in point. Here, as in that case, it is not only true that all the elements of the combination, as construed by counsel for defendant, are old, but also that each operates only in the old way, and no one of them contributes to the combined result any new feature. The operation of the complainant's mill is, to be sure, continuous and progressive, from the beginning to the end, but the crushers operate precisely as they would if detached from the combination, and when they have completed their part of the work of reduction the product falls to the conveyer in exactly the condition in which it would be delivered if transferred by basket or otherwise from detached crushers. The work of the conveyer is in like manner separate and distinct, and so is that of the grinding disks. "No one of them adds to the combination anything more than its separate, independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action." The complainant's mill is neither "a new machine, of a distinct character and function," nor does it "produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions." It is therefore "only a mechanical juxtaposition, and not a vital union." See, also, *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. Rep. 58, and *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. Rep. 1034.

If the construction of the claim contended for by counsel for the defendant is correct, the considerations above would seem to be sufficient to dispose of this cause. But let us look at it in the light in which it is viewed by complainant's counsel. Attention has already been directed to the efficiency of the protuberances or initial breakers of the complainant's patent, as compared with the nibbling or grinding devices shown in the prior patents. Counsel insist that none of them show the preliminary breaking by the initial crushers, and the secondary and final breaking by the crushing conveyer, which delivers the broken material to the disks, where alone the grinding takes place. They say that "it is the peculiarly constructed intergearing crushers, doing the work by the

crushing protuberances of the two members, which constitutes what we think is an invention *per se*, not found in the prior art so elaborately spread out in the case." Specifying, they refer to Baldwin's patent as showing two cylinders running in opposite directions, each having a series of saw teeth, between which corn is closely split up; that there are grinders working against a concave grinding bed, and that initial and secondary crushing, as shown in complainant's mill, are wanting. The Newlove patent, they say, represents a grinding mill geared on to a hopper, and two sets of grinding disks, each armed with teeth so as to draw material in to be reduced between the disks, which project past each other, so that their faces are opposite, and thereby in rotation crush corn into small fragments. And right here they call attention to the distinction between that patent and the complainant's, indicated by the reference in the complainant's patent to the crushing protuberances being "approximately in line," which, they urge, is to prevent the crushing into small fragments. They point out also that the combination of the primary and secondary agents does not exist in the Newlove patent, which was intended to do a very fine crushing at the outset. Similar criticisms are made in regard to the Nicholls patent, excepting that it has a series of disks on one cylinder, with smooth edges, between which is run a series of teeth attached to the other cylinder. The Hope patent is referred to as showing cylinders having grinding teeth, which intergear or lap past each other so as to rapidly reduce to a fine state ears of corn, and then pass them to a secondary grinding cylinder working against a concave, reducing the ground material to meal, and passing it out over a spout. The Nicholls patent is not referred to. As to the Beal patent it is contended that it does not represent the crushing protuberances of the complainant's patent, but shows two sets of diamond-shaped disks on parallel cylinders, with intergeared sets of teeth, between the four edges of which the grinding is performed, and that this is a fine reducer instead of a very coarse crusher.

The contention for the complainant is, in short, that the patent should be construed, taken in connection with the specification and drawings, to be for the special construction therein and thereby described and shown.

The true construction is not so broad as claimed for the defendant, nor so narrow as claimed for the complainant. The broad construction discards everything but the letter of the claim itself. That is in conflict with the well-established rule that a patent should be construed in a liberal spirit to sustain the just claims of the inventor, and that "liberality rather than strictness should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and his labors." Also, that patents for inventions "are, if practicable, to be so interpreted as to uphold, and not to destroy, the right of the inventor." Accordingly, the phrase "substantially as described," or its equivalent, is always implied in claims wherein it is not expressed. The claim in the complainant's patent is therefore to be read in the light of and qualified

by the specification and drawings. But, so reading, it does not altogether sustain the proposition of counsel for the complainant, that the patent is to be limited to the precise construction on which the strength of their argument largely depends. For example, they refer to the expression in the claim "approximately in line," relating to the protuberances of the crushing cylinders, as indicating that they are to be so placed in order to prevent the crushing into small fragments. But in this connection they omit or overlook the statement in the specification, explanatory of "approximately in line," that the crushers "are placed sufficiently near to each other as to cause the protuberances to stand either in line, or to lap, or to not quite reach each other," as well as the general statement that the invention relates to improvements in crushing and grinding mills for reducing not only corn-cobs, but also "roots, bark, bones, and the like substances," for some at least, of which, it would be necessary to give to "approximately in line" a much more flexible construction than comports with their view. Then, too, if their construction of "approximately in line" be correct, they would encounter the difficulty arising from the fact that in the specification of the Hope patent the crushers are expressly made adjustable, whence it follows that no claim of novelty resting upon the position of the crushing protuberances with relation to each other can be sustained. The state of the case, then, is this: Every constituent of the combination is old. The initial crusher is old, the adjustment of the crushing cylinder is old, and the use of projections or teeth to catch and draw in the material to be crushed is old. The only thing new is the shape of the protuberances. Without this the so-called "combination" would be nothing but an aggregation. Is this new feature, then, a contrivance of skill, or is it an invention? The conception of passing ears of corn through crushing cylinders as the first process preparatory to grinding was old. It was embodied in the Baldwin mill, the Wilson mill, and in the Hope mill. Granting, for the sake of the argument, that all these were inferior in operation to complainant's mill, the only thing that Winchell, the patentee under whom the complainant claims, had to do was to so improve upon those and other devices in evidence as to construct a mill that would economically and rapidly reduce corn and cob together to the condition of fine meal. He succeeded, and now the question is whether his improvement "is the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward," or something entirely within the reach of mechanical skill. In cases where the conception or discovery is new, that is, has not been reduced to practice, the question between invention and skill is least difficult, for some great inventions have been simple and of easy construction. Therefore if, in such a case, it be apparent that the embodiment is clearly within the reach of ordinary skill to one whose mind is directed to the conception, that circumstance will not defeat the patent, because the conception and the embodiment together constitute the invention. But when the conception or discovery is old, and the only problem is how to improve or perfect an imperfect and unsatisfactory

embodiment so as to better accomplish the result sought by the inventor, or even to accomplish a new result never thought of by him, the occasion is peculiarly one for the employment of skill; and the handicraft of the art, experimental and practical, must be exhausted before there can be invention. In other words, the improvement must be the embodiment of some inventive conception or discovery, and not merely a more excellent construction within the limits of the old conception or discovery. Now, let us apply these views to the complainant's patent. What the patentee had to do was to provide the crushing cylinders with projections or protuberances which would grasp ears of corn and subject them to the crushing process. At the hearing, counsel for complainant laid a common wooden lead pencil between the crushing cylinders of one of the prior mills, and then rotated the cylinders. The pencil was rolled over and over, but it was not caught by the projections, nor broken. They were not so placed as to touch it. Suppose that had been an ear of corn, and the thing to be done was to draw it in between the cylinders, and break and crush it: how long would it have taken a skilled artisan, exercising only the craft of his calling, to devise projections or protuberances that would accomplish that result? It would seem scarcely longer than to read this paragraph. At all events, it is clear that it would be within easy reach of his skill, for the teeth with which the cylinder of the old threshing machine of 35 or 40 years ago, and the concave within which it revolved, were armed, would furnish all the suggestion needed. Yet that is the only thing that can save the patent in suit. My conclusion is that the patent should not have been granted.

But if this conclusion be erroneous, and complainant's patent be valid within the narrow limits claimed by counsel, to-wit, that "it is the peculiarly constructed intergeared crushers, doing the work by the crushing protuberances of the two members, which constitute what we think is an invention *per se*, not found in the prior art," the defendant does not infringe. It is to be remembered that to sustain the claim the words "approximately in line" must be so construed as to prevent crushing into small fragments. The application for the patent, after having been repeatedly rejected by the examiner, was granted by the board of examiners in chief, as appears from the file wrapper in evidence, upon the holding that "approximately in line" meant substantially in line with each other, and that such feature was novel, and was the cause of the superiority of complainant's crushers. The projections on the defendant's crushers are not at all in line with each other, nor are the crushers themselves of the peculiar construction shown in the complainant's mill. As is testified by defendant's expert witness, the means for driving the crushing cylinders, or breakers, in the defendant's machine differ from those set forth in the complainant's patent. Instead of being geared to the main shaft, one of the upper breakers is geared to a counter-shaft, which is supplied with a pulley, and derives its motion from the main shaft through the medium of a belt, which passes over said pulley on the counter-shaft, and a suitable pulley on the main shaft, this construction being more nearly represented in the Leavitt 1879 pat-

ent than in any of the patents referred to. I find, therefore, that the defendant's mill does not have "intergeared crushers," having protuberances which "extend approximately in line with each other," and I find that the said mill does not have one of said crushers geared with the main shaft, "as described in the complainant's patent, and specified in the first claim thereof." From every point of view the equity of this cause is with the defendant. The bill will be dismissed, with costs.

ELECTRICAL ACCUMULATOR Co. v. BRUSH ELECTRIC Co.

(Circuit Court, N. D. Ohio. December 26, 1890.)

1. PATENTS FOR INVENTIONS—INTERFERENCES—PLEADINGS.

In a suit under Rev. St. U. S. § 4918, to set aside a patent on the ground of interference with plaintiff's prior patent, defendant may obtain affirmative relief on an answer alleging the validity of his own patent, and the invalidity of plaintiff's under that provision of the statute that "the court, on notice to adverse parties, * * * may adjudge and declare either of the patents void."

2. SAME—DISMISSAL OF BILL.

Where such suit has been pending for several years, and defendant has sought affirmative relief by his answer, and has failed to file a cross-bill, plaintiff will not be allowed to dismiss his bill before the hearing and after proofs have been taken, and it is immaterial that plaintiff has sold his patent.

3. SAME—PLEADING—SUPPLEMENTAL BILL.

A supplemental bill, alleging that since the filing of the original bill plaintiff's patent has been adjudged valid by another court in a case to which defendant was not a party, on plaintiff's filing a disclaimer limiting the scope of his patent, and that the two patents no longer interfere, will not be stricken out on general demurrer, though it prays that the original bill be dismissed, as the facts alleged can be made to appear by supplemental bill only.

4. SAME.

In such a suit questions of the duration of defendant's patent by reason of the existence of a foreign patent cannot be raised, as the object of the suit is to settle the questions of interference and priority only.

5. SAME.

Where the bill prays that defendant's patent may be declared void by reason of interference with plaintiff's prior patent, and the answer prays that plaintiff's patent may be declared void, the suit cannot be regarded as one for infringement.

In Equity.

Upon petition of plaintiff for leave to dismiss its bill, and also upon demurrers to the amended and supplemental bills.

The amended bill was filed in this case under Rev. St. § 4918, by the assignee of Camille A. Faure, to whom, on January 3, 1882, patent No. 252,002 was granted to procure an adjudication of the invalidity of patent No. 337,299, issued March 2, 1886, to Charles F. Brush for a secondary battery. To this bill a demurrer and answer was filed by the Brush Electric Company, affirming the validity of its own patent, and denying that of the Faure patent, and praying that the plaintiff might be restrained from transferring its rights under the Faure patent, from disposing of its stock, or from licensing others to make, use, or vend secondary batteries, embodying the invention described in the Faure

patent, and from beginning or prosecuting any suits against defendant, its licensees or customers, for alleged infringement of such patent. A replication having been filed, plaintiff proceeded to take his *prima facie* proofs, and defendant to take its answering proofs. At this stage of the case plaintiff filed a supplemental bill, setting forth that the first claim of the Faure patent had been adjudged to be valid in the circuit court for the southern district of New York, in a suit in which the Electrical Accumulator Company was plaintiff and the Julien Electric Company was defendant. Upon the filing of a disclaimer in the patent-office, limiting such claim, and disclaiming from the first claim of said patent "any electrodes of a secondary battery, coated with an active layer of absorptive substance, to which the active layer is wholly applied otherwise than in the form of a paint, paste, or cement." The supplemental bill further alleged that since the filing of said disclaimer the said Faure patent and the said Brush patent have not been interfering patents within the meaning of the law, and prayed the judgment of this court whether this suit should not be discontinued and become abated by reason of such disclaimer, so that there is no longer an interference between the said patents. To this supplemental bill defendant filed a general demurrer. Thereupon plaintiff filed this motion to dismiss, to which defendant filed a demurrer and answer, alleging the invalidity of plaintiff's disclaimer, and denying that the Brush and Faure patents were not still interfering patents within the meaning of the law, even if limited by the pretended disclaimer.

Betts, Atterbury, Hyde & Betts, for plaintiff.

Wilder & Kenyon, for defendant.

BROWN, J., (*after stating the facts as above.*) The petition for leave to dismiss raises the question as to the right of a plaintiff to dismiss his bill after proofs have been taken and before the hearing, and after an answer praying for affirmative relief has been filed. If it were an original question, I should feel considerable doubt whether, under section 4918, a defendant was entitled to a decree declaring the invalidity of the plaintiff's patent, without filing a cross-bill; but as the practice of claiming affirmative relief in the answer has been sanctioned by several judges, and as no objection is made to it in this case, we do not feel called upon to express an opinion upon the point. Even if, under section 4918, a cross-bill be unnecessary, the defendant, in seeking to obtain a decree establishing the invalidity of the plaintiff's patent, is clearly an actor, since the section declares that "the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part." Under such circumstances, we think the defendant should be considered as having the same rights as if it had filed a cross-bill. Indeed, if it were necessary under the statute to its affirmative relief, we should permit a cross-bill to be filed even at this stage of the case.

While there is no doubt of the general proposition that a plaintiff in an equity suit may dismiss his bill at any time before the hearing, it is equally well settled that he cannot do so without an order of court,—a practice which implies a certain discretion on the part of the court to refuse such order if, under the particular facts of the case, a dismissal would be prejudicial to the rights of the defendant. Leave to discontinue has been denied where the defendant has set up a counter-claim which would be barred by the statute of limitations. *Van Alen v. Schermerhorn*, 14 How. Pr. 287. Where the defendant pleaded an estoppel, which, if established, would amount to a defeasance of a lien claimed by the plaintiff on his property, and which it was the object of the bill to enforce: *Stevens v. Railroads*, 4 Fed. Rep. 97,—a most satisfactory opinion by Judge HAMMOND. Where defendant sought to dismiss his cross-bill after the original and cross-bill had been set down to be heard together; the court remarking that the plaintiff could not dismiss his bill when by so doing he might prejudice the defendant: *Booth v. Leicester*, 1 Keen, 247. Where a general demurrer had been overruled upon argument, and defendant had appealed: *Cooper v. Lewis*, 2 Phil. Ch. 178. After an order to account and a report has been made: *Bethia v. McKay*, Cheves, Eq. 93, overruling *Bossard v. Lester*, 2 McCord, Eq. 419. Or where a cross-bill was filed to a bill of foreclosure: *Bank v. Rose*, 1 Rich. Eq. 292; the court observing that “whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit, and making his proofs anew, such dismissal will not be permitted.” Whether, under the New York Code of Pleading, a plaintiff will be permitted to discontinue after a counter-claim has been filed seems to be a question upon which the authorities are not unequally divided. *Cockle v. Underwood*, 3 Duer, 676; *Railroad Co. v. Ward*, 18 Barb. 595; *Rees v. Van Patten*, 13 How. Pr. 258; *Young v. Bush*, 36 How. Pr. 240. In *Cummins v. Bennett*, 8 Paige, 81, it was conceded by counsel on both sides that the right of the plaintiff to discontinue was absolute, even if a cross-bill were filed; but that it did not carry the cross-bill with it; that as the cross-bill was the bill of the defendant it remained in court until he voluntarily dismissed it, or it was dismissed by his default or disposed of by the judgment of the court. This, however, does not seem to accord with the practice in the federal courts. *Railroad Co. v. Rolling-Mill Co.*, 109 U. S. 702, 713, 3 Sup. Ct. Rep. 594. It was also conceded that the right existed in replevin where the defendant is an actor, and may notice the cause as well as the plaintiff, and continued in actions of contract after the law allowed a set-off to the defendant, and his right to recover from the plaintiff any excess of the set-off beyond the plaintiff's claim. In a case at law arising in my own district (*Holcomb v. Holcomb*, 23 Fed. Rep. 781) I held that where a defendant pleaded a set-off, and the case was referred, and the referee had reported a balance due to the defendant, and the statute of limitations has run against an original suit upon his claim, the plaintiff had no right

to discontinue the action. In *Bank v. Schulenberg*, 54 Mich. 49, 19 N. W. Rep. 741, the supreme court of Michigan was equally divided upon the question whether a nonsuit can be taken after set-off has been pleaded and defendant has claimed judgment for a balance.

Upon a full examination of all the cases upon this subject we have come to the conclusion that leave to dismiss a bill should not be granted where, beyond the incidental annoyances of a second litigation upon the same subject-matter, such action would be manifestly prejudicial to the defendant.

In the case under consideration the litigation has been pending for three years and a half. The defendant is entitled under his answer to an affirmative decree declaring the invalidity of the plaintiff's patent, in case it succeeds in establishing the priority of its own. Relying upon this, it has neglected to institute a cross-cause, and to allow this bill to be dismissed would be virtually to shorten the life of its patent for the time this litigation has been pending. Indeed, as the very object of the statute is to save the necessity of two suits, it will be manifestly unjust to permit either party to put an end to the litigation by dismissing its own bill.

It is said, however, that this order ought to be granted, because, since the cases of *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. Rep. 117, and *Brush Electric Co. v. Julien Electric Co.*, 41 Fed. Rep. 679, a disclaimer has been entered which renders these no longer interfering patents, and hence there is no necessity for this litigation. On the other hand, it is said that this disclaimer was unauthorized by the statute, and is a nullity; that while such disclaimer has been accepted in the second circuit, the defendant was not a party to that suit, has not been heard upon the question, and is not bound by the decision, and that the judgment of that court is not a bar to this action, nor to the prayers for affirmative relief contained in the defendant's answer. It is further claimed that even if the disclaimer be valid and legal, the two patents are interfering within the meaning of section 4918; that the first claim of the Faure patent is the only one affected by the disclaimer; and that an interference still exists between the third claim of the Faure patent and the ninth claim of the Brush patent and the fifth of the Faure and the tenth of the Brush. Without expressing any opinion as to the effect of this disclaimer, or the present existence of the interference, it is sufficient to say that these are questions which go to the merits of the case, and we have no right to consider them upon a motion to dismiss the bill. *Fuller v. Insurance Co.*, 31 Fed. Rep. 696. The question whether an interference exists or not is one which must be determined from an inspection of the pleadings and proofs, a question no more to be raised upon this petition than the question of the priority of the respective patents.

The objection that the plaintiff no longer owns the Faure patent, and therefore has no interest in this suit, is untenable. Granting that a sale *pendente lite* by a plaintiff of his interest in the subject-matter of a suit

operates as an abatement,—and such seems to be the law, (*Brewer v. Dodge*, 28 Mich. 358,)—this is clearly a matter of defense, and not one of which the plaintiff itself can take advantage. If the defendant seeks to obtain affirmative relief against it, its right to such relief ought not to be defeated by an assignment of plaintiff's interest in the patent. A decree in its favor would operate as an estoppel, not only upon the plaintiff, but upon any one purchasing its interest during the pendency of the suit, and also by the statute upon those deriving title under it subsequent to the rendition of the judgment. It is not the judgment which would affect the purchaser *pendente lite*, but irrespective of the statute he is charged with notice of the suit, and bound by its result. *Murray v. Ballou*, 1 Johns. Ch. 566; *Murray v. Lyllburn*, 2 Johns. Ch. 441; *County of Warren v. Marcy*, 97 U. S. 96, 105.

The petition to dismiss must therefore be denied.

2. There are also two demurrers interposed by the defendant, one to the supplemental bill, and the other to the original amended bill.

The first of the demurrers is to the supplemental bill. The amended bill alleges that the inventions described in the two patents are substantially the same; that they are interfering patents within the meaning of the law; and that Faure was the true and first inventor,—and prays that the Brush patent may be declared void. The defendant in its answer admits that certain claims of the Brush patent recite substantially the same invention as certain claims of the Faure patent, and that the patents in the suit are interfering patents to that extent, but avers that Brush is the true and first inventor, and prays that the Faure patent may be declared void. Replication was filed and testimony taken upon both sides. While defendant was awaiting the plaintiff's rebutting testimony the latter obtained leave to file a supplemental bill.

This bill, after reciting the proceedings had in the suit, states that the first claim of the Faure patent has been declared valid in the circuit court for the southern district of New York, in a suit against a defendant not a party herein, upon filing a disclaimer in the patent-office limiting such claim. This claim is admitted by defendant in its answer to be for substantially the same invention as one of the Brush claims. The supplemental bill further states that since the filing of said disclaimer the two patents have not been interfering patents within the meaning of the statute, and prays judgment whether this suit should not be discontinued and become abated. In short, after denying that it has any cause of action against the defendant, it prays the court to dismiss its bill. By the recognized rules of equity pleading the province of a supplemental bill is either to supply some defect in the structure of the original bill, when this cannot be done by amendment, or to introduce matters occurring subsequent to the filing of the original bill. Story, Eq. Pl. § 332. Although the plaintiff may, in a supplemental bill, pray for other and different relief from that demanded in the original bill, the new matters which may be introduced should be such as refer to and support the rights and interests of the original bill. *Id.* §

336. The facts introduced by way of such bill must not only be material in themselves, but must be such as are in furtherance of the general object of the original bill, and not such as are destructive of it. Its province is to meet exigencies arising or discovered since the filing of the original bill, and to put them on record in such manner that they may be made available for the continued prosecution of the original suit, that the benefit of proceedings already taken may not be lost.

Tested by these rules it is quite evident that this bill is objectionable, in so far at least as it prays for a dismissal of the original bill. While it introduces matter which has arisen since the filing of the amended bill, it is matter which, so far from being beneficial to the plaintiff's cause of action, is subversive and destructive of it. It prays not for the same or similar relief to the original bill, but that this may be dismissed. We do not understand that the plaintiff can, either by amendment or by supplemental bill, make an essentially different case, or pray for relief manifestly inconsistent with that claimed in the original bill. *Snead v. McCoull*, 12 How. 422; *Allen v. Spring*, 22 Beav. 615; *Maynard v. Green*, 30 Fed. Rep. 643. In *Shields v. Burrow*, 17 How. 130, it is said (page 144) that "a bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated, must be the foundation for precisely the same relief. * * * Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. * * * We think sound reasons can be given for not allowing the rules for the practice of the circuit courts respecting amendments, to be extended beyond this, though doubtless much liberality should be shown in acting within it, taking care, always, to protect the rights of the opposite party."

Obviously the proper way to obtain the relief sought by this supplemental bill was to move to dismiss the amended bill, the course which was subsequently pursued in this case. While we have already held that, under the peculiar circumstances of the case, plaintiff was not entitled to a dismissal of this bill, no objection was made to the petition as the proper method of procedure.

But, inasmuch as the defendant prays for affirmative relief against the plaintiff, it is quite evident that the facts set forth in this supplemental bill of the adjudications in New York and the disclaimer should, in some way, be called to the attention of the court, in order that it may pass an intelligent judgment upon the two patents as they now stand. Indeed, this case well illustrates the difficulty of carrying on a double litigation under this statute without the filing of a cross-bill. Had such bill been filed in this case, the court would have had no doubt of its power to permit these facts to be set up in a supplemental answer. *Story*, Eq. Pl. § 903; *Patterson v. Slaughter*, 1 Dick. 285; *Graves v. Niles*, Har. (Mich.) 332; Gen. Eq. Rule 46. But as the right of the plaintiff to have the benefit of these facts is as clear as though a cross-bill were filed, we know of no way by which, in the absence of a cross-bill, they can be made to appear except by a supplemental bill, and for this purpose it will be permitted to stand. And as the demurrer in this case is taken to the whole bill,

and not to the prayer for relief only, it must be overruled. The rule is that a general demurrer cannot be good to the part which it covers and bad as to the rest, and therefore it must stand or fall altogether. Story, Eq. Pl. § 443; *Higinbotham v. Burnet*, 5 Johns. Ch. 184; *Williams v. Hubbard*, Walk. (Mich.) 28.

3. The demurrer to the amended bill arises out of the allegation that prior to the granting of the patent to Brush there was an Italian patent granted to one Hadden, agent of Brush, for the term of three years from August 8, 1882, a certified copy of which was annexed to the bill. The argument is that, as the foreign patent had expired before the American patent was taken out, the latter is invalid, and of no effect. Defendant claims that this allegation raises an issue which cannot properly be determined in a suit based upon an interference; that the sole objects of section 4918 are to determine the questions of interference and priority as between two patentees; and that all other questions, including those of anticipation, novelty, and duration of the patent, can only be raised in suits for infringement. This question has been passed on in five cases, and in all, except the earliest, the contention made by this demurrer was sustained. In the case of *Foster v. Lindsay*, 3 Dill. 126, the defendant, in a suit upon an interference, set up, among other defenses, that the patent compound or process had been anticipated and in use before either of the interfering patents had been claimed or issued. The point was made that the court was bound to adjudicate solely between the interfering patents, leaving one to stand for subsequent adjudication when assailed in a proper suit. Judge TREAR held that the defense was a proper one, and that under the statute the court had the power to declare either one or both of the patents void, and thus end the litigation. But in the subsequent case of *Pentlarge v. Pentlarge*, 19 Fed. Rep. 817, where the defendants interposed a plea that the invention described in the plaintiff's patent was anticipated by an English patent, Judge BENE-DICT held, in an opinion which seems to me unanswerable, that the statute has for its sole object the determination of the question of interference and priority. "If the defendant," says he, "in such an action, may attack the plaintiff's invention on any ground which the statute permits to be set up by answer in an action for infringement, it would often result that the proceeding would fail to carry the adjudication of the question of interference, and so the proceeding be rendered futile for the purpose which the statute intended to be accomplished."

The same view was taken by Judge NIXON in *Lockwood v. Cleveland*, 20 Fed. Rep. 164; by Judge SAGE in *American Clay-Bird Co. v. Ligowski Clay Pigeon Co.*, 31 Fed. Rep. 466; and by Judge SPEER in *Sawyer v. Massey*, 25 Fed. Rep. 144. We regard those cases as settling the law that questions of novelty cannot be raised in suits under this section, and by parity of reasoning, that questions of the duration of either patent, by reason of the existence of a foreign patent, which would involve incidentally the question of the identity of the two, are equally beyond the power of the court.

But it is said that this is also a bill for an infringement, as well as for an interference, and that in such case every question which might properly be put in issue in an ordinary suit for infringement may be raised here; citing *Holliday v. Pickhardt*, 29 Fed. Rep. 853.

We do not so read the pleadings. The bill prays that the Brush patent be adjudged void by reason of its interference with the patent to Faure. The answer prays that the Faure patent may be declared void; that the plaintiff may be restrained from disposing of it, or making use of it directly or indirectly. There is no allegation in either that would justify us in treating either pleading as a bill for an infringement. Indeed, it is very clear that an answer to a bill under this section could not be treated as a bill for an infringement.

Separate orders will then be entered, denying the petition to dismiss, overruling the demurrer to the supplemental bill, and sustaining the demurrer to the amended bill.

AMERICAN ROLL-PAPER CO. v. KNOPP *et al.*

(Circuit Court, E. D. Missouri, E. D. November 8, 1890.)

1. PATENTS FOR INVENTIONS—PRESUMPTION OF PRIORITY—INFRINGEMENT AND INTERFERENCE.

Where two patents interfere, there is a rebuttable presumption that the inventor who first applied for a patent was the first inventor.

2. SAME—RIGHT TO DAMAGES.

Where two patents interfere, and the later in date was first applied for, the owners of the latter cannot have damages for an infringement by the owner of the other without first obtaining an adjudication under Rev. St. U. S. § 4918, providing for suits to determine questions of interference, that the other is void.

3. SAME—PLEADING.

A count under that section for an interference and a count for infringement may be joined in the same bill.

In Equity.

Geo. H. Knight, for complainant.

Paul Bakewell, for defendant.

THAYER, J. In this case it appears that the roll-paper machine manufactured and sold by defendants is manufactured strictly in accordance with the specification and drawings of letters patent of the United States No. 394,121, owned by defendants, and issued to Edward L. Knopp December 4, 1888, the application for which was filed September 8, 1888. Complainant's contention is that defendants' machine embodies substantially the same invention claimed and described in letters patent of the United States No. 409,028, granted to the complainant, as assignee of Leo Ehrlich, on August 13, 1889, the application for which appears to have been filed December 2, 1887, and was renewed March 28, 1889. Its contention is also that the machine is an infringement of the Ehrlich patent. v.44F.no.8—39

ent. Assuming, but without deciding, that it is substantially the same invention, and that the Ehrlich device possesses patentable novelty, still complainant cannot recover in this case, (defendants' patent having been first granted,) unless it is shown in some way that Ehrlich was the original and first inventor of the device; and it has not been so shown to my satisfaction. There is no evidence in the record as to whether Knopp or Ehrlich was the original and first inventor, unless the fact that Ehrlich's application for a patent was first filed creates a presumption that he was the first inventor. But the date of an application for a patent does not necessarily or ordinarily indicate the true date at which the invention was made, because inventors sometimes, if not often, fail to make an application for a patent for months after the invention is complete. In the case at bar it appears, as before stated, that Knopp first obtained a patent, although Ehrlich's application for one was first placed on file. Under the circumstances, and in the absence of other evidence on the subject, the court will not presume that Ehrlich was the first inventor, and the burden is on complainant to establish that fact. It is just as reasonable to infer that Knopp was the first inventor. I have not stopped to consider whether, in a bill of this character, which is merely a suit for infringement, it is competent for the complainant to show that Ehrlich was the first inventor of the alleged infringing device, and thus invalidate the prior Knopp patent. For present purposes, it is sufficient to say that, if the fact in question may be shown, it has not been, and a decree must go against the complainant on that ground.

Another feature of the case justifies comment. It was admitted at the hearing that the complainant is not manufacturing, and has not manufactured, any machines under the Ehrlich patent, or put them on the market in any manner. It is manufacturing a machine made under a patent granted five years previous to the Ehrlich patent, which it evidently considers superior to the Ehrlich machine, and seems to be using the latter patent merely to keep other manufacturers of roll-paper machines out of the market. Whatever its technical right to make such use of the patent may be, its conduct in this respect evidently deprives the public of whatever advantages the Ehrlich invention possesses, contrary to the true policy of the patent laws.

The bill is dismissed.

ON MOTION FOR REHEARING.

(January 8, 1891.)

THAYER, J. 1. Under the authorities cited, it must be conceded that, in the absence of proof showing the true date of each invention, the presumption is that each invention was made at the time the respective applications were filed. *Bates v. Coe*, 98 U. S. 33, 34; *Pennington v. King*, 7 Fed. Rep. 463; *Dane v. Manufacturing Co.*, 3 Biss. 380. According to this view, as the Ehrlich application was filed December 2, 1887, and the Knopp application on September 8, 1888, and as there is no evidence that Ehrlich's original application was modified or amended

in any respect after it was filed, it must be conceded, as the proof stands, that Ehrlich is presumptively the first inventor.

2. But although Ehrlich's application was first filed, defendants' patent antedates his by eight months, and defendants appear to be manufacturing paper rollers strictly in accordance with the claims of their patent. Plaintiff's contention is that defendants' patent is subordinate to the Ehrlich patent, and that it is for the same invention, covered by the first three claims of the Ehrlich patent. It has accordingly filed a bill in the ordinary form for an alleged infringement of its exclusive rights. In view of these facts, defendants insist that complainant cannot maintain a simple bill for infringement, in view of the priority of their letters, but that it should couple with its bill for infringement a count under section 4918, to have the Knopp patent adjudged void, in whole or in part, because of the alleged interference. The question thus raised seems to be one of first impression; at all events, I have not been referred to any case where the precise point has been considered and adjudicated. It was not considered in the case of *Lane v. Sovereign*, 43 Fed. Rep. 890, for the decision in that case turned merely on a question of pleading, the cause having been submitted on the bill, answer, and replication; nor was the question at all discussed in *Johnsen v. Fassman*, 5 Fish. Pat. Cas. 471, nor in the case of *House v. Young*, 3 Fish. Pat. Cas. 335, cited by defendants' counsel. In the latter case, the defendant was acting under a reissued patent later in date than complainant's, but defendant's original patent antedated complainant's patent. In the ordinary case of a bill for infringement, filed by the holder of a senior patent against the holder of a junior patent, the claims whereof conflict, it is no defense that the defendant is acting under a patent. The reason of the rule, as I apprehend, is that by the grant of the first letters the government exhausts its power to grant to another person a monopoly of the same invention, hence the holder of the prior patent is at liberty to treat the subsequent patent as utterly void, in so far as it conflicts with the earlier grant. Rob. Pat. § 370. But there is an obvious distinction between such a case and one where the defendant proceeded against holds the prior grant, and is operating thereunder in good faith. Ordinarily a prior grantee of a right, privilege, or estate cannot be proceeded against as a trespasser by a subsequent grantee of the same grantor, even though the prior grant is for some reason voidable, until the proper steps have been taken to have the invalidity of the prior grant judicially ascertained and declared. The principle last referred to seems to be applicable to the case at bar.

It may be that the commissioner of patents erred in granting a patent to the defendants while the earlier application of Ehrlich was on file; but, be that as it may, if such action was erroneous, it was an error, in my judgment, that merely renders the patent voidable in a direct proceeding brought to establish its invalidity, as the government clearly had power when the grant was made to issue a patent for the invention in question. A suit for infringement which proceeds plainly upon the theory that the defendants are trespassers, although acting strictly within

the terms of a prior grant, and that they are liable to the subsequent patentee for profits and damages, even before the invalidity of the prior grant had been judicially ascertained, would not seem to be a proper remedy, in view of the fact that a more appropriate remedy has been provided by statute. Section 4918 is well designed to afford relief in a case like the one at bar. It provides, in substance, that whenever there are interfering patents, any one interested in any one of them may have relief against the interfering patentee by a suit in equity, and the court, after due proceedings had according to the course of equity, may adjudge either of the patents void in whole or in part. The judgment in such case binds the parties thereto and those acquiring title to or an interest in the patent in question subsequent to such adjudication.

Under the provisions of this section, the complainant, if its contention is well founded, may obtain a decree determining to what extent defendants' prior patent is subordinate to its own, and to what extent, if any, the claims of the prior patent are invalid. Upon the whole, therefore, I conclude that in a case like the one at bar, where defendant holds and is operating under a prior grant, it is incumbent on the plaintiff to proceed, in the first instance, under section 4918, to have the invalidity of defendants' patent, in whole or in part, judicially ascertained and declared. That method of procedure appears to the court more regular, and more in accordance with the analogies of the law, than to permit the complainant to proceed against the defendants merely for infringement.

It has been held that a count for infringement and a count under section 4918 may be joined in the same bill, and I can see no objection to that course of procedure. *Leach v. Chandler*, 18 Fed. Rep. 262; *Hollday v. Pickhardt*, 29 Fed. Rep. 853; *Swift v. Jenks*, Id. 642.

The decree heretofore entered was for the right party, and will be allowed to stand, but it will be modified so as to show that the dismissal ordered is without prejudice to the right to proceed as herein indicated.

PARKS *et al.* v. BAY *et al.*

(Circuit Court, E. D. Missouri, E. D. January 3, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—NUT-LOCKS.

In a patent for a nut-lock, claim 1 is for a combination, with a nut having a notched or serrated face, of a rectangular washer, split across one of its sides, the ends thus formed being bent in opposite directions, and "each being beveled from one side to the other, to form a knife edge," substantially as described. Claim 2 also describes the ends of the split washer as being beveled to form a knife edge. In the specifications the ends of the washer are said to have "a sharp edge," and "sharp spring-lips," to engage the serrated surface of the nut. *Held*, that the patent must be restricted to washers having beveled sharp edges, and the use of similar washers with square edges does not constitute an infringement.

In Equity.

Wm. C. Marshall, for complainants.

Wm. M. Eccles, for defendants.

THAYER, J. For the purposes of this decision it will be conceded that plaintiffs' improved nut-lock possesses patentable novelty, although, in view of the state of the art, there may be some doubt on that point. Among the numerous prior patents referred to in the answer, and put in evidence, there are several which render it questionable whether the patent in suit ought to be sustained. I am satisfied that it can only be upheld by limiting it to the precise form of device described and claimed. The patentees cannot consistently object to such a construction of the patent, as it appears to have been their expectation when the application was pending, as evidenced by their correspondence with the patent-office, that the patent would be so limited and construed. The claims are as follows:

"(1) In a nut-lock, the combination, with a nut having a notched or serrated face, of a rectangular washer, split across one of its sides, the ends thus formed being bent in opposite directions to substantially the same degree, and each being beveled from one side to the other, to form a knife edge, substantially as specified.

"(2) As a new article of manufacture, a rectangular washer, made of tempered steel, and having a bolt-hole, one side of the washer being cut through from the edge to the bolt-hole, the ends thus formed being bent in opposite directions to substantially the same degree, and each end being beveled from one side to the other, to form a knife edge, substantially as described."

In the descriptive part of the specification, the ends formed by cutting the washer through from one side to the bolt-hole, are said to have "a sharp edge," and "sharp spring-lips" to engage the serrated surface of the nut, and prevent it from turning; and Fig. 3, attached to the specification, which purports to be a detail drawing of the washer in question, also shows an unmistakable bevel, forming such a "knife edge" as is described in the claims.

Further comment is unnecessary, to demonstrate, that the beveling of the ends of the washer where it is cut through, so as to form a "sharp or knife edge," as distinguished from a square edge, is an essential feature of plaintiffs' invention. It may be that a "square edge"—that is to say, an edge formed by cutting through the washer in a plane perpendicular to its surface, and then bending the ends back in opposite directions—would be equally as serviceable as a knife edge, formed by beveling the ends; but it goes without saying that the patentees have made the bevel a material element in both of their claims, and, whether it was necessary or unnecessary so to do, they must be limited to what they have claimed.

In view of the construction of the patent herein adopted, there is no evidence of infringement, as none of the washers made by defendants, so far as shown, have a knife edge formed by beveling the ends.

The bill is accordingly dismissed.

SMEAD *et al.* v. UNION FREE SCHOOL-DIST., ETC.

(Circuit Court, N. D. New York. November 29, 1890.)

1. PATENTS FOR INVENTIONS—DRY CLOSETS—NOVELTY.

In patent No. 314,884, granted March 31, 1885, to Isaac D. Smead for a dry closet in which air is used to desiccate fecal matter, the first claim is destitute of novelty, everything essential to the invention stated having been described by Henry Ruttan in his book published in 1862; but the second and third claims are not without novelty, the improvements on the Ruttan system being a vault in the form of a tube so arranged as to receive deposits distributed along its surface in comparatively small quantities at any given place.

2. SAME—INVENTION.

Patent No. 332,157, granted Isaac D. Smead for improvements in his closet, by which air is let into the vault from the outside of the building, and a fan employed in the vent-shaft to create a draught, is void for want of invention.

3. SAME—ANTICIPATION.

In patent No. 363,971, also granted to Isaac D. Smead for improvements in the closet, the first claim is not without novelty, the transverse partition located in the vault being serviceable, and adding somewhat to the efficiency of the closet; in view of the prior patent to W. S. Ross, the second claim is without novelty.

In Equity.

J. B. Foraker, H. H. Rockwell, Lysander Hill, and John W. Munday, for complainants.

Warren, Patterson & Gambell, for defendant.

WALLACE, J. This is an action for infringement of letters patent No. 314,884, dated March 31, 1885, granted to Isaac D. Smead for new and useful improvements in dry closets. The defenses are that the claims of the patent are destitute of patentable novelty, and that the invention was in public use more than two years prior to the application for the patent. The dry closet of the patent is one in which air is used to desiccate fecal deposits, render them innocuous, and remove the foul odors from the building. The treatment of such deposits in buildings where a large number of persons use the closets is a problem which architects and sanitary engineers have attempted to solve in various ways. Water-closets, with their sewer connections, involve the well-known danger of the generation of disease germs, as well as the expense and annoyance commonly incident to plumbing. Earth closets smother the foul odors, and do not thoroughly dry the deposits, and the absorbing material soon becomes charged with the odors that the closets become offensive if they are not frequently and carefully cleansed; and it would seem manifest that they could not be practically employed for the use of several hundred persons in a single building. The dry closet in which the deposits are desiccated by an air current constantly forced into contact with them is especially adapted for use in buildings where the general system of heating and of ventilation can be utilized to furnish the air current, and convey it out of the building. The present invention is more especially designed for use in such buildings. The invention described in the specification, and shown in the drawings, consists of a system of foul-air ducts, a gathering room, a deposit vault, and a vent

shaft, so constructed and arranged in relation to each other that the air drawn from the various rooms in the building to ventilate them shall be delivered at one end of the vault, and pass horizontally through it to and out of the vent shaft. The foul-air ducts leading from the several apartments may be constructed so that each one will ventilate several rooms, or only a single room. They are connected with the rooms preferably by a register, and are connected by intermediate ducts with the gathering chamber so as to concentrate there the entire volume of air drawn from the building. The gathering room is located at one end of and opens into the vault. The vault is a horizontal tube which serves as an air duct between the gathering room and the vent shaft. It is oblong in form, and is of sufficient length to receive the fecal deposits from a series of closets located side by side above it. The vent shaft, or exit shaft, extends from the base of the vault to and above the roof of the building. It opens into the vault, and is provided with means for creating a strong draught through the vault from the gathering room. The specification states that the location of the closets in the building will be governed by circumstances, and it is immaterial where they are located so long as the vault is so arranged that the air from the building will be conducted through it and from thence into the outer atmosphere at such a point that it will not be wafted back into the building through the doors or windows. The specification implies that buildings like those in which the dry closets will be employed are usually heated by a furnace or furnaces; and in that case the means described for securing the necessary draught for the vent shaft are provided by building the furnace flue along-side the vent shaft, and heating the vent shaft by the smoke and gases which escape from the furnace; and when the furnace is not in use a heater of any suitable kind located within the shaft is employed; or "any of the known appliances in use may be availed of to increase the draught," in case it should be found necessary to do so. The specification contains this summary of the invention:

"From the foregoing description, it will be seen that the gist of my invention consists in so arranging the closets, in relation to the exhaust ducts and ventilating shaft or shafts, as to cause the foul air which is drawn from the rooms to pass through the vault which receives the fecal deposits and desiccate the same, and at the same time take up and carry off all foul odors. As the air leaves the rooms at a temperature of about 65 degrees, it will readily be seen that it is in a condition to rapidly absorb moisture and produce a drying effect upon any matter with which it may be brought in contact. By this method the fecal matter is quickly desiccated and greatly reduced in volume, so that its removal is easily and quickly accomplished. If desired, a small amount of plaster, dry earth, or other absorbent material, may be from time to time thrown into the vault; but, in practice, I have not found this necessary or advisable, because of the rapidity with which the deposits in the vault were dried up by the passage through it of such a large volume of warm air. By this method I am enabled to avoid all the serious difficulties or objections which have heretofore existed in reference to closets, especially when located within buildings, the closets themselves being as free from offensive odors as are the ordinary rooms of the building."

The claims of the patent are as follows:

"(1) The combination and arrangement of one or more ducts for the removal of the foul air from a room or rooms of a building, a vault for receiving and retaining the fecal deposits, connected with said duct or ducts, and a ventilating or exit shaft connected with said vault, whereby the warm air from within the building is made to desiccate or dry the deposit in the vault and remove all odors therefrom to the outer air, as set forth. (2) The combination in a building of a series of foul-air ducts, B, a gathering room, C, a vault, D, and a ventilating or exit shaft, E, with means, substantially such as described, for creating a draught through the same, substantially as and for the purposes set forth. (3) A dry closet arranged in relation to the ducts which convey the air from the room or rooms in a building, and the ventilating or exit shaft, substantially as shown and described, whereby the foul and warm air from the room or rooms is made to pass through said dry closet, and thence out through the ventilating shaft, as and for the purposes set forth."

The patentee was not the originator of the method of treating fecal deposits by an air current to desiccate them and remove their odor, nor the first to utilize for that purpose the air drawn for ventilation from the various rooms of the building; nor was he the first to do this by using a system of air ducts like those described in his patent, leading into a gathering room, and a vent shaft like that described in his patent for creating the requisite draughts. The credit for all this belongs, according to the present record, to Henry Ruttan, of Canada, who published in 1862 a book upon the ventilation and warming of buildings, which is a very valuable contribution to the literature of that subject. Everything in the specification of the present patent, which is essential to the broad invention stated in the first claim, is described in Mr. Ruttan's book. But, instead of a vault like that described in the patent, Ruttan's closet had a basin located within and at the bottom of the gathering chamber, a single basin to which all the deposits from the various closets in the building were to be conducted. It was placed in front of an opening into the vent shaft, and consequently was in the line of the air current entering the vent shaft. It was in no sense a tube or air duct between the gathering chamber and the vent shaft. The gathering chamber opened directly into the vent shaft. Obviously, in such a closet the air current can only reach the top of the deposits in the basin; it may create a crust over the deposits, but will not dry the mass. Such a closet might do the work of removing the odors, but it could not do the work of desiccation. No one can doubt that it would be of very little practical utility in a building in which it would be used by any large number of persons. Those who were familiar with it, among them the Ruttan Heating & Ventilating Company, engaged in manufacturing Ruttan's heating and ventilating apparatus, and whose interest it was to introduce his closet, attempted to do so to a limited extent in family residences, but never recommended it for large institutions or public buildings, and finally abandoned closet work altogether. The change made by Smead in the organization of the Ruttan closet by inserting a vault in the form of a tube between the gathering chamber and the exit vent adapted the vault to receive deposits distributed along its surface in comparatively small quantities at any given place, and to act as a duct for a

condensed current of air. The deposits are thus exposed intimately and effectually to the air current that travels through the vault to the exit shaft. It was this change which made the dry closet of the patent a practical and commercial success, and led to its introduction in many public buildings. The testimony in the present record proves beyond peradventure that the dry closet of the patent is an extremely useful and valuable invention. The witnesses testify that in buildings where the Smead closets are used by hundreds of people daily no foul odors arise, the fecal matter becomes within 36 hours after its deposit so dry as to be combustible, and shrinks so much in weight that the deposits of many months can be carried away in two or three barrels. No doubt is entertained that the novelty of the second claim of the patent is not impeached by the closet described in the Ruttan book, or that the change made by the patentee in the organization of the devices of Ruttan was one that involved invention. The second claim of the patent is aptly expressed to specify the invention really made by the patentee by reference to the specification and drawings. Limiting the third claim to one for a combination of the same parts as the second claim, but omitting the gathering room, its novelty is not negated by the Ruttan publication. It is not entirely clear that this claim is fairly capable of such a limited interpretation; but, unless such an interpretation is placed upon it, the patent will be of but little practical value, because any infringer, by dispensing with the gathering room, will appropriate the real invention of the patentee without infringing the second claim. Obviously, the gathering room is not an essential feature of the real invention, and the foul-air ducts can be conducted directly to the vault without the interposition of the gathering room. It cannot be assumed that the third claim is for the same invention as the first. The patent-office must have understood that there was some distinction between them, and could not have intended to allow two claims for the same thing. With some hesitation, the conclusion is reached that the third claim can be construed more narrowly than the first, and that the dry closet of that claim is one in which the vault is of the particular form described in the specification, and not, as in the first claim, a vault of any description, through which air can be conducted.

The prior patent to W. S. Ross, cited for the defendants, is of no importance as an anticipatory reference to either claim of the patent, or as tending to suggest the absence of patentable novelty in the second or third claim. The Ross patent is for a furnace for baking or burning fecal deposits by heat. The vault is located between the fire pot and the smoke flue, and has within it a transverse shelf or partition for the reception of the deposits. When the furnace is in operation, the products of combustion pass over and beneath this shelf, and thus burn or bake the deposits. The defense of prior use based upon the dry closets of Mr. Clark, Mr. Yeomans, and the Mount Carroll closet, cannot prevail. These closets are illustrations, more or less crude, of the Ruttan closet, with unimportant modifications. It is doubtful whether, from a sanitary point of view, any of them were an improvement upon the old-fashioned privy.

The first claim of the patent, having been asserted and put in controversy by the complainant, and being adjudged void for want of novelty, must be disclaimed. Upon filing a proper disclaimer, the complainants are entitled to the usual decree, but without costs.

The second suit between the parties is brought upon two later patents granted to Mr. Smead (Nos. 352,157 and 363,971) for minor improvements upon the dry closet of the patent which has been considered. The questions of the validity and the infringement of these patents have been but little discussed by counsel, and may be briefly disposed of. The earlier of these two patents, so far as it relates to the claims now in controversy, is for a modification of the principal patent and covers improvements by which air is let into the vault from the exterior of the building, and by which a fan is employed in the vent shaft to create a draught. It could not involve invention to devise either one or both of these modifications. Invention cannot be reasonably asserted of making a hole in the wall of the building to let air into a vault, or of using the well-known fan to create a draught of air. As to the later of these two patents, undoubtedly the transverse partition located in the vault, which is the subject of the first claim, is serviceable, and adds somewhat to the efficiency of the closet. When constructed, as that claim implies, of absorbent material, the improvement seems to be new and patentable. But in view of the Ross patent, the second claim is without patentable novelty. Upon filing a disclaimer as to the second claim of patent No. 363,971, the complainants will have a decree upon the first claim, without costs.

INTERNATIONAL TERRA COTTA LUMBER CO. v. MAURER *et al.*

(Circuit Court, S. D. New York. December 1, 1890.)

1. PATENTS FOR INVENTIONS—REISSUE OF LETTERS.

The claim of reissued letters patent No. 10,420, for an improvement in fire-proof composition, was for "a composition to be used for fire proofing, and other purposes, consisting of kaolin * * *, prepared with water, machine-pressed, dried, burned, and adapted when burned to be sawed or wrought with edged tools." The claim of the original patent No. 248,094, granted October 11, 1881, to Charles G. Gilman, was for "a composition to be used for fire-proofing, and other purposes, consisting of kaolin * * *, prepared with water, machine-pressed, dried, burned, and, subsequent to firing, sawed or wrought with edged tools." *Held*, that the claim of the reissue was for an invention different and broader than the original, and was invalid.

2. SAME—IDENTITY OF REISSUE AND ORIGINAL.

A reissue is not void because one division of the reissue is identical with the original patent.

3. BILL FOR INFRINGEMENT—PROPERT AND OYER.

When a bill for infringement, based on reissued letters patent, tenders propret and oyer of the original as well as of the reissue, and as the instruments are public documents, at all times open to examination, they are presented as parts of the bill, and objections to their validity may be taken by demurrer.

4. SAME—DEMURRER.

On demurrer to a bill for infringement of reissued letters patent there may be special grounds thereof which relate to each of the reissues separately, and the demurrer may be sustained in part and overruled in part.

On Demurrer.

This action is based upon reissued letters patent, No. 10,419 and No. 10,420, now owned by the complainant. The original patent, No. 248,094, was granted to Charles C. Gilman, October 11, 1881, for an improvement in fire-proof composition. Subsequently, the patent was surrendered and issued in two divisions. The bill alleges as follows:

"On the eleventh day of October, 1881, letters patent of the United States numbered No. 248,094, signed, sealed and executed in due form of law, and bearing date the day and year last aforesaid, were issued to said Charles Carroll Gilman, whereby there was secured to him and to his heirs and assigns for the term of seventeen years, from the eleventh day of October, 1881, the full and exclusive right of making, using and vending the said improvement throughout the United States and the territories thereof, as by a certified copy of said letters patent, in court to be produced, will more fully appear. * * * That said Charles Carroll Gilman having for good and lawful cause surrendered said letters patent No. 248,094 to the commissioner of patents, and having made due application therefor on the 10th day of October, 1883, and having in all things complied with the acts of congress in such case made and provided, on the eleventh day of December, 1883, new letters patent numbered reissue No. 10,419 and reissue No. 10,420, were issued to Gilman Porous Terra Cotta Company, of New York, N. Y., as assignee of said Charles Carroll Gilman for the same invention for the residue of said term of seventeen years, as by said last mentioned patents or a duly certified copy thereof in court to be produced, will appear."

The demurrer disputes the validity of the reissues for the following reasons: (1) The original patent was not inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new; nor did any inadvertence, accident or mistake occur in the procuring of the original patent. Hence both reissues were granted without authority of law and are invalid. (2) Reissue No. 10,420 describes and claims a different invention from that described and claimed in the original patent, and is therefore invalid. (3) The patentee was guilty of laches in applying for the reissues, and hence they are invalid.

Esek Cowen, for complainant.

Robert N. Kenyon, for defendants.

COXE, J. The complainant contends that the original letters patent are no part of the bill and that the questions affecting the validity of the reissues cannot be considered on demurrer. It will be observed that the averments of the bill having reference to the original are almost identical with those employed in alleging the reissues, upon which the action is founded. In each instance the language is explicit and exact, leaving no doubt that the pleader intended to make all these instruments a part of the bill without incumbering the record with copies, *in extenso*. Proffert and oyer are tendered in the most formal manner. The instruments thus alleged are public documents, at all times open to examination. It is thought, therefore, that they are presented to the court as part of the bill and that objections thereto may be taken by demurrer. *Bogart v. Hinds*, 25 Fed. Rep. 484.

In the original specification the patentee, after stating that he is the inventor of a new and useful composition of matter, proceeds to describe ingredients of which it is composed and the various steps by which the composition is reduced to the form of logs ready for sawing. He then says:

"On cooling, the logs are removed to the mill and sawed into planks, boards, and dimension stuff, as lumber from wood is manufactured, and subsequently fashioned in the workshop into such forms and articles as demanded by purchasers. This material, being free from grit and tough in texture, can be cut, sawed, bored, grooved, planed, and carved with edged tools, and before or after such treatment can, after slipping and glazing, be submitted to a second firing, with fine results in ornamentation obtained."

On the 10th of October, 1883, the application for a reissue was filed. Reissue No. 10,419 (division 1) with the exception of a few immaterial verbal changes is identical with the original. At the head of the printed copy of the specification of No. 10,420 (division 2) furnished by the patent-office, are these words: "Application for reissue filed October 16, 1883." It is urged that this date must be considered as the date of the application. This position is untenable: *First*, because an unverified declaration of this character is not proof (*Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. Rep. 117, 140;) and, *second*, because the allegation of the bill that the application was made on the 10th of October, 1883, is admitted by the demurrer. Regarding division 2 it is argued that the attempt is made to claim a much broader invention by the omission of one of the elements of the original. The claims in question are here placed side by side, the italics in each show the matter not found in the other.

Original.

"A composition of matter to be used for fire-proofing and other purposes, consisting of kaolin clay, free from sand or sandy clay, and resinous sawdust, in the proportions specified, prepared with water, machine-pressed, dried, burned, and, *subsequent to firing*, sawed or wrought with edged tools, in manner described in the foregoing specification."

Division 2.

"A composition of matter to be used for fire-proofing and other purposes, consisting of kaolin clay, free from sand or sandy clay, and resinous sawdust, in the proportions specified, prepared with water, machine-pressed, dried, burned, and *adapted, when burned, to be sawed or wrought with edged tools in a manner described in the foregoing specification*."

The original claim covers a composition of matter having the following ingredients and features combined in the proportion and manner described. (1) Kaolin clay, free from sand. (2) Resinous sawdust. (3) Prepared with water. (4) Machine pressed. (5) Dried. (6) Burned. (7) Sawed or wrought after firing. In division 2 the last element (7) is omitted from the claim and the description is correspondingly altered. The composition claimed is completed without this additional step. True, the suggestion is made that the composition may be sawed or wrought with edged tools, but whether this is done or not is entirely optional. The language "and adapted, when burned, to be sawed or wrought with edged tools" has no legal significance and might as well have been omitted from the claim. A log untouched by saw or edged

tool would infringe the reissue, but not the original. To this extent, therefore, the claim is expanded; it seizes upon structures which would escape from the grasp of the original. It is said that the element of sawing and cutting was no part of the original invention. This may be so, but there can be little doubt that it was fully described in the specification and made a part of the claim of the original, and that the object of the reissue was to get rid of it. By reason of the omission the reissue, in question, is for a different and broader invention.

The demurrer not only attacks the bill in its entirety, but there are special grounds of demurrer which relate to each of the reissued letters patent separately. This practice is proper. Eq. Rule 32; *North v. Earl of Strafford*, 3 P. Wms. 148; 1 Daniell, Ch. Pl. & Pr. (Perk. Ed.) p. 650. The demurrer may be sustained in part, and overruled in part. *Powder Co. v. Powder Works*, 98 U. S. 126, 140; *Novelty Co. v. Rouss*, 39 Fed. Rep. 273. The special demurrer marked "Fifth" relates to so much of the bill as refers to reissue No. 10,420, and clearly presents the question above discussed, viz.: that the reissue is not for the invention originally patented. This demurrer should be sustained. *Manufacturing Co. v. Ladd*, 102 U. S. 408; *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. Rep. 537; *Plow Co. v. Kingman*, 129 U. S. 294, 9 Sup. Ct. Rep. 259; *Yale Lock Manuf'g Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 379, 10 Sup. Ct. Rep. 884.

Very little is said in defendants' brief regarding No. 10,419 (division 1) but it is insisted that it is void because, being identical with the original, there was no defect in the latter justifying a reissue. It is argued that if the reissue is valid now the original must have been valid and operative in October, 1883, and, therefore, the commissioner was without jurisdiction to grant the reissue. No authority is cited in support of this contention and, on principle, no just reason can be advanced in its behalf. Although I have been unable to find a decision based upon precisely this state of facts the case which approximates it most closely is *Giant Powder Co. v. Nitro Powder Co.*, 19 Fed. Rep. 509. The court there says:

"Patents may be reissued in divisions. It is not necessary that all claims in the reissue should be included in one patent. They are often issued in divisions, and I suppose that a patent might be reissued in divisions in the identical language as to some of the claims, the changes being included in another or separate division or patent; that is to say, all claims, or inventions which are fully covered and operative may be reissued by themselves in one division in the identical language of the original surrendered patent, and all other claims, on amendments to the specifications, and covering the invention shown by the amended specifications, in another division or patent."

A patentee who reissues his patent for the purpose of correcting a clerical error or improving the phraseology of the description may do an unnecessary act but why should it work a forfeiture of an invention justly his own? The public are in no way affected; they lose nothing; the patentee gains nothing. To hold the reissue invalid, in such circumstances, would be to follow an ingenious syllogism to an arbitrary and inequitable conclusion. It frequently happens that a patent is reissued

with the original specification and claims intact and a number of new claims added. The courts have frequently held the new claims to be invalid, but have permitted the original claims to stand. *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. Rep. 819; *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174; *Walk. Patents*, § 248. There can be no real distinction between these cases and the case at bar. The special demurrer marked "Fifth" is sustained, in other respects the demurrer is overruled.

ON REHEARING.

(February 7, 1891.)

COXE, J. A rehearing is asked upon the ground that the court erred in holding that the reissue, division 2, is for a different invention from that described in the original patent. Upon this proposition an argument is presented which states the complainant's position more fully than at the hearing of the demurrer. The reason assigned for the omission to make this argument at that time is that the complainant's counsel did not then fully appreciate the importance of division 2, and was under the impression that the decision would turn upon other questions to which greater attention was given. It is doubtful whether, in any view, a rehearing should be granted. No new proposition of law or fact is advanced. Though elaborated, strengthened, and enriched with new illustrations, it is still the old argument which is reasserted. That the contention of the complainant was not presented as fully as its counsel could desire is to be regretted, for impressions are sometimes formed at the hearing of a cause which might have been prevented or modified at the time, but which it is difficult to remove by subsequent argument. In the present instance, however, the fact that the complainant's brief was not so full upon the point in question as upon the other branches of the controversy induced what was intended to be an unusually thorough examination. As a result, the court was unable to find a decision of the supreme court or of a circuit court, since 1882, sustaining a reissue having infirmities like those of division 2. It should be remembered that the patent is not for a machine, but for a new composition of matter, produced by a formula consisting of seven progressive steps which are described with minuteness and accuracy. The question then is, can the patentee omit one step and insist that the product of six steps is the same invention as the product of seven steps? If he may omit step No. 7, and have the same composition, why may he not omit step No. 6, or steps Nos. 6 and 7, and still insist that the invention has not been changed? In describing step No. 7 he is unusually precise. He introduces it with the same formality which is accorded to the other steps. He says, in substance: When the mixture is reduced to a plastic mass it is removed from the tubs and pressed; when sufficiently dry, the logs are removed to the kilns and burned; and when they are sufficiently cool, they are removed to the mill and sawed. The proposition is now advanced that the invention stops with the sixth step. This is asserted

by counsel, not by the inventor. The latter expressly states that the invention is the result of all the described steps. He nowhere intimates that his composition can be produced by less than all. If conjecture were permitted, we might infer that the seventh step could be omitted, but the inventor does not say so. On the contrary he says:

"I am aware that like compositions have been made from a very early day, and that English and American patents have been granted therefor * * *; but I claim that no composition of this character, so far as I can learn, has been made of the same material, with the same proportions, and in the same manner, and without these materials, proportions, and treatment, as described, the full results which I assert cannot be reached."

The complainant's brief upon this motion proceeds upon the theory that all of the description and claim relating to sawing—and fully one-seventh of the specification is devoted to this subject—might as well have been omitted. That the composition is not changed or modified in the least by being sawed into planks, etc., and that no feature is added to the invention by this process. It would seem that this proposition is based largely upon speculation. How can it be asserted, as a fact, of a new composition of matter? How can it be said that the action of the saw upon the logs "on cooling," admitting light and air to the surfaces thus exposed, performs no function and produces no result, other than the ordinary one, and, especially, how can it be said in the teeth of the patentee's assertion that no part of the treatment described by him can be omitted? Even in the pithy and ingenious illustration of the complainant's counsel,—where the invention relates to a liquid composition, and the claim concludes with a statement that the fluid is "subsequently to boiling and cooling, bottled for use, as described,"—a case can readily be imagined where the exclusion of light and air, by immediate bottling, might add a very important feature to the fluid or prevent it from losing strength and vitality. Surely, if the patentee should still further affirm that "unless the said mixture, immediately after it becomes cool, is placed in stone bottles and tightly corked, in the manner described, it will be impossible to produce the said composition," the court would hardly venture to hold that the patentee was ignorant of his own invention, and that it was produced in a different manner from the one described by him. Those who are familiar with patent litigation will recall numerous instances where the highest quality of invention and the most phenomenal results are attributed by learned counsel and enthusiastic scientists to processes and proceedings, apparently, far more trivial. The conclusion cannot be resisted that the reissue in question is within the rule so often laid down by the supreme court. It was thought at the argument of the demurrer, and it is still thought, that it is for the interest of both parties that this important question, which lies at the threshold of the litigation, should be determined before they are subjected to the expense and delay incident to the taking of final proofs in an action in equity. The motion for a rehearing is denied.

MENTZ v. THE SAMMY.

MARTIN *et al.* v. SAME.

(Circuit Court, E. D. Louisiana. October 25, 1890.)

ADMIRALTY—REVIEW ON APPEAL.

In cases involving questions of fact only, depending on conflicting evidence and the credibility of witnesses, the circuit court in admiralty will not disturb the decrees of the district court, where there is no preponderance of evidence, and no additional evidence offered on appeal. Following *Duncan v. The Nicholls*, ante, 302.

In Admiralty.

R. DeGray, for libellant.

Frank Butler, for claimants.

PARDEE, J. To this case, tried and submitted at the last term of court, I have given a careful and laborious examination. The questions presented are questions of fact. The proper decision of them depends upon the credibility to be given the witnesses. The examination given the case raises some little doubt as to whether the case made by the libellant is not overturned by the claimants' evidence. But this doubt is not of such magnitude, nor so well supported by the evidence, that the court can say that the finding of the district court based upon the same evidence, with opportunities to hear and observe witnesses, is incorrect. For the reasons given in the case of *The Nicholls*, ante, 302, (just decided,) the decree of the district court will be affirmed.

The following decree will be entered in the cause:

This cause came on to be heard on the transcript of appeal, and was argued by Mr. DeGray for the libellants and Mr. Butler for the claimants. Whereupon, and for the aforesaid reasons, it is ordered, adjudged, and decreed that the libellant, Mrs. Amelia Mentz, wife of E. D. Mentz, do have and recover from Martin & Dreibholz, claimants, and owners of the steam-boat Sammy, and from Newell Tilton, surety on their release bond, *in solido*, the sum of \$400 damages, and all costs of the circuit and district courts.

THE SAUGERTIES.¹SMITH *et al.* v. THE SAUGERTIES, (two cases.)GENTHNER v. SMITH *et al.*

(District Court, S. D. New York. November 25, 1890.)

1. CARRIERS—JOINT ADVENTURE—PROTESTED DRAFT—FORFEITURE.

Upon the shipment of a cargo of ice upon a joint adventure, under a contract providing for the acceptance by the consignee of a sight draft for a guarantied sum, to be attached to the bill of lading, under which contract the consignee chartered the vessel on which the cargo was accordingly shipped, and made advances for transportation pursuant to the contract, time not being made essential, *held*, that the shipper was not entitled to treat the contract and the charterer's rights as forfeited by the mere non-acceptance of the draft, or to deal with the cargo as his own.

2. SAME—BILL OF LADING—MASTER'S COPY—INDORSEMENT—PREMATURE SUIT.

Upon such a joint adventure and shipment, the bill of lading made the cargo deliverable to the order of the shippers. *Held*, that the bill of lading was controlled by the contract subject to which the ice was shipped; and that the master's copy, obtained at the port of delivery by the shipper to attach to the draft was insufficient, though indorsed to the libelants, to require the vessel to deliver the cargo to them, while the other bill of lading was outstanding, without indemnity to the ship against the claims of the charterer for whom the ship held possession, subject to the contract; and that a suit for the ice thereupon was prematurely brought.

3. SHIPPING—NEGLIGENCE—STEAM IN HOLD—DAMAGE—FREIGHT.

On delivery of a cargo of ice, a considerable portion proved to be "struck." There was a valve in the pipe in the hold used for the discharge of condensed steam. Beneath the valve a large hole was found on discharge running through the cargo, and considerable steam was at times observed in the hold. *Held*, upon conflicting evidence, that the damage was largely due to the negligent use or condition of the valve by which the ice had become "steam-struck," through steam escaping into the hold; and the amount of such damage was allowed in the second libel, and offset against the amount due under the third libel as freight for the use of the vessel.

In Admiralty. First suit to recover damages for non-delivery of cargo of ice. Second suit to recover for damage to the ice during transportation. Third suit a cross-suit to recover freight for transportation of the ice, and use of the vessel during delivery.

Goodrich, Deady & Goodrich, for Smith *et al.*

Wing, Shoudy & Putnam, for the Saugerties and owner.

BROWN, J. The above three libels have grown out of a shipment of a cargo of ice on board the barge Saugerties, by the Treats Fall Ice Company, of Bangor, Me., to the firm of C. L. Riker, of New York, in August, 1890. On the shipment, a bill of lading for the ice was taken by the company, making the ice deliverable to the company's own order. After the arrival of the Saugerties at New York, the captain's copy of the bill of lading was obtained by the company for the purpose of drawing on Riker on account of the cargo, and, the draft not being paid, the company delivered the captain's bill of lading, indorsed by them, to the libelants, to whom they also executed a bill of sale. The first libel was filed September 23d, to recover damages for non-delivery of the ice to the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

libelants on demand as indorsees of the bill of lading. The second libel, filed October 21st, claims damages for negligence during the transportation of the ice, whereby it became "struck" through steam negligently admitted into the hold. The third libel was brought by the owner of the Saugerties to recover for the hire thereof at \$50 per day, upon the alleged promise of the respondent to pay at that rate therefor.

The ice was shipped on board the Saugerties by the Treats Fall Ice Company, under a written contract with C. L. Riker, dated August 12, 1890, which provided, among other things, (1) that the company should ship on board the Saugerties, then on the way to Bangor, 1,600 tons of good merchantable ice; (2) that Riker should tow the barge, when loaded, with all reasonable speed to New York, and there sell the cargo for the best price obtainable; (3) that he would pay the company's draft at one day's sight for the certificated, in-take weight of the cargo, at \$2.50 per ton; certificate of weight and bill of lading to be attached to the draft; the said \$2.50 per ton being guaranteed to be paid to the company in any event, unless the cargo were lost; from the proceeds of sale Riker, to have \$1.50 per ton freight, half the cost of towing, and the cost of discharge, and to advance all necessary expenses incurred after the cargo left Bangor; the cargo to remain the property of the company until sold and paid for; and the net profits to be evenly divided between the company and Riker, who was to furnish a detailed statement of the expenses, and a check to the company for their share of the profits. Riker had chartered the barge at the rate of \$50 a day, for the purpose of bringing on the cargo of ice, and also a tug to tow her to Bangor and back to New York. The barge left Bangor August 30th, and arrived near New York September 5th. On August 28th, in consequence of a fall in the market price, Riker wrote to the company requesting them not to draw on him on one day's sight with the bill of lading, but promised to pay the amount before he unloaded the cargo, to which a reply was sent by Mr. Bartlett, one of the company, that he would see him in New York in reference to it. On September 5th, Mr. Bartlett came to New York, and had several interviews during the week following with Riker and his partner without referring to the draft. On the 12th he told Riker he wanted the contract performed, and on the 13th told his partner that he had determined to draw. In the mean time, finding that he had left the bills of lading in Bangor, he procured from the captain of the barge his copy of the bill of lading, telling him that he wished to make use of it for the purpose of drawing on Riker, according to his contract, and gave the captain a receipt, promising to send him one of the other bills of lading as soon as he returned to Bangor. On the 15th, a draft at one day's sight was drawn on Riker by Mr. Bartlett in the name of the company for \$4,000, attached to the master's bill of lading, which Mr. Bartlett indorsed in the name of the company, and presented for acceptance to Riker. It was duly protested for non-acceptance, and on the 19th duly protested for non-payment. On Saturday, the day following, Mr. Bartlett executed a bill of sale of the ice in the name of the firm to the libelants, and delivered to them the indorsed bill of

lading that had been attached to the draft. On the same day, the libelants demanded of the master and owner of the barge a delivery of the ice under the bill of lading and bill of sale above stated. In the interviews that followed on the same day, the owner of the barge referred to the claims of Riker under his charter of the barge, and his payment of \$900 on account of the charter money, and of some \$800 in addition for towage; but he offered to deliver the ice as desired if the libelants would indemnify him against any claim of Riker, which the libelants refused to do. Mr. Genthner, the owner of the barge, stated he would consult counsel, and answer further. He was notified by Riker not to deliver the ice to the libelants, and would do so at his peril. On Monday, the 22d, a notice somewhat similar was served by Riker on the libelants, and notice was also given them, on behalf of Mr. Genthner, that security against Riker's claim was required, and that the captain's copy of the bill of lading was insufficient. On the 23d, the first-above libel was filed for non-delivery of the ice on the libelants' demand. On the next day, Mr. Genthner received from Mr. Bartlett, who in the mean time had returned to Bangor, another copy of the bill of lading, as promised to the captain; and no further steps having been taken in the mean time by Riker, and an offer having been made by him to waive his claim for the moneys advanced by him, if the company would release him from his guaranty, Mr. Genthner, by his attorneys, on the 24th, agreed to deliver the ice as requested by the libelants upon the latter's promise to pay \$50 a day for the barge, allowing a reasonable time thenceforth for discharge, and computing from the 30th of August, up to which date Riker had paid at that rate.

The libelants, on the 20th or 22d, had made an agreement for the sale of the ice at \$3.50 per ton, deliverable at Hoboken, and had ordered the barge there. By her failure to proceed at once, upon her arrival there on the 25th, a further delay of three days arose in getting a berth; and when the discharge was commenced, ice having fallen in price, the purchaser, after the discharge of about 80 tons, refused to accept any more, on the alleged ground that the ice was unmerchantable in quality, in consequence of a large proportion turning out "struck." The cargo was afterwards sold by the libelants at auction, upon notice to Mr. Genthner, at 65 cents per ton. The purchaser resold it at \$2 per ton, and its discharge was completed on the day of the close of these trials, November 11th. On the trial it appeared that the bill of sale of the ice to the libelants on September 20th, and the delivery of the master's copy of the bill of lading indorsed by the company, were for the benefit of the latter, and for their convenience only in the transaction of any subsequent business in regard to the ice in New York, and that it was accompanied by their guaranty to the libelants to hold them harmless, and to pay them a commission for their trouble. While the nominal title to the ice, therefore, was in the libelants, their rights were no greater than those of the ice company.

1. The first libel was, in my judgment, prematurely filed, both because the ice company could not cut off the rights and interests of Riker

in the cargo in that summary manner, and because they could not lawfully require the barge to deliver the ice upon the captain's copy of the bill of lading while the other copy of the bill of lading was still outstanding. The contract between the ice company and Riker did not impose upon Riker an immediate forfeiture of all his rights as a consequence of the non-payment of the sight draft. The contract was not a contract of sale of the ice to Riker. It constituted a joint adventure, which was already to a considerable extent executed on Riker's part, and in which he had expended about \$1,700. For this expenditure, he had an equitable lien on the ice; and for the \$900, perhaps a maritime lien also, by equitable subrogation, though this was subject to the provisions of the contract. Such expenditures by Riker were contemplated by the very nature of the contract; and, in the absence of any express provision in the contract for a forfeiture of his rights, no such forfeiture can be implied from the mere non-payment of the sight draft at the moment it was due. For the same reason the payment of the draft cannot be construed as a condition precedent to the acquisition by Riker of important interests in the cargo; since, by the nature of the case, a large expense had to be incurred by him in the execution of the contract before the bill of lading and contemplated draft could be presented. I do not think the drawing of the bill of lading to the order of the ice company was, in itself, incompatible with the nature of the contract between them and Riker, for it can be interpreted consistently with the contract. It was a proper mode of securing the company against an unconditional delivery of the ice to Riker before he had performed his guaranty by paying the draft. Still, the ice was not in the company's possession. It had been delivered by them to the barge for Riker, to be dealt with pursuant to the contract. They knew Riker had chartered the barge to bring the ice to him, and was incurring large expenses in doing so. The possession of the barge was, for most purposes, the possession of Riker, and was subject only to the restriction of the contract, and of the bill of lading given under it, which by implication required payment of the draft before the ice came under Riker's absolute control. Here the bill of lading was not an independent document. It did not give to the ice company, as consignees, as a bill of lading usually does, the lawful disposition of the ice in any way they might see fit. On the contrary, it was a mere shipping memorandum, given in execution of the company's contract with Riker, having reference to that contract, and wholly subject to it, as respects Riker's rights and interests. After the ice was laden on Riker's chartered barge, the company had no right to do anything with the ice or with the bill of lading contrary to the contract between them and Riker. 1 Pars. Shipp. & Adm. 286; *The Chadwicke*, 29 Fed. Rep. 521.

Notwithstanding the non-payment of the sight draft when due, nothing in the contract with the ice company prevented Riker's contracting to sell the ice, and delivering it to the purchaser, at the same time with the receipt of the price and his payment of the draft. That was perfectly compatible with the contract, as well as with the bill of lading

No special time was made an essential part of the contract; and hence such a sale and delivery and payment of the draft might be made by Riker within a reasonable time, though the sight draft was not paid on the day it was due, and interest would be the legal damages to the ice company for the delay in payment of the draft. If there was unreasonable delay in disposing of the ice, the ice company could have brought the adventure to a close, on notice to Riker, by obtaining possession of the ice, if they could do so peaceably, and then selling it upon joint account; or by obtaining from the court, on suit brought, an order for an immediate sale. Such a sale would necessarily be upon joint account under the contract. A sale of the ice by the ice company to the libelants, such as this bill of sale imported, could only stand upon a lawful right in the company to repudiate the entire contract, and to treat the rights of Riker as wholly forfeited. If any such right existed, it was of so doubtful a character, and its exercise was so harsh and inequitable, that it would be most unreasonable to require the barge and her owner to take upon themselves the risk and the burden of maintaining such a right, by delivering the ice, not to the shippers even, but to third persons, in violation of the charter to Riker, under which the vessel was running. Such a delivery of the ice to other vendees, with all the advantages of its transportation to New York, which Riker had procured and paid for, would be a much more serious and doubtful proceeding than would have been a delivery to the shippers themselves, on account of non-payment of the draft. The latter might have been partially compatible with the contract. The former was a total repudiation of both the contract and the charter. The demand of security against Riker's claims, as a condition of the delivery of the ice to the libelants was, therefore, a justifiable demand; and, such security having been refused, the vessel cannot be held liable to the libelants for non-delivery on that demand, nor for any damages accruing from such non-delivery. The use of the captain's bill of lading, moreover, as a means of diverting the delivery of the ice to some other person than Riker, was not authorized, and imposed no duty on the ship. The use of it for the purpose of attaching it to the draft, to secure a performance of the contract with Riker, was perhaps permissible, because that was using it consistently with the contract, and the captain assented thereto. The use of it for the purpose of selling and delivering the ice to third persons was not justifiable, because that was not only inconsistent with the contract with Riker, but was not assented to by the master or owner of the barge. The barge was, therefore, justified in refusing to deliver the ice to any one but Riker, except upon the production of some other bill of lading than the captain's own copy. A vessel is never called on to take the risk of delivering goods upon the captain's bill of lading only, which is a mere memorandum for the ship's convenience, while another bill of lading is outstanding, which the captain of the vessel may be called on to make good by the delivery of the cargo to another, or be mulcted in damages for non-delivery. *The Thames*, 14 Wall. 98; *The Mary Bradford*, 18 Fed. Rep. 189; *The Stettin*, 14 Prob. Div. 142. This objection was not removed until the forwarding from Bangor of the additional bill of lad-

ing, which was received on September 24th, the day following the filing of the libel. As soon as the latter bill of lading was produced, and Riker apparently no longer insisted on his claims, the vessel proceeded to act under the libelant's direction, as she has done ever since. The first libel must, therefore, be dismissed.

2. As respects the second libel for the damages from steam improperly admitted to the hold, there has been a large amount of testimony, exhibiting a great difference of opinion, both as to the actual marketable quality of the ice as it came out of the vessel, the amount of "struck" ice, and the probable cause of its struck appearance. There is proof that ice may be sun-struck, water-struck, wind-struck, or fog-struck; and, upon analogy, it is argued that it might be steam-struck on board the barge, though no previous instances of that kind of striking are proved. It is shown that some struck ice went on board, though it was urged that this was extremely little. Some of the conditions while loading were favorable to ice being struck; while more or less snow on the surface of the ice would at least partly protect it from the influence of those conditions. There is evidence that at times considerable steam was observed in the hold, through the use of a drip-valve beneath the pump room by which the steam-pipe below was cleared of previous condensation whenever pumping was to be done. While some of the witnesses on this subject are not very exact or trustworthy as respects the amount of steam observed, yet I cannot help giving great weight to the existence of a large hole, of the size of a man, which was found running down through the ice immediately beneath the valve, when the hatches were opened and the discharge commenced. Though drip-valves similarly placed were proved to be not uncommon on ice barges, no hole like this in the ice beneath them, or any hole, was proved to have been found in any previous case. This is convincing proof of some defect in the valve, or of some improper use of it while pumping, whereby quantities of steam were forced down into the hold. This lends a probability and force to the other testimony about the amount of steam seen in the hold, to which, through its vagueness, it would not otherwise be entitled. Looking at the whole evidence, I come to the conclusion that a considerable portion of the ice was damaged through steam improperly let into the hold while the hatches were on; and that the amount of this damage, difficult as it is to fix, was \$1,900.

3. *Use of the Barge.* The sale of the ice by the libelants was on October 14th, and 12 days were allowed by them to the purchaser to take the balance of the ice from the barge. This may be taken as their own estimate of a reasonable time for discharge after the previous discharge of 80 or 100 tons, during which they were to retain the barge for their own use. From August 30th, this makes 57 days. Deducting seven days, as a sufficient and ample time for a resale of the ice after its rejection by the first purchaser, for which the libelants should not be charged, because caused by the barge's fault, there remain 50 days, for which they are liable upon their promise, at the rate of \$50 per day, making \$2,500, against which should be offset the \$1,900 damage to the ice adjudged in the other action, and a decree entered for the difference.

THE TOPSY.

KELLY *et al.* v. THE TOPSY.

(District Court, D. South Carolina. December 29, 1890.)

1. SEAMEN—THE CONTRACT—FORFEITURE.

Where a vessel is bound on a two-years' voyage, touching at many ports, a provision in the shipping articles that any seaman who terminates his contract before the end of the voyage shall only receive one dollar per month as wages is reasonable.

2. SAME—WAGES—RELEASE.

Where a seaman who has shipped for such voyage and signed said articles voluntarily terminates his contract and releases the vessel on receipt of his wages at the rate of one dollar per month, and there is no evidence of duress or ignorance of his rights, the release will not be set aside at his suit.

3. SAME—QUANTUM MERUIT.

Where a sailor whose name does not appear on the shipping articles, and who says that he shipped without signing them, performs his duty properly until the vessel reaches a port, when he leaves her, he is entitled to recover on a *quantum meruit* for the time he served, where there is no positive evidence that he signed the articles.

4. SAME—REASONABLE DISPUTE.

Where such seaman's right to wages is denied under a belief that he had signed the shipping articles under another name, and had violated their terms, he is not entitled to wages from the time he left the ship up to the date of payment, since such matters constitute a reasonable ground for dispute.

5. SAME—DISRATING.

Where no prejudice or manifest error is shown, the decision of the master of a vessel disrating a sailor from an able-bodied seaman to an ordinary seaman will be accepted by the court in a libel for wages.

6. ADMIRALTY—PRACTICE—INFANTS.

An admiralty court will allow a minor to recover in his own name wages earned in sea service, when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to receive his earnings. Following *The David Faust*, 1 Ben. 184.

7. SAME—JURISDICTION.

Where the subject of a foreign nation libels a vessel belonging to such nation for wages in a United States court, and the vessel, pending the suit, leaves port without any certain destination, and the libellant has left the vessel, the court will not, at the request of the consul of the said nation, refuse to take jurisdiction of the suit.

In Admiralty. Libel by seamen for wages. •

C. B. Northrop, for libellants.

I. N. Mathews, for claimant.

SIMONTON, J. The libellants were a part of the crew of the British bark Topsy. The shipping articles, dated 12th August, 1889, state her voyage in these words:

"From Montreal and Quebec to Toulon, France, for a series of voyages for a term, but not exceeding two years, at master's option, to port or places within, but not beyond, 70° north, and 70° south, latitude; trading to and fro, as required by master and owners. Final port of discharge, in the United Kingdom or dominion of Canada, at master's option. Crew to have privilege of terminating this contract previous to expiry of engagement, on giving reasonable notice to master; they accepting one dollar per month as compensation for their services."

One of the libelants, George Mellor, an English subject, and a minor, shipped at Quebec; the others shipped at Marseilles. Each case is attended by its peculiar circumstances. They will be discussed separately.

Charles Kelly. Kelly is a citizen of the United States, an able-bodied seaman, with 26 years' experience, apparently of unusual intelligence. He signed the shipping articles before the British consul at Marseilles, 10th March, 1890. He says that he never read them nor heard them read. He does not say that he did not know their purport. The British vice-consul certifies that Kelly was engaged with his sanction, and that he signed the agreement, fully understanding the same; Kelly remained with the bark until she reached this port by way of Cardinas and Matansas. When he reached Charleston, he asked the master for his discharge. No reason is assigned for this request. When he asked the discharge, and once or twice afterwards, he demanded pay at his rate of wages, \$18 per month, for five months and a week, less advances, \$29. The master consented to give the discharge, but refused the demand for wages. Kelly afterwards went before the British consul at this port, got his discharge, and, in the presence of the consul, signed a full release of the vessel. Nothing appears to have been said to the consul about his claim or demand for wages. There is no evidence whatever of duress or persuasion, or collusion, or inducement, or dissatisfaction with Kelly on the part of the master, or of any ignorance of his right on the part of the seaman. A release of this kind can always be inquired into, and is not a bar to the seaman, preventing inquiry into his rights, (*The Mary Paulina*, 1 Spr. 45; *The David Pratt*, 1 Wall. 510;) but it is *prima facie* good, (Id.,) and cannot be set aside unless obtained by fraud, mistake, or ignorance of the seaman, (*Thompson v. Faussatt*, Pet. C. C. 182; *The Ship Neptune*, 1 Pet. Adm. 180.) Nor was the condition imposed by the shipping articles unreasonable. The vessel was bound on a long voyage, possibly two years. She was to trade from port to port, within a belt of 140 degrees of latitude. Numerous temptations would be offered the crew to leave the vessel. This provision protected her. If the master used it so as to work injustice to the seamen,—if, for instance, he maltreated them, furnished improper food, tyrannized over them, because they must either remain with him or accept the reduced pay,—he could be prevented by the court. This does not appear here. This is not a case in which the doctrine *nudum pactum* can be applied. The sailor was not paid a part of his wages for a full release. In order to entitle himself to his wages, Kelly was bound to fulfill his contract. He was free to rescind his contract on one condition,—to content himself with one dollar a month. He gave the required notice, and got his discharge before the consul. In consideration of this discharge, he released the ship. A seaman will be protected when he needs protection. This man needs it not. Let the libel be dismissed as to him.

John Cordovil Montiero. This case is not free from embarrassment. The libelant's name does not appear on the shipping articles. He says that he shipped at Marseilles without signing any articles; that he is an

experienced sailor, and has in other instances signed articles; that he went on board the Topsy with a shipping agent, and got his advance. He remained on her, doing his work to the satisfaction of every one, until he reached this port. Here he left the vessel, the master not consenting to his discharge. He contends that, as he signed no articles, he could leave when he pleased. He sues on a *quantum meruit*. The master, on the other hand, thinks—is not sure—that he saw libellant signing the articles before the vice-consul. His theory is that he went on board, either personating some seaman who had signed, or that he is A. Ramatta, whose name is on the articles. There is no doubt that he was aboard—one of the crew—an able-bodied seaman; that he did his work well, and earned his wages. The defense seeks to forfeit these for desertion. The burden of proof is on the respondent. Macl. Shipp. 221. He must establish the contract and its breach. The testimony of respondent does not meet and overcome the burden of proof. It does not appear that Ramatta and libellant are the same person. Ramatta signs, by his mark, A. Ramatta. Libellant, in the course of his examination, was called upon to write his name. He did so in a good hand of an experienced penman. It is true that, when asked his name by the seamen, he said, "It is too long for you to pronounce; call me 'Antone;'" but there is nothing but the letter A. to create the relief that "A. Ramatta" meant "Antone Ramatta." So, also, there is no legal evidence to support the theory that he went aboard personating some one else. There is plausibility in the theory, and strong suspicion behind it, but no proof. I must allow him his wages. All other able-bodied seamen but Kelly shipped at Marseilles at \$15 per month. Let him take a decree for \$53.15; that is to say, for wages for four months and eighteen days, less his advances. His counsel earnestly contends for payment of his wages up to this decree, and also that provision be made for his passage money. But under 17 & 18 Vict. c. 104, § 187, quoted in Macl. Shipp. 227, the wages do not run and become payable until the final settlement, if the delay be due to any reasonable dispute as to liability. Such reasonable dispute exists here. Again, as the libellant of his own volition left the service of the bark, upon the ground that he was under no contract, he cannot claim on a *quantum meruit* for services not rendered, nor demand passage money. See *Boulton v. Moore*, 14 Fed. Rep. 925. When this case had progressed so far that the testimony was about to be closed, the British consul at this port addressed a letter to the court, asking that it refuse jurisdiction, and remit the case to the proper authorities of the government to which the vessel belongs. Montiero is not a subject of Great Britain; has no domicile in any country subject to that crown. The vessel has left this port, having stipulated with him. Her return is uncertain and improbable. If she were discharged from this case, there would probably be a failure of justice, not from want of motive, but of power in the consul. For these reasons, I retain jurisdiction. *Bernhard v. Greene*, 3 Sawy. 236; *Patch v. Marshall*, 1 Curt. 452.

Frank Healy. Libelant is an infant, from Minnesota. He shipped at Marseilles as an able-bodied seaman, signing shipping articles before the British consul. He was disrated to an ordinary seaman by the master, and reduced from \$15 to \$12 per month. When he reached this port, he claimed his discharge because of his minority, (*The Hotspur*, 3 Sawy. 194,) and was allowed it, was discharged before the consul, and signed the release. The master has deposited in the registry of this court a sum of money, being his wages for the time of his service, at the rate of \$12 per month. Libelant claims \$15. This is the only question in the case. The master of a vessel is necessarily the judge, in the first instance, of the competency of a seaman, and he can disrate him. *The Alonzo*, 3 Ware, 318; *The Exchange*, Blatchf. & H. 367; *U. S. v. Savage*, 5 Mason, 460. His judgment will be sustained unless proof be made of some prejudice or injustice towards the seaman, or manifest error on the part of the master. There is no evidence whatever of Healy's previous experience as a seaman. It appears in another case now pending that he had made one voyage across the Atlantic in an American man of war. Kelly says that he was worth \$15 per month for his age, but does not say of him, as he does say of Montiero, that he was an able-bodied seaman, or entitled to rate as such. I accept the decision of the master. Some doubt was entertained as to the form of decree in his favor. He is an infant. Can he receive the money? On this point Judge BLATCHFORD's ruling is conclusive: "Admiralty courts allow a minor to recover in his own name wages earned in sea service when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to recover his earnings." *The David Faust*, 1 Ben. 184. As the minor has elected to rescind the contract of the shipping articles, and discharge himself, he can only recover on the *quantum meruit* for actual services. As the master has admitted that he should have wages at the rate of \$12 per month, no inquiry will be made respecting any injury to the vessel by reason of the rescission of the contract. *The Hotspur*, 3 Sawy. 197. Let libelant receive the money in the registry.

George Mellor. Libelant is a minor. He shipped at Quebec, signing the articles, stating his age. He was engaged as cabin-boy, and served in that capacity until the bark reached Marseilles. The cook having left the vessel at that port, he was put in the galley, and so remained until she reached this port. On her arrival here he left the vessel without leave of the master, and is entered on the articles as a deserter. He sues for wages as cabin-boy to Marseilles, and thence as cook. The wages as cabin-boy were \$10 a month. The former cook, an able-bodied seaman, and experienced, got \$30 per month. Mellor is not a trained cook, but picked his knowledge up at sea. He was supervised by the mate, and aided by a boy hired for the purpose. During the hearing of this case, and after both the bark and the libelant had left this port, the British consul by letter requested the court to refuse jurisdiction, and to remit libelant to the proper authorities of his own coun-

try. The counsel for the libellant, in an argument characterized by research and ability, contends that the court cannot do this, and must entertain jurisdiction; that, under the constitution, it was established for the purpose, and was clothed with full authority to take cognizance of "all cases of admiralty and maritime jurisdiction;" that the claim for wages is a case of maritime jurisdiction; "that all persons in time of peace have the right to resort to the tribunals of the nation where they happen to be for the protection of their rights, [Ben. Adm. § 282; *The Hotspur*, 3 Sawy. 196;] and that the court could not, consistently with its duty, refuse to exercise a power which the constitution and law had clothed it, when its aid was invoked by a party entitled to demand it as a matter of right," (TANEY, C. J., in *The St. Lawrence*. 1 Black, 526.) There can be no doubt that this case is within the jurisdiction of the court. *The Belgenland*, 114 U. S. 364, 5 Sup. Ct. Rep. 860. The objection goes to its right to exercise discretion in taking or refusing jurisdiction. The conclusion which I have reached renders it unnecessary to discuss this interesting, and, as far as I can see, novel, question. The uniform current of decisions in the courts of the United States is that courts of admiralty can, and, except in special circumstances, will, forbear to exercise the jurisdiction in suits for wages by seamen serving under a foreign flag against a foreign vessel. Judge BEE in this court, in *The Ship Nanny*, Bee, 225; *The Carolina*, 14 Fed. Rep. 424; *The Pacific*, Blatchf. & H. 187; *The Napoleon*, Olcott, 208; *Gonzales v. Minor*, 2 Wall. Jr. 348; *Willendson v. The Forsoket*, 1 Pet. Adm. 197. The English courts claim that this discretion always has existed in the admiralty, and that it is not taken away by Act 24 Vict. c. 10, § 10, giving to the court jurisdiction over any claim by a seaman of any ship for wages. *The Nina*, L. R. 2 Adm. & Ecc. 44. The general subject is exhaustively treated by Mr. Justice BRADLEY in *The Belgenland*, 114 U. S. 365, 5 Sup. Ct. Rep. 860, and the existence of this discretion in the court in every suit by a foreigner against a foreigner is fully recognized and maintained. He draws a distinction between the cases which may bear on this subject. Where the controversy between the foreigners is *communis juris*,—that is, where it arises under the common law of nations,—special grounds should appear to induce the court to refuse jurisdiction. Page 365, 114 U. S., 5 Sup. Ct. Rep. 864, 865. But when the controversy is upon a mariner's contract, which is a creation of the particular institutions of the country, to be applied and construed and explained by its own particular rules, (see WILLIAM SCOTT in *The Two Friends*, 1 C. Rob. 271,) special circumstances must exist to induce the court to take jurisdiction, (Id.) This discretion necessarily flows from the character of the court of admiralty. In every case it seeks complete justice. When, therefore, upon examination it appears that the construction and enforcement of the laws of a foreign state are involved in a question arising between parties owning allegiance to, and contracting with reference to, such laws, and that the tribunals of their own country are open and accessible to them, the court withholds its

hand, remitting the parties to their own courts, in which their own laws are better understood, and the means of enforcing them possibly more complete. And this is specially observed in the matter of seamen's wages, the contract of which is local in its character, and is made the subject of special legislation in all maritime countries. But when the circumstances of the case are such as demand immediate investigation, or when the seaman discharged from the ship would be put at disadvantage were she suffered to depart, or when she has departed he would be compelled to search the world for her, the court will proceed and decide the case against the wish, and, at times, against the protest, of the foreign consul. *The Russia*, 3 Ben. 476; *The Lillian M. Viguss*, 10 Ben. 388.

The bark has departed this port with no intention of returning to it. Her future course is uncertain. Her trading ground covers 140 degrees of latitude. The libellant has left her, and has himself gone elsewhere. The only means of enforcing a decision in the case is the stipulation filed in the clerk's office. If no decision is made here, libellant would either be without remedy, or without the means or ability, or perhaps the opportunity, of enforcing it. For these reasons the court cannot comply with the request of the consul. *The Hermine*, 3 Sawy. 85; *The Hotspur*, Id. 197, 198. Libellant is a minor. He is not bound by the articles. He can avoid them at any stage of the voyage. The contract is supposed to have been made on that basis. As he has avoided the contract, he can only recover on a *quantum meruit*. A deduction will be made for any injury to the owners arising from the sudden determination of the service. DEADY, J., in *The Hotspur*, *supra*; 1 Pars. Cont. 263n, (2d Ed.) His wages as cabin-boy may well be ascertained from the shipping articles; his wages as cook must be on a *quantum meruit*. *The Frank S. Hall*, 38 Fed. Rep. 258. He cannot be entitled to the same wages as cook which his predecessor received. Let it be referred to Mr. Seabrook to inquire what he should receive according to these principles.

THE SARAH THORP.

THE AMERICA.

THAMES TOW-BOAT CO. v. THE SARAH THORP.

ALLEN *et al.* v. THE AMERICA.

(District Court, D. Connecticut. January 6, 1891.)

COLLISION—BETWEEN STEAMERS—EVIDENCE.

A steamer and a tug collided in Long Island sound on a dark night. Each had proper lights burning. When they first saw each other they were a mile apart, approaching nearly end on, each going at the rate of eight miles an hour. On sighting the steamer the tug ported her wheel one point, and when about half a mile from the steamer ported her wheel another point, and blew one whistle, whereupon the steamer blew two whistles, and shaped her course across the tug's bow, under a starboard wheel. The tug immediately sounded a danger whistle, and backed at full speed, but too late to avoid the collision. Shortly after the steamer saw the tug, the former starboarded her helm to avoid a small sailing vessel. *Held*, that the steamer was responsible for the collision.

In Admiralty.

Samuel Park, for the Thames Tow-Boat Company.

James Parker, for C. H. and S. D. Allen.

SHIPMAN, J. These cases are a libel and cross-libel arising out of a collision between the steamer Sarah Thorp and the steam-tug America, at about half past 8 o'clock on the evening of August 20, 1890, in Long Island sound, about one and three-fifths miles eastward of Execution light. The America is a large steam-tug, which tows between Norfolk and Boston. On the night in question she was towing the unloaded barge Marvin, a barge without masts or sails, or means of propulsion, from Newport to Weehawken. She entered Long Island sound by Fisher's Island sound, went north of the middle ground, and was about one and one-half miles from Norwalk Island light when she passed it upon a course W. by S., $\frac{1}{2}$ S. When Captain's island bore N. W. her course was changed to S. W. by W., $\frac{1}{2}$ W., (magnetic.) The wind was light, the sea was smooth, the night was dark, but lights could be seen without difficulty. The America had side lights, and two white vertical lights in front of the foremast, all in good order, and brightly burning, and placed in accordance with the statute of March 3, 1885. The Marvin's two vertical white lights were burning, and in proper order. The Thorp's side lights and foremast light were also in good order, and brightly burning. The lights of both the America and the Thorp were in accordance with said statute, and were the lights required by law. By the collision the America was seriously and the Thorp was slightly injured. Each vessel was sailing at the rate of about eight miles per hour.

The theory of the America, as detailed in the libel, is that when she was about two miles to the eastward of Execution light "both the side

lights of the steamer Sarah Thorp were discovered by the lookout and master of the America right ahead and about a mile away. Very soon thereafter the wheel of the America was ported, changing the course of the America to the starboard about one point, in order to pass port to port. The starboard or green light of the steamer Sarah Thorp still showing as well as the red, when about one-half a mile away the America blew one whistle, and again ported her wheel, changing her course still further to the starboard one point. After proceeding a short time on this course, the steamer Sarah Thorp blew two whistles, and shaped her course across the America's bow, under a starboard wheel. Immediately an alarm or danger whistle was sounded by the America, and her engines backed at full speed. The Sarah Thorp made no other signal but the two blasts above mentioned, and kept on her course across the America's bow, without any reduction of speed. The two boats came together, the America striking the guard of the Sarah Thorp on her starboard side about amid-ships."

The theory of the Sarah Thorp, as detailed in the answer and in the cross-libel, is that "shortly after 8 o'clock P. M. she passed close around and to the southward of the light-house on Execution rock, in Long Island sound, and shaped her course true for the buoy on the Cow's shoal, south of Shippan point, Connecticut; that being her usual and proper course. * * * That shortly thereafter, at about twenty minutes past eight o'clock, the lookout and master discovered a green light of a vessel, (which afterwards proved to be the said steamer America with a light barge in tow,) which light, when discovered, bore two points on the starboard bow of said steamer Sarah Thorp; and at or about the same time also discovered two white lights displayed vertically, one over another. That at the time said lookout and master were unable to discover whether these vertical lights were on the vessel showing the green light, or on one of the Sound steamers going east, several of which had passed said steamer Sarah Thorp, but no single white head-light was seen. That shortly after the discovery of said lights it became necessary to starboard the helm of said steamer Sarah Thorp to avoid and pass under the stern of a small sailing vessel (without light set) that was standing on starboard tack, across the bows of said steamer Sarah Thorp, to the S. S. E. That about the time when the said small sailing vessel passed across the bows of said steamer Sarah Thorp the approaching steam-vessel (the America) blew two blasts of her steam-whistle, which were immediately answered with two blasts of the steam-whistle of the steamer Sarah Thorp, and the helm of the latter was further starboarded, and her course changed more to the northward. That shortly thereafter those in charge of the steamer Sarah Thorp discovered that said steamer America had ported her helm, and was standing across the bows of the Sarah Thorp, and was in such close proximity that a disastrous collision seemed imminent. That upon such discovery two blasts of the Sarah Thorp's steam-whistle were immediately blown, which were answered by two blasts from the steam-whistle of the America. That at this time the only safe course for the steamer Sarah Thorp to pursue in

order to avoid or minimize said collision was to keep on at full speed, in the hope that the America would starboard her helm, (as by answering with the two blasts of her steam-whistle she had indicated would be done,) and back in time to permit the Sarah Thorp to pass ahead of said America; and accordingly the speed of said Sarah Thorp was kept up."

The initial and the important point of difference between the parties is the position of the America when the vessels were first seen by each other, they being, at that time, at least a mile apart. The Thorp says that the America was then two points off her starboard bow. The America says that the two vessels were approaching each other, nearly head on. If the Thorp is right, her red light could not have been seen by the America; each vessel was showing a green light to the other; there was no necessity for the America's going to the starboard, and her persistence in so doing caused the collision. If the America is right, her determination to go to the starboard, so that each vessel might pass on the port side of the other, was correct, and the conduct of the Thorp can only be explained upon the theory that, after her lookout first saw the America's light, the sailing vessel crossed the Thorp's bows, and her lookout became forgetful of or inattentive to the America's position. The oral testimony introduced by the respective parties is, as usual, contradictory, but the circumstances and the probabilities resulting therefrom which surround the case satisfy my mind that the theory of the America is correct. The Thorp was bound from New York to Westport, Conn., and, at 23 minutes after 8, passed around the light-house at Execution rock, at a distance of 500 feet therefrom, and thence took her ordinary course directly towards the Cow's shoal, N. E. by E., $\frac{1}{4}$ E., (magnetic.) The America was going almost directly to Execution rock, and her proper course, after leaving Captain's Island light, would be the one which her captain testified she took,—S. W. by W., $\frac{1}{4}$ W., (magnetic,) if she was no further from the Connecticut shore than she naturally would be. She was in the ordinary route of the Sound steamers which had passed both vessels a few minutes before. On the other hand, her position, if in accordance with the theory of the Thorp, would have been an unnatural and improbable one. The two vessels must have been, when about a mile apart, meeting each other nearly head on, each vessel going at the rate of about eight miles an hour; and thus the testimony of the officers and sailors of the America, as to subsequent events, becomes consistent with the pre-existing facts. The Thorp's red light first appeared to the lookout upon the America, who then saw both lights. The America's captain, who was at the wheel, saw both lights, and immediately ported his wheel, for the purpose of going to the northward. He still saw the Thorp's green light, blew one whistle, and ported his wheel still more. The Thorp did not immediately answer the single whistle, but in about one minute blew two whistles. The vessels were now very near each other. The America's captain gave signals to his engineer to stop and back, which were obeyed, and blew four short whistles. The Thorp's speed was not diminished, and she was struck about amid-ships. Meanwhile the lookout upon the Thorp had seen the green light of a

small sailing vessel, and, to avoid her, the helm was starboarded, and the course of the Thorp turned more towards the northward. This was the reason why she continually showed her green light to the America. The America gave but two signals,—one of one blast, and the danger signal of four short whistles. The Thorp's theory that the America's captain gave two whistles, and continually ported his wheel, is not a probable one. I have queried whether the green light which the owners of the Thorp say that they saw two points off her starboard bow was the light of the America, and whether, therefore, they saw the America at all until after they had avoided the small sailing vessel. The captains of the America and of the tow say that they saw no vessels in that locality except the Thorp, and I can find no evidence of the presence of a third steamer. The light which the Thorp's lookout saw must have been the America's. The mistake which he and the master then made, or now make, is as to the relative position of the two vessels. The probability is that when the Thorp turned her course to the northward to avoid the sailing vessel, and thus placed herself more and more in danger of a collision with the America, the Thorp's lookout became forgetful of or inattentive to the fact that he had seen the steam-tug, and that, if her single whistle was heard, it was misunderstood. It must be observed that the two vessels were approaching each other with rapidity, and that the entire time which elapsed between the America's first sight of the Thorp and the collision was between four and five minutes, and that when the America heard the two whistles from the Thorp the vessels were very near together, and collision was imminent. The shortness of time which intervened between the America's whistle and the collision answers the argument of the Thorp that the America's captain, seeing continuously the Thorp's green light, should have avoided the danger by turning his own vessel to the southward. If holding her course was an error of judgment, "it was not a fault, being an act resolved upon *in extremis*, a compliance with the statute, and a maneuver produced by the fault of the steamer." *Nacoochee v. Moseley*, 11 Sup. Ct. Rep. 122, (October term, 1890.) The theory of the Thorp, as contained in its answer and cross-libel, is, when examined by the light of circumstances, which are tolerably clear, an improbable one, whereas the America's theory is both probable and is sustained by the evidence. Upon the libel of the Thames Tow-Boat Company let there be a decree for the libelants, with an order of reference to a commissioner upon the question of damages. The libel of Charles H. and Sereno D. Allen is dismissed, without costs.

BANK OF BRITISH NORTH AMERICA v. BARLING *et al.*

(Circuit Court, N. D. California. December 22, 1890.)

FEDERAL COURTS—JURISDICTION—STATE LAWS.

A foreign banking corporation can sue in the circuit court of the United States sitting in California, notwithstanding its failure to comply with St. Cal. 1876, p. 729, requiring every corporation to record each year a sworn statement of its capital, assets, etc., and prohibiting any corporation that fails to comply with the law from suing in the state courts.

At Law. On demurrer to plea in abatement.

Smith & Pomeroy, for plaintiff.

Daniel Titus, for defendant *Eva*.

HAWLEY, J. Plaintiff is a foreign banking corporation, and brings this action against the defendants as stockholders in the Alaska Improvement Company, a corporation, to recover their statutory liability for certain debts of said corporation. The suit is founded upon bills of exchange brought by the plaintiff in British Columbia. The defendant James Eva, who is the only defendant served, filed a plea of abatement, and to this plea the plaintiff files a demurrer, on the ground that said plea does not state facts sufficient "to constitute a defense to said action." The plea and demurrer thereto present the legal question whether it is necessary for a foreign banking corporation, doing business in this state, to make, file, and publish the statements required by the provisions of the "Act concerning corporations and persons engaged in the business of banking," (St. Cal. 1876, p. 729,) as a prerequisite to its right to maintain an action in the circuit court of the United States. The statute requires every corporation, at certain times every year, to publish and file for record a sworn statement of the amount of capital actually paid into such corporation, and of the actual condition and value of its assets and liabilities, and where said assets are situated. It is provided in said act that "no corporation and no person or persons who fail to comply with * * * any of the provisions of this law shall maintain or prosecute any action or proceeding in any of the courts of this state until they shall have first duly filed the statements herein provided for, and in all other respects complied with the provisions of this law." This act is general in its terms, and applies to all corporations, whether foreign or domestic. *Bank v. Cahn*, 79 Cal. 464, 21 Pac. Rep. 863. It will be noticed that it does not prohibit the conducting or carrying on of the banking business unless the statements are made, filed, and published as therein prescribed. The penalty imposed, for a non-compliance with its provisions, refers only to the right of maintaining or prosecuting any suit in the courts of the state. In this respect it is clearly distinguishable from the cases of *Ex parte Schollenberger*, 96 U. S. 369; *Manufacturing Co. v. Ferguson*, 113 U. S. 733, 5 Sup. Ct. Rep. 739,—which are relied upon to support the plea of abatement. If a state legislature passes an act imposing terms, as a condition precedent, upon which a foreign cor-

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poration shall have the privilege of transacting business within the state, such terms, if held legal and binding by the state courts, would be upheld and enforced by the national courts, and this is the extent of the principles announced in the cases referred to. But state legislation cannot restrict, impair, or limit the jurisdiction of the national courts, and the act in question does not attempt to do so. The penalty imposed by the act was not, in my opinion, intended to apply, and does not apply, to a case like the present, where the business of the bank in purchasing the bill of exchange, which constitutes the foundation for the institution of the suit against the defendants, was transacted outside of the state of California. But, independent of these special facts, it is proper to state that the authorities go still further, and support the proposition that state legislation of this character should be construed as having application only to the maintaining of suits in the state courts. In *Union Trust Co. v. Rochester, etc., R. Co.*, *ACHESON, J.*, in deciding a similar question, said:

"The New York statutory provisions, forbidding suit to be brought upon a judgment rendered in a court of record of that state, without a previous order of the court in which the original action was brought, granting leave to bring the new suit, must be held as intended only to regulate the course of procedure in the New York state courts. Such was the conclusion of Judges DILLON and LOVE in respect to a similar statute of the state of Iowa. *Phelps v. O'Brien*, 2 Dill. 518. It is an established principle that state legislation cannot in any wise impair or limit the jurisdiction of the courts of the United States." 29 Fed. Rep. 610.

The demurrer to the plea of abatement is sustained.

STEPHENS v. BERNAYS.

(Circuit Court, E. D. Missouri, E. D. September 24, 1890.)

DISTRICT COURTS—JURISDICTION—RECEIVER OF NATIONAL BANK.

Rev. St. U. S. § 563, gives the district courts jurisdiction of "all suits at common law, brought by the United States, or any officer thereof authorized by law to sue." Act Cong. Aug. 13, 1883, (25 St. at Large, 433,) confers the same jurisdiction on the district courts, and declares (section 4) that for jurisdictional purposes national banks shall be deemed citizens of the state in which they are located, but that this provision shall not affect the jurisdiction of the federal courts "in cases commenced by the United States, or by the direction of any officer thereof, or cases for winding up the affairs of any such bank." *Held*, that the district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. Affirming 41 Fed. Rep. 401.

H. A. Loevy, for plaintiff in error.

Geo. D. Reynolds, U. S. Atty., for defendant in error.

Before MILLER, Justice, and CALDWELL, J.

CALDWELL, J. This is an appeal from the district court. See 41 Fed. Rep. 401. The error assigned is that the district court had no ju-

isdiction of the case. The action is brought by the receiver of an insolvent national bank to collect assessments on stock. The stockholder died, and this suit is brought against his executrix. The first contention of the counsel for the defendant (the plaintiff in error) is that the district court has no jurisdiction of the case at all. That the fourth subdivision of section 563 of the Revised Statutes of the United States, which says that the district court shall have jurisdiction of "all suits at common law, brought by the United States, or any officer thereof authorized by law to sue," has been repealed by the act of August 13, 1888, (25 St. at Large, 433.) That act does not repeal the clause referred to, but, on the contrary, in terms confers on the district court jurisdiction in this class of cases. The fourth section of the act provides that all national banks and associations established under the laws of the United States shall, for the purpose of actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located, and in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The proviso is:

"The provision of this section shall not be held to affect the jurisdiction of the courts of the United States, in cases commenced by the United States, or by the direction of any officer thereof, or cases for winding up the affairs of any such bank."

Now, this case falls within the provisions of that proviso in two or three respects. In the first place, it is a case for winding up the affairs of the bank. It is a suit directed by an officer of the United States, and prosecuted by an officer of the United States. The comptroller is an officer of the United States. He appointed the receiver, who is also an officer of the United States, and directed him to bring this suit. It was suggested by counsel for the appellant that the word "commenced" in this proviso should be construed to mean "now pending," but obviously that is not its meaning. The difference between the language in that proviso and that in the proviso of the fourth section is marked. The proviso of the fourth section declares:

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The word "commenced" in this proviso is to be given a prospective, as well as a present, operation. The proviso is to be interpreted as if it read, "now pending or hereafter brought."

It is further contended that the district court had no jurisdiction, because this suit is brought against an executrix, and that a suit brought against an executrix, seeking to establish against her, as such executrix, a debt incurred by her testator, is not a suit at law within the meaning of the act of congress; that it is something different from a suit at law, and therefore does not fall within the statute. Whatever learning there is on the subject of the administration of an estate by an ecclesiastical court that makes an action against an executor to establish a claim against

the estate of his testator something different, or more or less, than a lawsuit, has long been obsolete in this country, where suits against executors and administrators are suits at law, or in equity, as the case may be, as much as if they were against one not acting in a representative capacity. Of course, under the old practice you could not sue an executor of a dead man and a living man together; but now, if two men make a contract, and one of them dies, you may sue the survivor and the executor of the dead man jointly, and recover judgment against both of them in the same suit if you show yourself entitled to it.

It is further objected that the court has no jurisdiction, because all suits against executors or administrators should be prosecuted in the probate court of a state where the estate is being administered. We must not confound distinctions here. The district court of the United States has no probate jurisdiction, and is not seeking to interrupt the regular and orderly administration of the estate of Mr. Bernays in the probate court of the state. The administration of the estate belongs to the probate court of the state. But, if the receiver, or any other person having a right to sue in a federal court, has a claim against the estate of Mr. Bernays which the executrix is unwilling to allow, he is not bound to sue in the probate court to establish that claim; but if his *status* or citizenship is such as to entitle him to sue in a court of the United States, he has a right to come into that court and have the question of debt or no debt determined in that forum. Over that question the federal court has jurisdiction. But when, in such suit, judgment is recovered against the executrix, the federal court cannot do much more than to give to the judgment creditor a certified transcript of the judgment to be filed in probate court, and there probated and classified in accordance with the state law, unless the judgment was for a preferred debt under the laws of the United States. The action of the district court in no way or manner interferes with the due administration of the estate in the probate court. It only settled the fact that the defendant, in her representative capacity as executrix of the estate of Mr. Bernays, was indebted to the receiver in the amount of the judgment on account of the liability incurred by the testator in his life-time. The errors assigned are overruled, and the judgment affirmed.

MILLER, Justice, concurs.

LA MONTAGNE v. T. W. HARVEY LUMBER CO.

(Circuit Court, E. D. Wisconsin. January 5, 1891.)

1. REMOVAL OF CAUSES—NON-RESIDENT DEFENDANTS—COUNTER-CLAIM.

The filing of a counter-claim in the state court by a non-resident defendant does not change his standing as defendant in the action, so as to preclude him from availing himself of the right to remove the cause to a federal court, conferred on non-resident defendants by the removal act. Disapproving *Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 578.

2. SAME—JURISDICTIONAL AMOUNT.

The claim of the plaintiff can alone be considered as the "matter in dispute," within the meaning of the removal act; and, where plaintiff's claim is for less than \$2,000, defendant's petition for the removal of the cause must be denied, though he has filed a counter-claim against plaintiff for a sum exceeding \$2,000.

At Law. Motion to remand.

The plaintiff, a citizen of Wisconsin, brought suit in a state court against the defendant, a citizen of Illinois, to recover the sum of \$1,004.07. The defendant made timely answer, pleading, *inter alia*, a counter-claim in the sum of \$2,500, and simultaneously therewith filed in the state court its petition for the removal of the cause to the federal court. The suit being here docketed, the plaintiff moves to remand the cause, upon the ground that the matter in dispute is less than the jurisdictional amount.

H. O. Fairchild, for the motion.

W. H. Webster, opposed.

JENKINS, J. This court was without jurisdiction at the institution of the suit. It then involved an amount less than the amount requisite to confer jurisdiction. If jurisdiction now obtains, it is because of the counter-claim asserted by the defendant. It is insisted for the motion that, with respect to the counter-claim, the defendant stands in the light of a plaintiff, and cannot, therefore, be permitted to remove the cause to a federal court; and *Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 578, is cited in support. There a non-resident plaintiff brought suit in a state court for an amount less than the jurisdictional amount, and was as to the counter-claim treated as a defendant and permitted to remove the cause. Undoubtedly, in a general sense, he who prefers a claim is a plaintiff,—a complainant. Unquestionably, also, a counter-claim is a cause of action existing in favor of a defendant against a plaintiff. The right of counter-claim is borrowed from the civil law, and is there known as "demand in reconvention." As to it, the defendant is the actor, the plaintiff virtually a defendant. The plaintiff in the suit may discontinue his action at will, but the counter-claim still remains. He cannot discontinue as to that. *Lanusse's Syndics v. Pimpinella*, 4 Mart. (N. S.) 439; *Adams v. Lewis*, 7 Mart. (N. S.) 405; *McDonough v. Copeland*, 9 La. 309; *Coxe v. Downs*, 9 Rob. (La.) 133; *Donnell v. Parrott*, 10 La. Ann. 703; *Destrehan v. Fazende*, 13 La. Ann. 307; *Bertschy v. McLeod*, 32 Wis. 205. Nor can the court properly permit such discontinu-

ance against the will of the defendant. *McLeod v. Bertschy*, 33 Wis. 176. In this respect it is analogous to a cross-bill in equity. The court cannot be ousted of its jurisdiction over it by dismissal of the original bill. Notwithstanding, however, the question still remains whether a defendant, although an actor or plaintiff as to the counter-claim, does not still remain the party who alone has the right of removal to a federal court. The term "defendant" was, I think, used in the removal act in its commonly accepted sense, and not with respect to the attitude of parties as to various causes of action preferred in one suit. The plaintiff is the party with whom the cause originates. The defendant is the party summoned to answer. Whatever causes of action may be permitted to be alleged against the plaintiff, he still remains the plaintiff upon the record; his antagonist, the defendant. The state statute so treats the matter. The counter-claim is a cause of action existing in favor of a defendant, and judgment thereon is rendered to the defendant. Rev. St. Wis. § 2662. There is but one suit, however numerous the causes of action involved, and although some one or more of them exist in favor of the defendant. In that suit, the party by whom it was instituted is the plaintiff, and so remains, whatever claims may be preferred against him. In that suit the party summoned is the defendant, and so remains, whatever rights he is permitted to assert against the plaintiff. It is to this party, known to the record as the defendant, being a non-resident, that the law grants the right of removal. It is not given to the original plaintiff under any circumstances. Other construction would give to a non-resident plaintiff, who had selected as his forum a state tribunal, or to whom the federal court was denied because of the amount of his claim, the right to bring that controversy into the federal court, notwithstanding the removal act denies to him that right, because his antagonist had asserted a claim. Invoking the assistance of a state court, the plaintiff was bound to know the right of the defendant to counter-claim, and, submitting to the jurisdiction, he submitted in its whole extent. *West v. Aurora City*, 6 Wall. 139. I cannot concur in the decision in *Lumber Co. v. Holtzclaw*, *supra*. I conceive it to be in direct antagonism to *West v. Aurora City*, *supra*. There, upon the filing of a counter-claim, the plaintiff entered a discontinuance of his suit, and sought to remove to the federal court the counter-claim as to which he claimed to be defendant. The supreme court deny the right, asserting that a suit removable under the section of the judiciary act then in question is one commenced by a citizen of the state in which the suit is brought, by process served on a defendant, a citizen of another state, and such defendant only has the right of removal. There is no substantial difference between the statute there considered and that now existing as to the party having the right of removal. If, therefore, the amount of the counter-claim can be properly deemed part of the "matter in dispute," the defendant may rightfully remove the cause.

Certainly, in a general sense, the "matter in dispute" in an action embraces the subject-matter of a counter-claim. But is it so embraced within the meaning of the removal act? It grants to the circuit courts

of the United States original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, "in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars;" and provides that any such suit brought in any state court may be removed by a defendant therein, being a non-resident of the state in which the suit is brought. It is apparent from the language of the act that no suit can now be removed to a federal court which could not originally have been brought there, except when the sole objection to the original jurisdiction was the non-residence of the defendant. Here another objection existed, viz., that the "matter in dispute" at the commencement of the action did not amount in value to the sum requisite to confer jurisdiction. Can jurisdiction be conferred by the assertion of a counter-claim by the defendant? The right to assert such claim in the state court is permissive, not obligatory. He, therefore, as to the counter-claim, has selected his forum. If he were plaintiff to the record, as he is in fact *quoad* the counter-claim, he could not remove his cause. I, however, concede his right so to do, if the amount of the counter-claim can properly be considered as part of the "matter in dispute," within the meaning of the act. In a series of cases under the various acts from the original judiciary act to the present, the supreme court has uniformly held that the jurisdictional fact of citizenship must exist at the commencement of the action, as well as at the time of removal. *Insurance Co. v. Pechner*, 95 U. S. 183; *Gibson v. Bruce*, 108 U. S. 561, 2 Sup. Ct. Rep. 873; *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. Rep. 472; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510; *Akers v. Akers*, 117 U. S. 197, 6 Sup. Ct. Rep. 669; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. Rep. 518; *Orehore v. Railway Co.*, 131 U. S. 241, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. Rep. 9; *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. Rep. 75; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. Rep. 196; *La Confiance Compagnie d'Assurance Contre l'Incendie v. Hall*, 137 U. S. 590, 11 Sup. Ct. Rep. 5.

The effect of these decisions is to construe the statute as speaking to the time of the commencement of the suit, with respect to matters of jurisdiction. It must therefore be held that the "matter in dispute" at the commencement of the action must exceed in value the sum of \$2,000. This is the logical result of the decisions of the supreme court. It also effectuates the manifest design of congress to deny to one selecting a state court as his forum the right to remove his controversy into a federal court. The precise question has been differently ruled. The position here taken was held in *Manufacturing Co. v. Broderick*, 6 Fed. Rep. 654, and in *Carriek v. Landman*, 20 Fed. Rep. 209. A different conclusion was reached in *McGinnity v. White*, 3 Dill. 351, and *Clarkson v. Manson*, 4 Fed. Rep. 257. It is to be observed, however, with respect to the former case, that it was decided prior to any determination by the supreme court upon the subject, and that Judge DILLON predicates his decision upon the ruling of Mr. Justice MILLER in *Johnson v. Monell*, 1

Woolw. 390, to the effect that a party by change of residence after suit brought may have the right of removal. This decision of Mr. Justice MILLER is counter to the ruling of the supreme court, and cannot be sustained, and Judge DILLON's decision, bottomed upon it, must fall with it. The decision of Judge BLATCHFORD in *Clarkson v. Manson* is ruled in part upon his own decision in *McLean v. Railway Co.*, 16 Blatchf. 309, to the effect that, under the act of 1875, the requisite citizenship need not exist at the commencement of the suit, and the decision in *Insurance Co. v. Pechner*, *supra*, under the judiciary act of 1789, was held inapplicable. The cases of *Johnson v. Monell*, *supra*, and *McGinnity v. White*, *supra*, are cited in support of the conclusion reached. The decision was made, however, before the construction by the supreme court of the act of 1875, and is counter to the settled law of the land.

I am compelled to the conclusion that, to entitle a non-resident defendant to remove the cause from a state to a federal court, the jurisdictional amount or value of the matter in dispute must exist at the commencement of the suit, as well as at the time of the petition for removal; or, in other words, that it is the claim of the plaintiff in such suit which must alone be considered, and such claim must, at the commencement of the suit, as well as at the time of application for removal, come within the jurisdictional amount.

The cause will be remanded.

HARTJE *et al.* v. VULCANIZED FIBRE Co.

(Circuit Court, D. Delaware. October 18, 1890.)

1. ESTOPPEL—IN PAIS—SILENCE.

The owners of three patents assigned the right to their use to defendants, reserving to themselves a stipulated royalty. To successfully carry on the business, defendants purchased a patent owned by one Hanna, which, by a supplemental contract, became the joint property of defendants and the owners of the three original patents. Afterwards the father of one of the owners of the three original patents acquired all of the latter's rights therein, and later sold the same to defendants. *Held*, that by managing this sale, and by knowingly permitting defendants to consummate it under the belief that they were acquiring his interest in all the patents, without informing them that no interest in the Hanna patent had ever passed to his father, the son was estopped from asserting any rights under that patent as against defendants.

2. TRUSTS—PROPERTY LIABLE TO ATTACHMENT.

Where a *cestui que trust* has conveyed all its interest under the trust to others by instruments *prima facie* competent, and where the *bona fides* of the transfer and of the trust has been unsuccessfully assailed on the ground that it was without consideration, and made to defraud creditors, and that both trustee and original *cestui que trust* were identical, and insolvent when the assignment was made, a debtor in whose hands the individual assets of the trustee have been attached cannot refuse to pay to him a trust debt.

Bill in Equity by August Hartje, trustee of Waldemar A. Schmidt, and of Henrietta Hartje and said Waldemar A. Schmidt and John H. Mueller, and said August Hartje and said Henrietta, his wife, in right of said Henrietta, against the Vulcanized Fibre Company of Wilmington.

M. A. Woodward and Henry C. Conrad, for complainants.

The assignment from Schmidt to Hartje was for three named patents. It must appear that the actor, having no means of knowledge, was induced to do what he would not otherwise have done, and that injury would ensue from a permission to allege the truth. *Com. v. Moltz*, 10 Pa. St. 527; *Bigelow, Estop.* 9, 480; *Herm. Estop.* § 325 *et seq.* If both parties have equal means of knowledge there can be no estoppel. *Hill v. Epley*, 31 Pa. St. 331; *Bigelow, Estop.* §§ 289, 290, *et seq.* 1 Story, Eq. Jur. § 191.

Edward G. Bradford, for respondent.

Schmidt is either equitably estopped or has parted with his interest. *Whitney v. Burr*, 115 Ill. 289, 3 N. E. Rep. 434; *Walk. Pat.* §§ 274, 285.

WALES, J. This bill is filed for a discovery, an accounting, and for a decree to compel the payment of royalties claimed to be due and payable for the use of certain patent-rights, which were formerly the property of the complainants, and by sundry mesne assignments came into the possession of the defendant, subject to the payment of the royalties now sued for. The patents referred to cover improvements for treating paper pulp and vegetable fibre substances in the manufacture of what are known as "vulcanized fibrous articles." The pleadings put in issue the title and ownership of each one of the complainants in or to the royalties which are the subject-matter of the present suit, and by the stipulation of counsel this is the only question now to be decided, leaving the scope and limitation of any account that may be decreed to be settled hereafter.

The answer denies that Waldemar A. Schmidt had any legal or equitable right or interest in any of the patents or royalties mentioned in the bill, at the time of bringing this suit, and alleges that what was known as the Schmidt interest in the patents had been assigned to the defendant before that time. The evidence shows that Waldemar A. Schmidt derived his right and interest in the most important and valuable of the patents by and under a declaration of trust made by August Hartje, that the latter held the patents therein mentioned in trust for the Pittsburgh Manufacturing Company and Waldemar A. Schmidt in equal shares. It further appears that August Hartje, acting as trustee, and with the consent of his *cestuis que trustent*, sold and assigned the right to use the trust patents to third persons, through whom they came into the possession of the defendant, on terms and conditions set out in a contract of assignment dated June 30, 1873. This contract fixed the rate of royalties to be paid for the use of the trust patents, and provided that any improvements in said inventions, made by the assignees, should be secured and patented for the joint benefit of the contracting parties. The patents thus assigned were No. 61,267, dated July 12, 1867; No. 113,454, dated April 4, 1870; and No. 114,880, dated May 16, 1871. The contract of June 30, 1873, was supplemented by another one between the same parties, made the 20th of November, 1873, and by which the first contract was modified and altered. The assignees of the trust patents having found it necessary, in order to secure greater protection in their business,

to buy other patents from Edmund S. Hanna, it was agreed by the supplemental contract that all patents which had already been purchased from Hanna, or which should thereafter be purchased from him, should be the joint property of the parties to these two contracts. E. S. Hanna, on November 14, 1873, had assigned and transferred to parties under whom the defendant claims, all patents and parts of patents held by him either as inventor or assignee, and all other patents for which he may make application thereafter, any of which shall relate to the methods of treating paper, paper pulp, or other vegetable fibrous substances, or any articles made from these substances, or any mechanical devices for working the same, reserving certain royalties to be divided equally between the said Hanna, August Hartje, trustee, and the assignees of the said patents. On June 7, 1880, Waldemar A. Schmidt assigned to A. T. Schmidt (his father) "all my interest, right, title, and claim of, in, and to those three patents," etc., referring to the trust patents, and specifying their numbers and dates. On the 15th of October, 1880, A. T. Schmidt assigned his interest in the three trust patents to the defendant for and in consideration of certain money payments, stated in the agreement between them of that date. On March 26, 1884, in the court of common pleas, No. 1, of Allegheny county, Pennsylvania, in the suit of A. T. Schmidt, assignee of W. A. Schmidt, against August Hartje, it was adjudged and decreed, *inter alia*, as follows:

"That the trust heretofore existing as set forth in the bill of complaint be, and the same is hereby, declared to be determined and fully ended; and that the said August Hartje, by good and sufficient assignments or instruments of writing, convey the one-half interest in the patents held by him in trust as set forth in the bill to the said plaintiff."

On November 10, 1884, August Hartje, in obedience to the above decree, assigned to A. T. Schmidt the undivided one-half interest in the trust patents. On the 14th of April, 1885, A. T. Schmidt, by way of further assurance, again assigned all his rights and claims in the trust patents to the defendant, on the payment of the consideration money mentioned in the agreement of October 15, 1880. These contracts and assignments complete the chain of defendant's title to what had been the Schmidt interest in the trust patents, and show that W. A. Schmidt has no right to sue for any royalties which may be due on them. But his counsel contend that he has never assigned or parted with his interest in the Hanna patents, on which royalties are due and payable, and that for a discovery and an account in respect to them he can maintain the present suit. It is true that Waldemar A. Schmidt, by his assignment to his father, transferred nothing more than his interest in the three trust patents, and that the father could not assign to the defendant any more than he had received; but the defendant charges that Waldemar A. Schmidt, in the course of the negotiations for the sale of the Schmidt interest, induced the defendant to believe that it was buying the Schmidt interest in all the patents, and that he is thereby estopped from now asserting any right in them. By the agreement of October 15, 1880, between A. T. Schmidt and the defendant, the con-

sideration for the assignment of the trust patents was to be paid partly in cash and the balance on the rendition of the decree establishing the right of A. T. Schmidt to the one-half interest in them. The trust having been determined, and the trustee having made the assignment, as ordered by the decree, the defendant was called on to fulfill his part of the agreement by paying the balance of the purchase money; and it is in the negotiations which preceded the final payment, and which were conducted by W. A. Schmidt in behalf of his father, that the evidence must be found to support the defendant's charge. It is clear enough that the defendant's officers and attorneys entertained the belief that in closing the transaction of April 14, 1885, they were obtaining the whole Schmidt interest, and it is only necessary to inquire what W. A. Schmidt did or said, or designedly left undone or unsaid, to produce that belief. It appears that at one time he presented a vague claim of \$500 on account of some of these patents, which was disallowed, and the matter was dropped. Mr. Dalzell, one of defendant's counsel, at Pittsburgh, testifies:

"The transfer of April, 1885, was made in further assurance of the title to the patents as originally made by A. T. Schmidt to the Vulcanized Fibre Company. I have no recollection of ever having heard, from my first connection with this business up to within a very short time, any suggestion or pretense that the entire Schmidt interest—by which I mean all the interest outside of that held by Hartje as trustee for himself and the manufacturing company—was not owned by A. T. Schmidt. * * * I know of the payment of the last installment of purchase money by the Vulcanized Fibre Company to A. T. Schmidt, and I understood when I paid that money and took the receipt that I was paying it for the entire Schmidt interest, and by the 'Schmidt interest' I mean as I have defined heretofore. Nothing was said by Mr. W. A. Schmidt, with whom I dealt, that would have led me to suppose anything else."

Waldemar A. Schmidt testifies on cross-examination:

"I was cognizant of the conveyance of all of A. T. Schmidt's interest in the Schmidt interest referred to in the question. *Question.* Do you not now understand, and did you not then understand, that the Vulcanized Fibre Company, through its counsel, was dealing or negotiating with your father for the transfer to it of the whole Schmidt interest? *Answer.* My offer having been refused by Mr. Hampton on the ground that I had nothing, and having received no intimation of a change of opinion on their part, it is possible that I thought they thought they had the whole interest; but I differed with them then, and do so now differ."

W. A. Schmidt never renewed his claim for the \$500, and allowed the negotiations to go on until the transaction was closed, and it was supposed by the defendant that it had acquired the complete title to the Schmidt property in the patents. If he had a title or claim to any portion of the patents or royalties he remained silent when it was his duty to speak, and his conduct affords a proper case for the application of the rule of equitable estoppel, which is nowhere more clearly stated than by Chancellor BATES in *Marvel v. Ortlip*, 3 Del. Ch. 9, as follows:

"Where one by his acts, declarations, or silence, where it is his duty to speak, has induced another person, in reasonable reliance on such acts or declarations, to enter into a transaction, he shall not, to the prejudice of the person so misled, impeach the transaction."

The same principle is also recognized in *Morgan v. Railroad Co.*, 96 U. S. 720, where the court say: A person—

"Is not permitted to deny a state of things which by his culpable silence or misrepresentation he has led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage."

A court of equity will not compel the purchaser of property, under such circumstances, to buy any portion of it over again from a person who stood silently by at the time of the sale and made no sign, although he knew that the purchaser believed that he was buying the property free from all claims. Much less will the court lend its aid to a claimant of such property who personally managed the sale and designedly permitted the purchaser to believe that he was getting a perfect title. Common honesty and fair dealing required that the complainant should notify the defendant, or its attorneys, that the assignment of A. T. Schmidt was of a part, and not of the whole, Schmidt interest; but, as he chose to adopt a different course, and to conceal what he should have made known, he cannot now be allowed to take advantage of his own wrong in maintaining this suit.

The right of the other complainants to bring the suit is disputed on the ground that August Hartje is the sole and individual owner of the royalties which he had formerly held as the trustee of the Pittsburgh Manufacturing Company, and that he should have sued in his individual capacity, and not as the trustee of his wife or of John H. Mueller. The defendant admits its accountability for the royalties which Hartje held for the benefit of the Pittsburgh Company, and by its answer alleges that it fully accounted for and paid them to the trustee of that company up to the 12th of July, 1885, on which day all the property, rights, and credits of August Hartje in the possession of the defendant were attached at the suit of A. T. Schmidt against the said Hartje in the superior court of Delaware for New Castle county. The defendant does not deny its obligation to pay the royalties, but asks for its own security to be directed by a decree of this court how and to whom such payment shall be made. The complainants' Exhibits G and H set forth the written instruments by which J. H. Mueller and Henrietta Hartje became the beneficiaries of the property in the place of the Pittsburgh Company. These instruments, two in number, bearing date, respectively, April 8, 1881, and May 11, 1881, are in due form, and are *prima facie* proof that their purpose was, as expressed, to put Mueller and Mrs. Hartje "fully in the place of the Pittsburgh Manufacturing Company under and in relation to the whole subject-matter of the trust respecting said patents, and recognized by said agreement, of which August Hartje was and remains trustee." The defendant has assailed the *bona fides* of the new trust by charging that it was created without consideration and for the purpose of defrauding Hartje's creditors, and is therefore void. It is also charged that August Hartje and the Pittsburgh Company were identical,

and that both were insolvent at the time when these complainants undertook to create the second trust. Without discussing the testimony produced by the defendant in relation to these charges, it is sufficient to say that the evidence does not support them. Mueller and Mrs. Hartje are the successors in interest to the Pittsburgh Company, and are entitled to have the royalties due on the patents paid to their trustee. The creditors of Hartje can prosecute their claims, in their own names, here or elsewhere. This case is decided on its own merits as they appear from the record evidence. The bill is dismissed as to Waldemar A. Schmidt, and sustained as to the other complainants, and a decree will be entered accordingly.

MCKENNAN, J., concurs.

FARMERS' LOAN & TRUST CO. OF NEW YORK v. CHICAGO & A. RY. CO.

(Circuit Court, D. Indiana. December 9, 1890.)

1. MORTGAGES—FORECLOSURE SALE—RIGHTS OF PURCHASER'S ASSIGNEE TO WRIT OF ASSISTANCE.

After a sale on the foreclosure of a railroad mortgage, the court directed its receiver to turn over the possession of the road to an assignee of the purchaser at the sale; the court reserving the right to resume the possession if the assignee should thereafter refuse to pay into court any part of the purchase price. *Held*, that this order brought the assignee within equity rule 10, which provides that every person, not a party to a cause, in whose favor an order has been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and that a writ of assistance would issue in favor of such assignee against another railroad company which unlawfully refused to surrender possession of part of the road.

2. SAME—MORTGAGOR'S CONTRACT PENDENTE LITE—DISCLAIMER BY PURCHASER.

Pending the foreclosure of a railroad mortgage, the mortgagor leased to another railroad company an equal right to the use of a designated part of the road for a period of 20 years. The foreclosure decree provided that the purchaser at the sale should be at liberty to abandon or disclaim any leasehold interest or contracts or other agreements entered into by the mortgagor after the commencement of foreclosure proceedings. *Held*, that the purchaser's right to abandon and disclaim the lease, as provided in the decree, was not affected by the receipt of the rent by the receiver during the pendency of the foreclosure proceedings, and his acquiescence in the lease, and that all right of possession in the lessee ceased on being notified of the purchaser's intention to disclaim and abandon.

3. SAME—WAIVER OF RIGHT TO DISCLAIM.

Shortly after the foreclosure sale, the purchaser notified the lessee of its intention to disclaim the lease, and forbade the latter from using the road at the expiration of 30 days from the date of the notice. *Held*, that the receipt of the rent for these 30 days by the purchaser, which was expressly stated to be without prejudice to its right to abandon the lease, was not such a consent to the lessee's possession as to constitute it a tenant from year to year, within the meaning of Rev. St. Ind. 1881, §§ 5207, 5208, which provide that all general tenancies where premises are occupied with the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year, to be determined by three months' notice to be given the tenant before the expiration of the year.

4. FEDERAL COURTS—JURISDICTION—WRIT OF ASSISTANCE.

Where the undisputed facts show that the purchaser, after the foreclosure sale, never waived its right to abandon and disclaim the lease, the federal court in which the mortgage was foreclosed, in the exercise of its primary jurisdiction over the matter, will issue a writ of assistance in favor of such purchaser, notwithstanding the issuance of a temporary injunction by a state court, in which the purchaser appeared, restraining it from interfering with the lessee's possession.

In Equity.

The Chicago & Erie Company is the grantee of Messrs. Coster and Thomas, who purchased the Chicago & Atlantic Railroad at the sale made on the 13th day of August last. The sale was made upon the decree of this court in this cause, foreclosing two mortgages, dated, respectively, June 13, 1881, and September 15, 1883. The decree was predicated upon two bills,—the supplemental and amended bill, filed September 24, 1886, by the original complainant, the Farmers' Loan & Trust Company, which was a trustee in each of the mortgages, and a cross-bill filed July 19, 1887, by George J. Bippus, co-trustee of that company in the second mortgage. On the 1st of September last, in pursuance of an order of the court entered that day, the receiver surrendered possession of the property to the Chicago & Atlantic Company, except that portion of the road between Hammond and Laketon junction, Ind., of which the Wabash Company was in *quasi* possession jointly with the receiver, and of that portion the receiver surrendered the possession which he had held. The petition is for the aid of the court to exclude the Wabash Company from that part of the road.

In its answer to the petition the Wabash Company sets up a contract made June 1, 1887, between the Chicago & Atlantic Railroad Company and O. D. Ashley and A. A. Talmage, as managing agents of the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, whereby—

"In consideration of certain payments, covenants, and agreements specified, the Chicago & Atlantic Company leased and demised to said Ashley and Talmage, their successors and assigns, for a period of twenty years, an equal right for using and enjoying, jointly with said railway company, the road, road-bed, track, side tracks, switches, bridges, outbuildings, tanks, coal-chutes, cattle-cars, and all other fixtures appertaining to the road of the Chicago & Atlantic Company between Laketon junction, aforesaid, in Wabash county, Indiana, and point above the tracks of the Chicago & Atlantic Railway Company connected with the Chicago & Western Indiana Railway Company at or near Hammond."

—And avers that afterwards, by virtue of certain transfers and assignments made with the consent of the Chicago & Atlantic Company, the Wabash Company, as the successor of the Wabash, St. Louis & Pacific and the Wabash & Western, became entitled to the rights of Ashley and Talmage under that contract and lease, and, as tenant, paid to the Chicago & Atlantic Company, from time to time, all rentals accruing, as they became due; that on or about the 20th day of May, 1889, this court, at the instance and request of the mortgagees and bondholders, appointed Volney T. Malott receiver of the railroad and property of the Chicago & Atlantic Company, and that thereupon the receiver and the Wabash Company entered upon the joint use and occupation of the Chicago & Atlantic road between Laketon junction and Hammond; the receiver holding under his appointment, and the said Wabash Railroad Company holding and occupying, with the knowledge and consent of the mortgagees and bondholders and receiver, under the aforesaid contract of lease; that the receiver, as the agent and representative of the mort-

gagees and bondholders, ratified and confirmed the said lease, and all the terms thereof, excepting as to its duration; that ever since the appointment of the receiver the Wabash Company has continued to pay the rents to him, as the agent and representative of the mortgagees and bondholders, as the same became due, and that, by reason of the premises, a general tenancy was created between said mortgagees and bondholders, of the one part, and the Wabash Railroad Company, of the other part, and that, as such general tenant, it has ever since, with the knowledge and consent of said mortgagees and bondholders, been in possession of said railroad and appurtenances. It is further averred that the sale was made on the 13th of August, 1890, to Coster and Thomas, who conveyed to the Chicago & Erie Company; that the receiver, in pursuance of the order of the court, delivered possession to that company on the 1st of September; that thereupon that company entered upon the joint use of the property with the Wabash Company between the stations aforesaid; that thereafter the Chicago & Erie Company, by the schedule rules which it adopted and put in force on said railroad, continued to recognize the Wabash Company as having equal rights with the Chicago & Erie Company to pass its trains over said railroad, and that the Chicago & Erie Company duly furnished the Wabash Company with such coal, water, and telegraph facilities as were necessary to enable it to run its trains, and also required the Wabash Company to report and register with the agents of the Chicago & Erie Company each and every train of the Wabash Company passing over the road, as required by the contract of June 1, 1887; in consequence whereof the Wabash Company became a general tenant by parol of the Chicago & Erie Company on the terms expressed in said contract, and became entitled to continue the use and enjoyment of said railroad on the terms aforesaid until such tenancy should be lawfully terminated; that it paid to that company the rental due under said lease for the month of September, and that, in recognition of the rights of the Wabash Company to the joint use of said tracks as a tenant of the petitioner, the petitioner has, since it came into possession, daily issued orders for the running of the Wabash trains, orders for the fuel required, and has delivered the same to the Wabash Company; that the occupancy of the property by the Wabash Company has been by the consent and with the approval of the petitioner, and that, relying upon its rights as a general tenant of said mortgagees and bondholders, it expended large sums of money in increasing and building up a profitable business for said railroad, and is now transporting over the same daily large quantities of freight and a large number of passengers, to-wit, 200 cars of freight and 300 passengers per day. It is further shown that the Wabash Company, after being notified that it should cease to use the Chicago & Atlantic road after September 30th, applied to the Wabash circuit court (a state tribunal) for a restraining order against the Chicago & Atlantic Company; that the Chicago & Erie Company appeared and resisted the application, but that a temporary injunction was granted as prayed, and that the complaint upon which the application to the state court

was made, among other things, contained averments substantially the same as those of the answer filed herein. The answer contains other averments which need not be stated because not material to the questions raised and argued at the hearing. The evidence, outside the records and files of the cause, showed that, after the surrender of possession by the receiver to the Chicago & Erie Company, the trains of the Wabash Company were permitted to run according to the schedule (No. 32) which took effect July 13, 1890, and the occupation and use of that part of the line in question continued in conformity with the terms of the contract of June 1, 1887, except that, commencing with the telegram of September 1st, there was the following correspondence between officers of the two companies:

"SEPT. 1, 1890.

"*To C. M. Hays, General Manager Wabash Ry., St. Louis, Mo.:* According to decree in suit Farmers' Loan and Trust Company against Chicago & Atlantic Company, the Chicago & Erie Co. abandons contract between Ashley and Talmage and Atlantic, dated June 1st, eighty-seven.

"OTTO GRESHAM.

"CHICAGO, Sept. 1, 1890.

"*The Wabash Railroad Company, Mr. Chas. M. Hays, General Manager, St. Louis, Mo.*—DEAR SIR: The Chicago & Erie Railroad Company, having, this first day of September, 1890, by order of the proper courts, been placed in possession of the railroad property of the former Chicago & Atlantic Railway, in accordance with the terms of the decree of foreclosure and sale entered in the suit of the Farmers' Loan & Trust Company against the Chicago & Atlantic Railway Company, in the United States circuit court for the northern district of Ohio, western division, the district of Indiana, and the northern district of Illinois, hereby gives notice, in addition to the notice given by the purchasers to the master commissioner at said sale, to the Wabash Railroad Company of its abandonment and disclaimer of a certain agreement and contract entered into the first day of June, 1887, by and between E. D. Ashley and A. A. Talmage, agents of the purchasing committee of the Wabash, St. Louis & Pacific Railway Company and the Chicago & Atlantic Railway Company.

THE CHICAGO & ERIE RAILROAD COMPANY.

"By OTTO GRESHAM, Atty.

"THE WABASH RAILROAD COMPANY. GENERAL MANAGER'S OFFICE.
CHAS. M. HAYS, GENERAL MANAGER.

"(ON ROAD,) Sept. 2-90.

"*Mr. Otto Gresham, Gen. Atty. C. & Erie Ry., Chicago, Ills.*—DEAR SIR: I have your message of the 1st inst., advising that, according to decree in the suit of Farmers' Loan & Trust Company vs. Chicago & Atlantic Ry. Co., the Chicago & Erie Ry. Co. abandons the contract between Messrs. Ashley and Talmage and the Chicago & Atlantic Ry. Co., dated June 1st, 1887. I presume it is your intention that we shall understand from this notice that, while you do not recognize the existing contract as binding upon your company, we are to continue under the terms of same until advised by your company of your desire to modify the present arrangement, or terminate the use of your line by our company. Please advise if this understanding is correct.

"Yours, truly,

CHAS. M. HAYS, General Manager.

"(ON ROAD,) Sept. 5, 1890.

"*Mr. S. M. Felton, Vice-President Chicago & Erie Ry. Co., New York.*—DEAR SIR: Notice has reached me, while out on the line of road, from Mr.

Otto Gresham, attorney for the C. & E. Ry., under date of September 1st, advising the Wabash R. R. Co., for the Chicago & Erie Ry. Co., of its 'abandonment and disclaimer of a certain agreement and contract entered into the first day of June, 1887, by and between C. D. Ashley and A. A. Talmage, agents of the purchasing committee of the W. St. L. & P. Ry., and the Chicago & Atlantic Ry.,' the receipt of which has been acknowledged. This notice was not entirely unexpected, as I have been informed through other sources that the arrangement referred to was not satisfactory to your company in every respect. Will you please advise me, as soon as convenient, if it is now your desire to make some modification or change in the terms of the contract under which we have been operating our trains over your line between Laketon junction and Hammond, Indiana, or if it is your intention to terminate absolutely all further relations with this company. If the former, I shall be glad to meet you at any time or place that may best suit your convenience, and negotiate for the continued use of your line by this company, upon such basis as we may be able to agree. If it is not your desire to do this, upon reasonable notice from you to that effect, we shall govern ourselves accordingly. Please answer.

"Yours, truly,

CHAS. M. HAYS, General Manager.

"NEW YORK, September 16, 1890.

"*Mr. Chas. M. Hays, General Manager Wabash Railroad Company, St. Louis, Mo.*—DEAR SIR: I am in receipt of your favor dated 'St. Louis, (on road,) Sept. 5, 1890.' In reply I beg to say that the Chicago & Erie Company desires that any use of its track by the Wabash Railroad Company shall absolutely cease. In order that you may govern yourselves accordingly, I inclose a formal notice fixing a time when use shall cease.

"Respectfully yours,

S. M. FELTON, Jr., Vice-President.

"NEW YORK, September 16, 1890.

"*The Wabash Railroad Company, Mr. Chas. M. Hays, General Manager, St. Louis, Mo.*—DEAR SIR: Referring to the notice sent to the Wabash Railroad Company on behalf of the Chicago & Erie Railroad Company by Mr. Otto Gresham, attorney, dated the first instant, you are hereby notified that on and after the hour of midnight on the 30th day of September, instant, the Wabash Railroad Company will not be permitted to run any cars or locomotives upon or over the track of the Chicago & Erie Railroad.

"Yours, truly,

J. G. McCULLOUGH, President.

"CHICAGO & ERIE RAILROAD COMPANY. OFFICE OF THE GENERAL SUPERINTENDENT.

"CHICAGO, ILLS., Sept. 30, 1890.

"*The Wabash Railroad Company*: Notice having been given by the purchasers at Indianapolis, Indiana, August 12th, 1890, at the foreclosure sale of railroad and property of the Chicago & Atlantic Railway Company, of the abandonment and disclaimer of a certain contract or agreement entered into on the 1st day of June, 1887, by and between the Chicago & Atlantic Railway Company and O. D. Ashley and A. A. Talmage, managing agents for the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, and notice also having been given by the Chicago & Erie Railroad Company on the 1st day of September, 1890, of the abandonment and disclaimer of said contract between the Chicago & Atlantic Railway Company and O. D. Ashley and A. A. Talmage, aforesaid, the Chicago & Erie Railroad Company now demand that the Wabash Railroad Company, by 12 o'clock midnight of this date, discontinue the use of the track of the Chicago & Erie between

Chicago and Laketon, or any other points, and after 12 o'clock to-night the Chicago & Erie will not expect the Wabash Railroad Company under any circumstances to send any trains over the track aforesaid.

"THE CHICAGO & ERIE RAILROAD COMPANY.

"By A. M. TUCKER, Gen'l Sup't."

The receipt, which is undated, given by the Chicago & Erie Company to the Wabash Company for rentals for the month of September, is indorsed—

"Without prejudice to the rights of the company under the notice given to the master commissioner by the purchasers of the property and franchises of the Chicago & Atlantic Railway Company, and under the notice given by Otto Gresham, attorney, etc., on Sept. 1st, 1890, from J. G. McCullough, president, etc., to the Wabash Company, and without in any wise qualifying or modifying the said notices, or the rights claimed thereunder, this voucher is signed and payment accepted."

The decree of foreclosure contains the following clause:

"It is further ordered that the purchaser or purchasers at said sale, and his, its, or their assigns, at any time before the delivery of the deed by the master commissioner, shall be at liberty to abandon or disclaim any of the said leasehold estates or interests, or contracts or other agreements, or rights, privileges, easements, or other property, by giving notice in writing of such abandonment or disclaimer to the said master commissioner, who shall annex the same to, and file the same with, his final report."

B. H. Bristow, C. W. Fairbanks, and Otto Gresham, for petitioners.

W. H. Blodgett, Henry Crawford, and C. B. & W. V. Stuart, for respondent.

WOODS, J., (*after stating the facts.*) The objection is made at the threshold that the petitioner cannot have the assistance of the court in the way asked to obtain possession, because it was not the purchaser, but comes as the grantee of the purchasers at the master-commissioner's sale. The authorities cited in support of this objection do not fully support it. In *Van Hook v. Throckmorton*, 8 Paige, 33, the court says:

"There is no settled practice of this court entitling a subsequent purchaser from a purchaser at a master's sale as a matter of right to the assistance of the court to obtain possession of the premises which his grantor had purchased under the decree."

And in *People v. Grant*, 45 Cal. 97, and *Stanley v. Sullivan*, 71 Wis. 585, 37 N. W. Rep. 801, the question was one of statutory construction, and the decisions have no general application. But, whatever the general rule in that respect is, it is not controlling in the present case; because, by the order of September 1st, this court recognized, and, in effect, declared, a substitution of the Chicago & Erie Company in the place of the purchasers at the sale, in respect both to rights and to duties and liabilities. That order, which was made with the consent of parties, besides directing the receiver to deliver possession "to the said Chicago & Erie Railroad Company, as the grantee and assignee of said purchasers at the commissioner's sale had herein," contains this clause:

"And the court now reserves the right to resume the possession of said railroad and other property in case the said Chicago & Erie Railroad Company shall hereafter fail or refuse, upon the order of the court, to pay into this court any money allowances for costs, expenses of the trust, or for claims against said receiver; and for that purpose the court retains jurisdiction of the said railroad and other property."

If this did not make the Chicago & Erie Company a party to the cause within the meaning of equity rule 9, which authorizes the issue of the writ of assistance for the use of a party, it certainly entitles it to the benefit of rule 10, whereby it is declared that—

"Every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause."

The petitioner is therefore entitled to the writ, if the facts justify the granting of it.

The answer of the respondent has in it the proposition that, by reason of the conduct of the receiver "as agent and representative of the mortgagees and bondholders," his receipt of rent from the Wabash Company, and other facts alleged, "a general *ténancy* was created between the mortgagees and bondholders, of the one part, and the Wabash Railroad Company, of the other part." In respect to this it is enough to say that the receiver did not make, or attempt to make, any arrangement which should extend beyond the term of the receivership. Without the consent of the court, I suppose, he could not have done so. The fact is that, during the possession of the receiver, he complied with the terms of the contract of June 1, 1887, in so far as they were obligatory upon the Chicago & Atlantic Company, so that there was, by reason of the receivership, no breach of the contract in that behalf; and if, instead of a sale, the suit had ended in the restoration of control to the Chicago & Atlantic Company, the relation between the two companies in respect to that contract would have been the same—the contract would have been just as binding upon them—as if there had been no receivership; and so, in the language of the answer, it remained true, until the receiver turned the property over to the petitioner that "the receiver and the Wabash Company entered upon the joint use and occupation of the railroad; * * * the receiver holding under his appointment, as aforesaid, and the Wabash Railroad Company holding and occupying * * * under the aforesaid contract of lease." That contract, whether it created a *tenancy* or an *easement*, having been made pending the suit, the rights of the Wabash Company under it were necessarily held subject to the decree, as much as if that company had been a party to the action. The suggestion at the argument that the contract was made before the filing of the cross-bill of Bippus is immaterial, because the bill of the Farmers' Loan & Trust Company sought a foreclosure of both mortgages, and consequently there was when that contract was made, in respect to both mortgages, a *lis pendens* as complete, I suppose, as if the

cross-bill had also been pending. Besides, the decree upon the first mortgage alone is a complete foreclosure of the rights of parties claiming under contracts made with the mortgagor after the commencement of the suit to foreclose that mortgage. When, therefore, the purchasers at the sale, in accordance with the terms of the decree in that respect, gave notice to the master commissioner of their election "to abandon and disclaim" the contract of June 1, 1887, with Ashley and Talmage, and all supplemental agreements, the result was that, immediately upon the surrender of possession by the receiver, all right of possession in the Wabash Company under that contract ceased; and, if that company has any ground for rightful resistance to the petitioner's claim for full and exclusive possession, it must be because, by conduct or by contract, the petitioner has conferred that right since it took possession at the hand of the receiver.

In respect to this point the attorneys for the Wabash Company, in a brief filed since the argument, say:

"On the foregoing facts, the first question presented is whether this court ought to attempt, in this proceeding, to determine the merits of the controversy now pending and being prosecuted in good faith between the same parties in the state court. If the Chicago & Erie Company has done nothing which entitles the Wabash Company to the injunction which it prayed for and obtained in the state court, then the Chicago & Erie Company can make its defense there. Both parties being citizens of the state of Indiana, the state court was the only tribunal to which the Wabash Company could appeal for the protection of its rights under any express or implied contract which had sprung up between September 1st and September 22d between the parties, which was after the Chicago & Erie Company had taken possession or assumed control; and we submit that no summary process from this court ought to be employed to cut down any such rights, in case they do exist. And especially is that true when such rights are asserted in good faith, and supported by evidence strong enough to induce the state court, upon a full hearing, to grant the relief prayed for. The cases cited and relied upon by petitioner are those in which the parties in possession set up no claim of right through anything arising subsequent to the sale. But here that claim is made, and it is made in good faith, and upon evidence sufficient to cause the state court to issue an injunction, and our contention is that the question whether or not that injunction was rightfully or wrongfully issued is an issue which ought to be left to the tribunal in which it is pending. We rely on the rule as stated in *Barton v. Beatty*, 28 N. J. Eq. 412, in which it was said: 'The exercise of the power of putting a purchaser in possession of land sold under the decree of this court rests in the discretion of the court. It will never be exercised in a case of doubt, nor, under color of its exercise, will a question of legal title be tried or decided.' *Schenck v. Conover*, 13 N. J. Eq. 227; *Vanmeter v. Borden*, 25 N. J. Eq. 414. The court will not in this summary way settle contested legal rights. *Thomas v. De Baum*, 14 N. J. Eq. 41. A writ of assistance is awarded in execution of a final decree. Having decreed a sale and conveyance of land, it is necessary, in order to give the purchaser the full benefit of his purchase, to put him in possession. This the court will do as a full enforcement of its judgment, and as incident to the relief given by its decree. But if, subsequent to the sale, the purchaser confers new rights on the person in possession, or his conduct leaves it doubtful whether he has not given the person in possession a right to hold the land, such fact takes away the power of this court to deliver possession. In such a case the ques-

tion would be, has the person in possession a right to hold the land by matter arising subsequent to the sale? and not, is a writ of assistance necessary to the complete enforcement of the decree? That question must be tried in another tribunal. In this case the person in possession puts in evidence certain facts tending to show the creation of a tenancy at will subsequent to the sale. The petitioner attempts to meet the case thus made by showing that no tenancy of any kind was created. Perhaps the evidence of each, standing alone, is sufficient to make out a *prima facie* case. It is obvious at a glance that the question thus raised is one not proper to be tried in this court. The application must therefore be dismissed. To the same effect, see *City of San Jose v. Fulton*, 45 Cal. 316."

It is evident that in the case referred to there was conflict in the evidence, and that on each side it was "sufficient to make out a *prima facie* case." There is no essential conflict of that kind here. The facts are as certain as if embodied in a special verdict or finding, and it remains only to deduce the proper legal conclusion,—a duty which would belong to the court even if the question were being tried in another tribunal with the aid of a jury; and in respect to that conclusion it seems to me that there is little or no room for doubt what it ought to be. There is nothing in the evidence adduced here that shows the ground upon which the Wabash circuit court granted its restraining order, nor that that court passed upon the exact question presented here; and, if it did, it would nevertheless be the duty of this court to act upon the matter according to its own judgment, because the primary jurisdiction is here, incident to the procedure of foreclosure and sale in the principal case, and upon the exercise of that jurisdiction the petitioner has the right to insist, notwithstanding the action had in the state court, and notwithstanding its appearance in that court, to resist that action. The powers and remedies of this court would be lame and inefficient indeed if they did not extend to situations like this, and if their exercise could be intercepted or cut off by applications to other courts.

The Indiana statute (Revision 1881, §§ 5207, 5208) provides that "estates at will may be determined by one month's notice," but that "a tenancy at will cannot arise or be created without an express contract; and all general tenancies in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year," which are determinable by "three months' notice given to the tenant prior to the expiration of the year." On the assumption that the occupation and use of the road by the Wabash Company in the manner shown constitutes a tenancy and estate in the sense of these statutes, it is now insisted that the Wabash Company holds as a general tenant of the Chicago & Erie Company. Whether the contract with Ashley and Talmage constituted, and whether any occupation and use of the road in accordance with the terms of that contract could constitute, a tenancy, seems to me quite doubtful. The right conferred thereby upon the "lessee," so-called, was simply to run its trains in charge of its own employees over the road of the other party, (the road itself being in the charge of the employees of the owner,) which by the contract was bound to furnish,

and did furnish, to the Wabash Company the requisite fuel, water, use of side tracks, and other facilities, including telegraph service, for the moving of its trains. A guest or boarder occupying a room for the time being, it may be exclusively, does not become a tenant in any proper sense of the word; and the right conferred by the contract with Ashley and Talmage seems to me to be rather in the nature of an easement; and the position of the Wabash Company since the Chicago & Erie Company took possession has been perhaps more like that of a licensee. But it is not necessary to define exactly the relation of the parties under that contract. It was treated in argument as a tenancy, and let it be so regarded. Whatever it was, by force of the decree of foreclosure and of the notice of "abandonment and disclaimer," given by the purchasers to the master commissioner on the day of sale, the rights of the respondent were terminated; and, aside from considerations of public policy against any sudden interruption of transportation and travel, the Chicago & Erie Company, upon taking possession, might have turned its switches, and refused to permit another locomotive or car of the Wabash Company to come upon its tracks; but it was not bound, in order to save its rights, to take so peremptory a course. It was enough that it sent immediate notice, both by telegraph and letter, to the Wabash Company of its purpose to abide by the disclaimer which Coster and Thomas had declared, and that in the subsequent correspondence with the officers of the Wabash Company this position was consistently maintained, and timely notice given that the Wabash Company at a time stated should cease entirely the use of the Chicago & Atlantic road. There was at no time cause for, nor was there in fact, on the part of the Wabash Company, any misunderstanding of the attitude of the Chicago & Erie Company; and if, under the circumstances, new rights have arisen in the nature of a general tenancy, it is because the law, from the mere fact of the continued joint use of the road conformably to the terms of the contract under which that use had begun, compels the inference of an intention contrary not only to the understanding of both parties, but to the expressed intention of the party against whose interests the inference is asserted. No such legal inference is necessary, and to say that there can be in this case an inference of fact, or of mixed law and fact, to the effect that a new tenancy or contract of any kind was intended to be created, instead of being a fair or reasonable deduction from it, would be a distortion of the evidence.

If there was not a strict compliance with the rule that there should be a formal demand for compliance with the order or decree of the court before applying for a writ of assistance, the respondent may be said, upon the facts shown, to have waived the objection. The prayer of the petition is therefore granted, and unless within a reasonable time (to be fixed on motion) the Wabash Company shall voluntarily withdraw its locomotives and cars, and cease to use the petitioner's road, the writ of assistance will issue, and the respondent will be enjoined, as prayed.

JESUP *et al.* v. WABASH, ST. L. & P. RY. CO. *et al.*

(Circuit Court, N. D. Ohio, W. D. December Term, 1890.)

1. RECEIVERS—SALES—ASSUMPTION OF LIABILITIES BY PURCHASER—ALLOWANCE OF DEMANDS.

Where a railroad which has been in the hands of a receiver appointed by the circuit court is sold, and the purchaser, as part of the consideration, covenants to discharge all existing debts and liabilities of the receivership, it is the duty of such court to protect the purchaser against all demands which are not just and proper demands against the receiver, and to that end to require all such demands to be presented to it for allowance.

2. SAME—ACTION IN STATE COURT—JURISDICTION OF FEDERAL COURT.

Where, on the strength of this covenant, a person brings an action in the state court against the purchaser to recover for a tort to his realty committed by the receiver, such demand being primarily chargeable on the fund in the hands of the federal court arising from the sale, such court will restrain the prosecution of the action, and require plaintiff to present his claim to it, for a judgment thereon in the state court would entitle him to satisfy it out of any property subject to levy in the hands of the purchaser.

3. SAME—WAIVER BY APPEARANCE.

The purchaser's appearance in the state court is no waiver of its right to have the proceedings therein restrained, where the nature of the suit did not at once appear, but it invoked the jurisdiction of the federal court as soon as its right to do so was revealed by the pleadings.

In Equity.

Osborn & Smith, for petitioner.

Hill & Hubbard, John W. Winn, and Harris & Comeran, for defendants.

RICKS, J. In this cause an application was made on behalf of the Wabash Railroad Company on the 25th of October, 1890, asking for an order to be made requiring Reuben T. Potterf to show cause why he should not be restrained from prosecuting an action at law against the petitioner in the common pleas court of Defiance county, Ohio. In that application the petitioner alleged that it was a corporation organized under the laws of Ohio, and became the purchaser of the property of the Wabash, St. Louis & Pacific Railway Company, foreclosed and sold in proceedings in the circuit courts of the United States for the several districts in the states of Illinois, Indiana, and Ohio. The petitioner further represents that in September, 1890, the said Reuben T. Potterf instituted an action against the petitioner, the Wabash Railroad Company, in the common pleas court of Defiance county, Ohio, to recover damages for a tort committed by John McNulty while he was receiver operating the railroad property foreclosed in the above proceedings under the order and direction of this court. It appears from the papers filed in connection with this application that the said Reuben T. Potterf is the owner of certain real estate in the town of Defiance, Ohio, adjacent to the property of the Wabash Railroad Company. In his petition filed in the state court the plaintiff alleges that he improved the real estate described in his petition by building thereon a suitable dwelling-house, barn, cistern, and outhouses, and constructed the same with reference to the grade of a certain highway running on the south-westerly side of said premises, and with reference to the grade as the same had been main-

tained for some 50 years preceding. The plaintiff further alleges that on or about the 1st of January, 1888, while the said John McNulty was the receiver in control of the said railroad property, he tore down a certain bridge crossing the railroad tracks adjacent to the plaintiff's property, and so rebuilt the said bridge as to place it on a grade five feet higher than it had theretofore been, and raised and constructed a bank along said premises, and near to said railroad bridge, four feet high, and made a stairway of ten steps by which people would reach said bridge and highway from the south-westerly line of said premises. The plaintiff alleges that his property, and the improvements thereon, were worth the sum of \$2,000, and that the said property was injured to the extent of \$1,000 by the changes made by the receiver, and that the same were done without the plaintiff's consent and against his protest, and without any legal permission from the properly constituted authorities of said town. The plaintiff, in his petition in said court of common pleas, bases his right to recover against the defendant, as the reorganized railroad company and purchaser of the property foreclosed, as above stated, upon the ground that the circuit courts of the United States, in foreclosing said property, made a decree or order providing that the said receiver, John McNulty, should turn over to the purchasers of said railroad property all the assets, books, vouchers, accounts, and property in his custody as such receiver, and be discharged from all further liability as such receiver, upon the following conditions, which I quote from the order of the court:

"The court orders the delivery of such receivership assets, papers, and property to the Wabash Railroad Company on the express condition that the last-named corporation agrees to pay, satisfy, and fully discharge all the debts and liabilities of such receivership of every kind now remaining unpaid, and that it may further defend in the name of such receiver all litigated claims or demands against such receivership now pending in this or other courts, and will fully abide by and pay any and all judgments and recoveries, together with costs, which may be rendered in any of such actions or litigations, and always protect and save harmless the said receiver from such claims or any of them."

This order was made by this court after the confirmation of the sale theretofore made, and the conditions therein required to be performed by the purchaser were substantially and in fact a part of the consideration exacted from such purchasers for said railroad property. This court authorized the receiver to deliver to the said purchaser all of the assets and property in his hands, upon the condition that said purchaser would save harmless the said receiver from all claims of every kind that might be preferred against him. It is therefore clearly the duty of this court to see that such purchaser is not required to pay or satisfy any claim or judgment of any kind that would not be a proper and just liability of said receiver. If this court had not discharged said receiver upon the conditions recited in the order, releasing him from further responsibility in connection with this property, it would have retained the assets, books, and vouchers in his hands, and adjusted all the liabilities incurred by him as receiver, by and through the proceedings customary

in such cases. It is clearly the duty of this court to protect the purchaser of this property to the same extent, and in the same manner, that it would have protected the receiver if he had been retained for the purpose of settling all these outstanding claims. When the purchaser bought this property it purchased it upon the conditions named in the decree and order of sale: The purchase price so obtained became a fund in the hands of this court for distribution to the beneficiaries under its decree. The court would certainly protect this fund from being diverted. It would take every precaution to see that no party received any portion of it unless justly entitled thereto. But this agreement to pay such just claims as might be allowed against the receiver, as before stated, is in fact a part of the price paid by said purchaser for the road, and it is the duty of the court to protect it against any unjust claims by the same diligence and care that it would protect the fund if actually in the registry of the court for distribution. The distribution of this fund, and the allowance of claims against the receiver, which is in fact a part of the purchase price, is exclusively within the control of this court. As the court would not allow any other tribunal to distribute any part of the purchase price, so it cannot properly or safely allow any other tribunal to say what are proper claims against the receiver to be paid out of this fund, or by the purchaser as a part of its purchase price for the property. In order to so fully protect the purchaser and fairly retain control of all claims against the receiver which such purchaser should be required to pay, this court must retain jurisdiction of all cases which involve the liability of its receiver. It must retain or acquire such jurisdiction in order that such liability may be adjusted and determined according to the equitable principles controlling this court in such proceedings. The plaintiff in this case had the right, under the act of August, 1888, to sue this receiver in the court of common pleas of Defiance county for the torts committed by him as such receiver. He had the right to bring such action without the leave of this court. Any judgment that he might have obtained in such court would have been subject to the equitable scrutiny of this court before it would have been allowed as a valid claim against the receiver; but the plaintiff's right to sue the receiver was fixed and indisputable. He chose not to avail himself of this right while it existed, but after the discharge of the receiver; and, when the purchaser of the foreclosed railroad property assumed the possession and management of it, he institutes this suit against such purchaser, and seeks to hold it liable for torts committed by the receiver during his management of said property under the orders of this court. While he bases his right to recover upon the express stipulation of the purchaser, made in this court, that it would pay all the liabilities of the receiver upon condition that the assets of the receiver and the control of the property purchased were turned over to it, yet the plaintiff elected to bring this suit against the purchaser instead of the receiver, because of some supposed legal advantage he could derive by reason of a suit against the former instead of the latter. But his right of action no longer exists against the receiver, because the receiver

has been discharged and released from all liability by express order of this court. He ought, therefore, to have no greater right against the purchaser than he has against the receiver. Whatever right or claim he has is against the fund in this court arising from the sale of said mortgaged property.

The promise and agreement of the purchaser constituted an additional consideration, and thereby added to said fund, as we have before stated; but in good faith to said purchaser it is the duty of this court to sift, scrutinize, and finally determine what claims shall be paid, and what claims shall be rejected. In order to do this satisfactorily this court should require all parties who assert any claim against such fund, or who claim any right to recover against said purchaser because of the stipulation and covenant made in this court, to establish such claim in this tribunal by proceedings usual in this class of cases. But if the said Potterf were permitted to prosecute his action in the state court, and recover a judgment thereon, he would have a right to satisfy said judgment out of any property subject to levy in the hands of the purchaser, the Wabash Railway Company; whereas, under the covenants and agreements made in this court between the court and the purchaser, placing upon said covenants the legal construction hereinbefore given, any claim he might have against the receiver was to be satisfied out of the fund arising from the sale of this mortgaged property. While counsel in arguing the case assured the court that they expected, in case they recovered a judgment, to come to this court, and ask to have it allowed and paid by the purchaser on this covenant, to which reference has been made, yet there is no legal barrier which would prevent the plaintiff from satisfying such judgment by levy and sale of subsequently acquired property in the hands of the purchaser. This places him in a more advantageous legal position than he occupied with a claim against the receiver, which could be satisfied only out of the fund or property in the receiver's control.

But it is further contended by counsel that the Wabash Railway Company cannot now ask for this stay of proceedings because it entered its appearance in the state court, and thereby conceded its jurisdiction. The appearance entered by the counsel for the said railway company would not have prevented it from asking the state court to remove said case to this court if the citizenship of the parties and the amount involved had been such as to justify such a request, and I do not think it prevents the said railway company from asking the relief it now demands. The jurisdiction of the court of common pleas, so far as the residence of the parties is concerned, is undisputed. It is because of the subject-matter of said contention that this court acquires jurisdiction. The exact character and nature of the suit were only developed by the motions made by the counsel for the defendant in the state court after the original suit was instituted; and when the pleadings properly revealed the actual basis upon which the plaintiff founded his action the petitioner at once invoked the jurisdiction of this court to restrain said proceedings because of the nature thereof. For these reasons I think the order here-

tofore made restraining said plaintiff from further proceeding against the receiver in the state court was properly allowed, and an order may now be drawn authorizing an injunction to issue perpetually restraining him from further prosecuting said suit. If said Potter chooses to avail himself of the privilege of filing his claim in this court against the receiver he may do so, and such further proceedings will be directed as the equities of the case demand. A decree may be prepared in accordance with this opinion.

BENTLEY v. LONDON & COLONIAL FINANCE CORP., Limited.

(Circuit Court, S. D. New York. December 23, 1890.)

1. SERVICE OF PROCESS—FOREIGN CORPORATIONS.

Where an action against a foreign corporation, which neither does business nor has a place of business or property in New York, is begun under Code Civil Proc. N. Y. § 432, by service upon a director thereof, found in the state, but not there in any official capacity or in the business of the corporation, the court acquires no jurisdiction.

2. SAME—REMOVAL OF CAUSES—DISMISSAL OF SUIT.

Defendant may have such suit dismissed on the ground that the state court acquired no jurisdiction even after removing it to the federal court

At Law.

Lester W. Clark, for plaintiff.

A. W. Evarts, for defendant.

WALLACE, J. Two questions arise in this case: *First*, whether the state court from which this suit was removed acquired any jurisdiction to render a judgment in the action against the defendant; and, *second*, whether the defendant, after removing the suit to this court, can have it dismissed upon the ground that the state court did not have jurisdiction. The Code of Civil Procedure of this state, (section 432, subd. 3,) as construed by the highest court of the state, authorizes an action to be commenced against a foreign corporation if the cause of action arose here, which neither does business nor has a place of business or property within the state, by the service of a summons upon a director who may be found here, although when found not here in any official capacity or in the business of the corporation. *Hiller v. Railroad Co.*, 70 N. Y. 223; *Pope v. Manufacturing Co.*, 87 N. Y. 137. The question of the jurisdiction of the state court in the present case depends upon the efficacy of such a service of process. For the reasons stated in the judgment of this court in *Goodhope Co. v. Railway Barb-Fencing Co.*, 22 Fed. Rep. 635, a personal judgment obtained in a suit commenced by such a service only, the defendant not appearing, would not be enforced in this court. If the suit had been commenced by the attachment of property of the defendant found here a different case would be presented; but if the action in the state court had proceeded to judgment, and property belonging to

the defendant and found here had been seized and sold on execution issued upon the judgment, the defendant could have resorted to this court to recover its value upon the theory that the judgment was a nullity. *St. Claire v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354; *Pennoyer v. Neff*, 95 U. S. 714. Upon the authority of these cases it seems entirely clear that the state court never acquired jurisdiction to adjudicate the action.

If the plaintiff could not have obtained a judgment in the state court which would have any validity whatever when called in question here, because of want of jurisdiction, what reason is there for denying to the defendant the right to challenge the jurisdiction at the threshold of the controversy? An alien, or a citizen of another state, sued in a state court other than that of the state in which he resides, is entitled, by removing the suit, to have all questions involved in it heard and disposed of by the federal court. The sole object of the constitutional and statutory provisions conferring jurisdiction upon federal courts in behalf of aliens and citizens of other states is that they may seek a trial and decision in these courts of questions which they are unwilling to submit to the judgment of the state tribunals. There are expressions in the cases of *Sayles v. Insurance Co.*, 2 Curt. 212, and *Bushnell v. Kennedy*, 9 Wall. 387, favorable to the contention for the plaintiff here, and to the effect that a party who has removed a suit from the state court cannot dismiss it in the federal court upon the ground that the state court did not have jurisdiction of the action. These expressions, however, were unnecessary to the decision of the cases, and since they were reported there have been numerous decisions of circuit courts to the contrary. *Parrott v. Insurance Co.*, 5 Fed. Rep. 391; *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 17 Fed. Rep. 865; *Hendrickson v. Railroad Co.*, 22 Fed. Rep. 569; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Miner v. Markham*, 28 Fed. Rep. 387; *Perkins v. Hendryx*, 40 Fed. Rep. 657; *Golden v. Morning News*, 42 Fed. Rep. 112. The last case was a decision of this court by Judge LACOMBE. The proposition thus decided ought not to be regarded in this court as disputable. The motion by the defendant to set aside the service of process, and dismiss the suit, is granted. The motion made by the plaintiff to remand the suit to the state court is without any foundation whatever, and is denied.

KINGORY *et al.* v. UNITED STATES.

(Circuit Court, W. D. Louisiana. January 5, 1891.)

1. REVIEW ON APPEAL—EVIDENCE NOT PRESERVED IN RECORD—INSTRUCTIONS.

Where no evidence is preserved in the bill of exceptions, an instruction directing a verdict for the plaintiff will not be questioned on appeal.

2. SAME—ERROR NOT COMPLAINED OF.

Where a defendant brings error, and the plaintiff does not complain of the judgment, though it is for less than he is entitled to, the error cannot be corrected in the circuit court.

3. WITNESS—USE OF MEMORANDUM.

A witness may, when testifying, refresh his recollection by the use of a memorandum made by himself.

At Law. Error to district court.

J. L. Bradford, for plaintiff in error.

M. C. Elstner, U. S. Atty., for the United States.

PARDEE, J. The United States sued Joseph J. Kingory and Perkins & Miller *in solido* for the conversion of a lot of trees or timber cut off of the public lands by trespassers. The defendants appeared and filed a general denial, and pleaded the prescription for one year. On the trial of the case the jury found the following verdict:

"We, the jury, find as special facts that the defendants are liable for one hundred and fifty logs, averaging two hundred and fifty feet each, the lumber thereof being worth at the mills at Lake Charles, where the defendants purchased them, six dollars (\$6) per thousand, and the trees standing on land being worth fifty cents each; that defendants are liable *in solido* to the plaintiff; that defendants did not know that the trees were cut by trespassers on the government land."

Upon this verdict a judgment was rendered against Joseph J. Kingory and the firm of Perkins & Miller, composed of Allen J. Perkins and C. H. Miller, jointly and severally in the sum of \$150, with legal interest from December 11, 1885, until paid, and all costs of suit. From this judgment the defendants in the court below prosecute this writ of error.

There is no assignment of errors in the record, but in the argument plaintiffs in error assign errors of court in the admission of evidence and in charging the jury, as shown by the two bills of exception allowed on the trial, to-wit:

"(1) Be it remembered that on the trial of this cause the court charged the jury that the testimony of the witnesses for the government must be taken for true, since the defendants had not offered evidence to contradict it, to which charge defendants excepted; and be it further remembered that the court directed the jury to find a special verdict for the plaintiff against the defendants for one hundred and fifty logs of an average measurement of two hundred and fifty feet per log, of the value of six dollars (\$6) per thousand at the mill, or fifty cents per standing trees, to which charge defendants excepted; and defendants tender their bill of exceptions in due time, and ask that same be signed and made of record. The court charged the jury that, the defendant having offered no testimony in his behalf, and the court believing that it fully appears from the evidence given by the plaintiff's witnesses

that the plaintiff had fully made out his case, the jury were authorized and were directed to find for plaintiff. (2) Be it remembered that on the trial of this cause the plaintiff offered the testimony of L. J. Hickman to prove the *locus in quo*, and the said Hickman, being on the stand, proposed to testify from papers which he had in his hands, to which defendants, by counsel, objected, on the grounds that the witnesses must testify from their recollection, and cannot be permitted to testify from memorandum; nevertheless the court overruled the objection, and permitted said witness to testify, and on his examination it appeared from his evidence that he was a special agent of the interior department for the suppression of depredations on the public lands, and that he had made a report to the government, and had memoranda of such report, and that without the aid of said report or memoranda of such report he was unable to testify as to the matters at issue; and to the reception of said testimony defendants object, and their objection was overruled by the court, on the ground that in law there can be no objection to a witness who made and has memoranda in his possession, reciting matters about which he is being questioned, reading the same to refresh his memory in order to be accurate in his testimony about such matters; to which ruling defendants excepted and tender this bill," etc.

It will be noticed that no evidence whatever is recited in the first bill of exceptions. That being the case, it is impossible for this court to say whether or not there was error in the charges given in said bill. The court will not go outside of the bill of exceptions to find the evidence offered in the case. See *U. S. v. Wingate*, lately decided by this court in the eastern district of Texas, reported *ante*, 129. The second bill of exceptions recites no error on the part of the court. The rule is universal that a witness may refresh his recollection with his own memoranda. On the verdict as rendered, following the rule of damages in *Wooden-Ware Co. Case*, 106 U. S. 432, 1 Sup. Ct. Rep. 398, the government was entitled to a verdict of \$225, while it seems that only a judgment for \$150 was rendered. As the United States does not complain, this error cannot be corrected in this court. For the foregoing reasons it is ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, affirmed, with costs.

UNITED STATES *v.* PERKINS *et al.*

(Circuit Court, W. D. Louisiana. January 5, 1891.)

1. PUBLIC LANDS—CUTTING TIMBER—SUBSEQUENT PURCHASE.

Where a homesteader, who has never had possession of the land included in his homestead claim, and whose entry has been canceled, buys the land from the government, such purchase does not pass title to timber which he had cut from the land before his purchase, and after he had learned that his homestead entry was invalid.

2. SAME—MEASURE OF DAMAGES.

In an action by the United States for the value of timber bought by defendant from a trespasser who had knowingly cut it from the public land, the measure of damages is the value of the timber at the time of the purchase.

On Writ of Error from District Court.
M. C. Elsner, U. S. Atty.
J. L. Bradford, for defendants in error.

PARDEE, J. December 17, 1885, the United States brought suit in the district court of this district against Allen J. Perkins and Charles H. Miller, composing the commercial firm of Perkins & Miller, claiming that they were indebted to the United States *in solido* in the sum of \$2,328, with legal interest from judicial demand, for the manufactured value of a lot of pine timber that was cut by one Reeves and one Perkins, trespassers, in the fall and winter of the year 1884, on the vacant lands of the United States, and by said trespassers sold and delivered to the defendants, said defendants well knowing at the time of said sale and delivery that the said timber had been unlawfully cut and removed from vacant lands of the United States; and that said timber, which so came to the hands of said defendants, was sold and converted to the uses of said defendants. Defendants answered with a general denial and the plea of prescription of one year. The cause came on for trial, and the jury found the following special verdict:

"We find as a fact specially that John T. Reeves went upon the W. $\frac{1}{2}$ of N. W. $\frac{1}{2}$, sec. 30, T. 8 S., R. 7 W., prior to 1877. Subsequently he made homestead entry of the N. E. $\frac{1}{4}$, sec. 25, T. 8 S., R. 8 W., supposing it to be the land upon which he was then and had been previously living; that in 1879 he discovered that the land upon which he was actually residing was not included in his said entry, and after learning this fact he cut eight hundred logs from the land included in said homestead entry, and sold same to Perkins & Miller, worth, as trees, fifty cents, and, as logs, five dollars (\$5.00) per thousand, averaging two hundred and seventy feet per log."

Thereupon, it appears, the following agreed statement of facts was entered into, viz.:

"In addition to the facts found by the special verdict of the jury in the above-entitled cause, it is agreed that the evidence before the jury in said suit established the following facts, viz.: 'That John T. Reeves, on March 9, 1877, at the United States land-office, New Orleans, Louisiana, made his homestead entry for the land described in plaintiff's petition in said suit, to-wit: "The N. E. $\frac{1}{4}$ of sec. 25, T. 8 S., R. 8 W.;" that on November 5, 1885, said homestead entry was canceled by the government; that on December 30, 1886, said John T. Reeves, at said land-office, paid the government in full for said land at the rate of one dollar and twenty-five cents (\$1.25) per acre, and the same day received from the receiver of said land-office a receipt in full for the price of said land, including receipt for the payment of all fees for said office in the matter of said homestead entry; that said receipts and a certified extract from the tract book of said land-office in the matter of said homestead entry, also in evidence in said suit, showed that said payment by said John T. Reeves, in full payment of said land, was made by him as a homestead claimant, as was supposed, by virtue of and under the privilege confirmed by section 2 of the act of congress, approved June 15, 1880, and had relation to the original claim or equity acquired by him, whatever that was, by his said original homestead entry, made as aforesaid, for said tract of land on March 9, 1877.' It is admitted that after 1879, and prior to the cash entry

on December 30, 1886, John T. Reeves, with the full knowledge that the land upon which he trespassed was not the land upon which he was living, cut the eight hundred sticks mentioned on the N. E. $\frac{1}{4}$ of sec. 25, T. 8 S., R. 8, and sold the same to Perkins & Miller."

Upon the facts as found, and as admitted in the record, the court gave judgment for the defendants, to which the plaintiffs excepted, reserving a bill of exceptions thereto, and thereupon sued out this writ of error.

On the facts as found and admitted the United States are entitled to a judgment, unless the effect of the purchase by Reeves, the original trespasser of the lands trespassed upon, was to estop the United States from further prosecuting the defendants for the value of the property converted. The defendants claim that as Reeves originally entered the land as a homestead in 1877, his purchase of the same from the United States in 1886, under the act of 1880, (21 St. at Large, 237,) and possession thereunder, related back to the date of the homestead entry, and thus effectually canceled the trespass, and this notwithstanding the fact that Reeves never lived upon, occupied, nor possessed the land, and the further fact that the entry of said lands by Reeves as a homestead had been canceled by the government. In the cases cited by counsel, where such effect has been given to such subsequent purchases, (*U. S. v. Ball*, 31 Fed. Rep. 667, and *U. S. v. Freyberg*, 32 Fed. Rep. 195,) the homesteader entered the land in good faith, and actually resided upon and possessed it; and there was no suggestion of any cancellation of the entry or abandonment of the same, nor in the lengthy and elaborate opinions given by the learned judges is there a suggestion that the homesteader took anything under the enabling act of 1880. The decisions cited from the land department, to the effect that under the act of 1880 the homestead settler, even after the cancellation of his original entry, can purchase the same tract at the full government price, provided it does not interfere with subsequent rights, (*In re Riggs*, 1 Dec. Dep. Int. 96; *Railroad Co. v. Burt*, 3 Dec. Dep. Int. 490; *Hollants v. Sullivan*, 5 Dec. Dep. Int. 115; *Holmes v. Railroad Co.*, Id. 333; *Railroad Co. v. McLean*, Id. 529; *Railroad Co. v. Elder*, 6 Dec. Dep. Int. 409; *In re Doolittle*, 8 Dec. Dep. Int. 403,) do not deal, or pretend to deal, with the effect of such purchase on the status of property, such as timber, which became personal property when severed from the soil and removed from the land prior to the purchase. As Reeves never had possession of the land, and as his prior entry was canceled, he never had any title, legal or equitable, prior to December 30, 1886, a date subsequent to the institution of this suit. The trees cut and removed from the tract in question in 1879 became and were personal property, which undoubtedly then belonged to the United States. When the defendants received the timber, and converted it to their own use, they became liable to the United States for its value, and there was no reason why the United States, in thereafter selling the land, should renounce their just right to recover their damages already accrued; and such an intention cannot be presumed in the absence of an act of congress warranting such presumption. But in this case we are not left to

conjecture as to what was the intention of the United States in the sale to Reeves, and as to the property sold and the rights reserved. Reeves' purchase is under the act of 1880, the first and fourth sections of which read as follows:

"Section 1. That when any land of the United States shall have been entered, and the government price paid therefor in full, no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon or for or on account of any material taken from said lands, and no civil suit or proceeding shall be had or further maintained for or on account of any trespasses upon or material taken from the said lands of the United States in the ordinary clearing of land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any *bona fide* settler, or for or on account of any timber or material taken or used by any person without fault or knowledge of the trespass, or for or on account of any timber taken or used without fraud or collusion by any person who, in good faith, paid the officers or agents of the United States for the same, or for or on account of any alleged conspiracy in relation thereto: provided, that the provisions of this section shall apply only to trespasses and acts done or committed and conspiracies entered into prior to March 1st, eighteen hundred and seventy-nine: and provided, further, that defendants in such suits or proceedings shall exhibit to the proper courts or officer the evidence of such entry and payment, and shall pay all costs accrued up to the time of such entry." "Sec. 4. This act shall not apply to any of the mineral lands of the United States; and no person who shall be prosecuted for or proceeded against on account of any trespass committed or material taken from any of the public lands after March 1st, eighteen hundred and seventy-nine, shall be entitled to the benefit thereof."

The said act is a part of Reeves' title, and contains a definite notice to him and the parties holding under him that there was to be no condonement for trespasses committed after the 1st of March, 1879, even when committed in the ordinary clearing of land, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any *bona fide* settler, or for and on account of any material or timber taken by any person without fault or knowledge of the trespass, or for and on account of any timber taken or used without fraud or collusion by any person who, in good faith, paid the officers of the United States for the same, and much less for trespasses willfully committed, or for and on account of timber taken or used in bad faith, as seems to be the fact in this case, the special verdict reciting "that in 1879 he discovered that the land upon which he was actually residing was not included in his said entry, and after learning this fact he cut 800 logs from the land included in said homestead entry, and sold same to Perkins & Miller." It hardly seems necessary to add that the effect which defendants claim should be given to Reeves' after-acquired title, if sanctioned by the courts, would be to offer condonement in advance for trespasses on the public lands, as it would be practically saying to the large class of depredators, "Make a paper homestead entry; cut off the timber, and if the United States complain, take part of the proceeds and buy the lands with full pardon."

By the special verdict and the agreed statement of facts the timber that came to the hands of the defendants amounted to 800 logs, averaging 275 feet per log, aggregating 216,000 feet, for which the United States is entitled to recover at the rate (following the decision of the supreme court of the United States in *Wooden-Ware Case*, 106 U. S. 432, 1 Sup. Ct. Rep. 398) of \$5 per thousand, amounting to the sum of \$1,080. In that case it is said by Mr. Justice MILLER for the court:

"The timber, at all stages of the conversion, was the property of the plaintiff. Its purchase by defendant did not divest the title nor the right of compensation. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by the defendant, was perfect, with no right in any one to set up the claim for work and labor bestowed upon it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea; if it were, he would be liable to no damages at all, and no recovery could be had. * * * But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, was worth eight hundred and fifty dollars, and he wants to satisfy the claims of the government by the payment of sixty dollars. He founds his right to this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sales, but on the proposition that in purchasing the property he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value. If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it, and stood in his shoes; but, as in the present case of an intentional trespasser who had no such right to sell, the defendant could purchase none. Such is the distinction taken in the Roman law, as stated in the Institutes of Justinian, lib. 2, tit. 1, § 34. * * * To hold that when the government finds its own property in hands but one removed from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in cutting down trees and removing the timber, is to give encouragement and reward to the wrong-doer by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable."

It is, however, contended that the rule laid down in the case of *Wooden-Ware Co.* does not prevail in the state of Louisiana, where, it is claimed, "the milder rule of the civil law prevails;" and reliance is had upon the case of *Eastman v. Harris*, 4 La. Ann. 198; *Yarborough v. Nettles*, 7 La. Ann. 116; and *Whitehead v. Dugan*, 25 La. Ann. 409. It seems to have escaped the attention of counsel that the supreme court in the *Wooden-Ware Case* based their rule of damages upon the authority of the civil law as well as upon the common law, and that the case is cited with approval by the supreme court of Louisiana in *Gardere v. Blanton*, 35 La. Ann. 811. An examination of the Louisiana cases does not, however, sustain the contention. In *Eastman v. Harris*, which was a suit to recover the value of certain logs from a possessor in bad faith, the court below had given a judgment upon the value of the logs at the time of the conversion, from which judgment the defendant appealed; the plain-

tiff not appealing, but asking an affirmance of the judgment of the court below. The supreme court affirmed the judgment, using this language:

"If the plaintiff was only entitled to recover the value of the logs as they lay on the ground, the damages given by the district judge are excessive, but if he was entitled to the enhanced value of the logs, deducting the cost of their conversion into fuel, the judgment cannot be deemed excessive, and ought not to be disturbed. As the plaintiff has asked an affirmance of the judgment, it is not necessary to decide whether a possessor in bad faith, under such circumstances, is entitled to compensation for the labors bestowed upon it, and by which it has been converted into a more valuable form. But we may remark that it is at best questionable. The policy of the civil law was to sanctify and uphold the right of property by discouraging and punishing wrong-doers; and we find a learned court of common law, in a case very like the present, applauding the wisdom of the civil law, and citing it as authority. We refer to the case of *Betts v. Lee*, 5 Johns. 349, where a party had trespassed upon another's land, cut down the timber, and converted it into shingles. This was held not to change the title to the property, and the trespasser, it would seem, was not considered as having a right to remuneration for making them. In *Brown v. Sax*, 7 Cow. 95, where logs had been cut on the plaintiff's land, drawn to the defendant's mill and converted into boards, the judge charged that the measure of damages would be the value of the boards, without reference to the price of the defendant's labor, and this ruling was affirmed by the supreme court."

—From which it appears that the decision in the case of *Eastman v. Harris*, instead of being opposed to the rule laid down in the *Wooden-Ware Case*, is in direct line with it, so far as the decision of the court goes. In *Yarborough v. Nettles*, which was a suit for damages against the defendant for having maliciously cut timber off the plaintiff's land, there was a verdict in favor of plaintiff for \$452, from which he appealed. The court say:

"The jury appears to have allowed the full value of the timber, and as their verdict is conclusive on the question of malice, the only ground seriously pressed upon us in argument for an increase of the judgment is that the jury should have allowed not merely the value of the timber, but its increased value when made up into lumber. If this be the rule, we are unable to perceive how the appellant should stop there, and not claim the value of the timber when worked up in buildings and furniture. The sum allowed by the jury will enable him to procure the same quantity of timber, and he may make out of that all the profits which his skill and ingenuity would have enabled him to make on his own by converting it to the uses of man. We are of opinion that justice has been done between the parties."

The sum of this case is that an owner cannot recover against a possessor in good faith the enhanced value placed upon the property by such possessor. This does not conflict with the *Wooden-Ware Case*, nor establish a different rule; rather the same rule. In the case of *Whitehead v. Dugan*, which was an action for tort or trespass against a purchaser from the original trespasser, the court held that "the defendant was not a trespasser, and that in his purchase from the original trespasser there was no offense, *quasi* offense of contract or *quasi* contract, nor obligation arising under operation of law in favor of the plaintiff, and that, as the suit was one for trespass, the plaintiff could not re-

cover." The court indulges in an *obiter* to the effect that if plaintiff had sued for the possession of his timber the defendants "would have been entitled to keep them on condition of paying the owner of the trees their value at the time they were cut," but expressly declares that "no such case is before the court."

In Louisiana a possessor in bad faith is not allowed to profit by his own wrong:

"An intruder may recover such expenses as are necessary for the preservation of things. A *negotiorum gestor* may recover what he has spent in doing the business necessary, which may be done for another, even without a mandate. It is a general rule of equity that no one shall enrich himself at another's expense, but this doctrine must not be stretched so far as to let an intermeddler recover for willfully doing what was not necessary to be done, and what the owner might not wish to have done, and what the law did not require to be done. If an intermeddler goes to the expense with a single view of benefiting himself, and reaps the benefit, he cannot demand a reimbursement for his time and trouble from the person upon whose property he has intruded by the suggestion that he, too, has been incidentally benefited." *Gibson v. Hutchins*, 12 La. Ann. 545. "Where one, through ignorance, commits a trespass on another's land by cutting and removing timber, he will be responsible only for the actual value of the timber used or destroyed. *Per Curiam*. The case is different where one willfully and knowingly commits a trespass on private property." *Watterston v. Jetche*, 7 Rob. (La.) 20. "It is well settled that the value of the trees, when first cut, is the measure of damages when the trespass is not willful, but the result of mere inadvertence. *Id.*; *Farborough v. Nettles*, 7 La. Ann. 117."

Lord HATHERLY states the doctrine thus:

"When once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, as far as is possible, under the circumstances of the case, the full value of that which cannot be restored to him *in specie*."

—And this statement of the then lord chancellor is quoted with approbation by the United States supreme court in the latest case on this point: *Bolles Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398.

In Louisiana it is well settled that the rule that no one should be allowed to enrich himself at the expense of another is limited to cases in which the alleged benefit arises from a lawful act. From unlawful acts, though they may prove beneficial to others, no right not expressly authorized by law can arise. See *Jenkins v. Gibson*, 3 La. Ann. 203; *Wood v. Lyle*, 4 La. Ann. 145; *Hollon v. Sapp*, *Id.* 519; *Jones v. Wheelis*, *Id.* 541; *Norman v. Ellis*, 5 La. Ann. 693. Considering the foregoing adjudged cases, I am unable to see that the rule of damages for the conversion of property taken by trespassers is different in Louisiana from the rule declared in *Wooden-Ware Case*. It is therefore ordered and adjudged that the judgment of the district court be and the same is reversed, with costs, and that this cause be remanded to the said district court, with instructions to enter judgment for the plaintiff against the defendants *in solido* for the sum of \$1,080, with legal interest from judicial demand, and for all costs.

UNITED STATES v. HORNER.

(District Court, S. D. New York. January 23, 1891.)

1. CRIMINAL LAW—DISTRICT OF TRIAL—REMOVAL OF PRISONER.

Upon an application under section 1014 of the United States Revised Statutes for the removal of a prisoner to another district, for trial upon an indictment there found, upon objection made, the court should look into the indictment, so far as to be satisfied that an offense against the United States is charged, and one that is legally triable in the jurisdiction to which it is sought to remove the prisoner.

2. SAME—USE OF MAILS FOR LOTTERIES—OFFENSE BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.

Upon the act of September 19, 1890, amending section 3894, Rev. St., which makes criminal (1) depositing lottery matter in the mails; (3) knowingly causing such matter to be delivered by mail,—an indictment having been found in the southern district of Illinois against the defendant containing five counts, the first four of which alleged such deposit by the defendant at New York, and the last that he, knowingly, caused such matter to be delivered, by mail, to a person in the southern district of Illinois, and that he had previously deposited such matter in the mails in New York, for such delivery, *held*, that the offense charged in the fifth count was not completed except upon the delivery of the prohibited matter in Illinois; that that offense was, therefore, consummated and "committed" there, though begun in New York, and was, therefore, an offense legally triable in Illinois; and that the sixth amendment of the constitution, providing for the trial of offenses within the district where "committed," presented no objection to the removal of the prisoner.

Indictment for Violation of Postal Laws.

Edward Mitchell, U. S. Atty., and *Maxwell Evarts*, Asst. U. S. Atty.

Alfred Taylor and *Hemans Aaron*, for defendant.

BROWN, J. The defendant having been arrested in this city, and held by a United States Commissioner, upon a charge of violating the statutes forbidding the use of the mails in the lottery business, application is made to me under section 1014 of the Revised Statutes for his removal to the southern district of Illinois for trial under the indictment there found against him for such offenses. Objection to his removal is made on the ground that no offense is charged in the indictment, or, if any, none that is legally triable in that state; that, if any offense is charged in the indictment, it is an offense consisting wholly of acts committed in the state of New York, and cannot, therefore, under the sixth amendment of the United States constitution, be tried in the state of Illinois, but only in the district wherein the offense was committed. I have no doubt that upon such objections it is not only the right but the duty of the court, before the removal of the accused to a distant forum for trial, to look into the indictment so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may be lawfully tried in the forum to which it is claimed the accused should be removed. *In re Dana*, 7 Ben. 1; *In re Buell*, 3 Dill. 116, 120. On examining the indictment, it is apparent that each of the five counts charges an offense against the United States, in at least general terms. Any defects of form, or objections that might be raised on special demurrer, are not proper to be considered here. All the counts are founded upon the act of congress approved September 19, 1890, which amends section 3894 of the United States Revised Statutes so as to pro-

hibit the carrying or delivery, by mail, of any "letter, postal-card, or circular, concerning any lottery, * * * or list of the drawings of any lottery," and then says:

"Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment, for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment, and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

This last provision is not enforceable any further than is compatible with the sixth amendment to the United States constitution, which secures to the accused the right to trial in that district only wherein the offense was committed. Three somewhat different offenses are created by the section above quoted: (1) Knowingly depositing, or causing to be deposited, such forbidden matter in the mails; (2) sending such matter or causing it to be sent by mail; (3) knowingly causing such matter to be delivered by mail. All the counts, I think, describe the matter mailed sufficiently for the purposes of this application, as prohibited matter within the statute. The first four counts are based entirely upon the first of the above three offenses, viz., knowingly "depositing or causing to be deposited" such prohibited matter in the mails at New York. The fifth and last count charges the third offense, viz., that, within the said southern district of Illinois, the defendant on the 31st of December, 1890, unlawfully did, knowingly, "cause to be delivered by mail" to the person therein named at Belleville, Ill., a prohibited circular, describing it, which it is alleged the defendant on December 29, 1890, did, knowingly, deposit and cause to be deposited in the New York post-office, addressed to her as above stated, and which circular was then and there carried by mail for delivery to her.

The first and second offenses do not require for their completion that the matter deposited in the mails for transmission should be, in fact, transmitted or delivered. All that is required to constitute those offenses is that the prohibited matter should be "knowingly deposited," or "caused to be deposited" in the mails, or "knowingly sent or caused to be sent" to the mails, for the purpose of transmission. And if those offenses are completed at the place where the prohibited matter is deposited or sent for deposit, in the mails, whether the matter be transmitted or not, it may be that, under the constitutional provision invoked, no trial for those particular offenses could be had in any other district. It is not necessary, however, to consider further those two clauses of the statute, or the first four counts of the indictment; for I have no doubt that the last count charges an offense which is not, and cannot be, completed without the delivery of the matter by mail to the person to whom it is addressed. This offense

consists, under the third clause of the act, in "knowingly causing such prohibited matter to be delivered by mail." It is competent for the law-making power to protect the citizen from the demoralizing or corrupting influence of printed or written matter circulated through the mails, by making criminal any such intentional delivery. That is precisely the ultimate object of the act in question; just as the ultimate object of the punishment for murder is the protection of human life. In cases of murder, it is well settled that a person who, within one territorial jurisdiction, commits murder upon a person within another territorial jurisdiction, as, for instance, by firing a pistol ball across the boundary line between two states, may be tried and convicted in the jurisdiction where the crime is completed by the death of the victim. The voluntary act of firing is in one jurisdiction; it takes effect in another. Without death there is no murder. The crime is consummated in the jurisdiction where the death occurs, and is consequently "committed" there, and may be tried there, although it may also be tried at the place of shooting. Rev. St. § 731. So under the last count in the present case, though the voluntary act began in New York by deposit in the mails, the third offense, viz., "causing the delivery by mail," could not be consummated except by delivery to the person and at the place intended. In whatever way the accused may have caused such delivery to be made, whether by deposit in the mails in New York, or elsewhere, and wherever his voluntary act may have begun, this third offense is not "committed" until the delivery by mail is made. And when such delivery is made, the offense is committed, and committed at the place where the delivery is made in accordance with the intent of the accused, and by his procurement; though it may perhaps also be deemed committed at the place of deposit. The offense stated in the last count is therefore triable in Illinois, under the provisions of the United States constitution, as well as of sections 731 and 3894 of the Revised Statutes as amended. *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. Rep. 1034. However inconvenient it may be to the accused to be removed to a distant tribunal for trial, one who voluntarily makes use of the long arm of the United States mails to inflict an injury at a distant place, has no just reason to complain of being held to answer within the jurisdiction that he has chosen as his field of operations.

The order for removal is granted.

POTTS *et al.* v. CREAGER *et al.*

(Circuit Court, S. D. Ohio, W. D. January 3, 1891.)

1. PATENTS FOR INVENTIONS—CLAY SEPARATOR—INVENTION.

Letters patent No. 322,393, issued July 14, 1885, to C. & A. Potts for improvements in disintegrating clay, consisting of the combination with a revolving cylinder of steel bars, fitted into longitudinal grooves in its periphery, so adjusted as to present sharp corners projecting above the surface of the cylinder, and a strong plate mounted on a shaft, so as to swing in bearings on the frame, and alternately approach and recede from the cylinder, are void for want of invention, all the elements of the device being old, and their combination being merely the exercise of mechanical skill.

2. SAME.

Letters patent No. 368,898, issued August 23, 1887, to C. & A. Potts for improvements in disintegrating clay, consisting in the combination, with a rotating cylinder longitudinally grooved, and carrying cutting bars projecting beyond the grooves, of a smooth-faced rotating cylinder, adapted to carry the clay and hold it against the grooved cylinder, are void for want of invention, all the elements of the device being old, and their combination being merely an exercise of mechanical skill.

In Equity.

C. & E. W. Bradford, for complainants.

Jas. Moore, for respondents.

SAGE, J. This suit is for the infringement of claim 6 of patent No. 322,393, July 14, 1885, and claims 1 and 2 of patent No. 368,898, August 23, 1887, both issued to C. & A. Potts for improvements in disintegrating clay. The purpose of these improvements is to disintegrate clay by means of a revolving cylinder, against which the clay is automatically pressed, as hereinafter described. The machine consists of a cylinder mounted on a shaft, having suitable bearings on the frame which supports it, the cylinder being of such length as to nearly fill the space between the sides of the frame. A series of steel bars is fitted into longitudinal grooves in the periphery of the cylinder, where they are held by flush screws at each end, or other suitable means, that they may be so adjusted as to present a sharp corner projecting above the surface of the cylinder. Opposite the cylinder a strong plate is mounted on the shaft, so as to swing in bearings on the frame. The central part of this plate is cylindrical in outline, the upper portion presenting a straight surface and the lower portion presenting to the cylinder a curved surface, corresponding to the periphery of the cylinder. This plate is caused to oscillate in its bearings by means of an eccentric wheel.

The opposed sides of the cylinder and the upper and central portions of the plate form, together with sheet-metal end-plates which are secured to the frame, a trough, one side of which approaches and recedes from the other at intervals, and which has at the bottom a narrow opening of constant width.

The operation of the machine is as follows:

The upper end of the plate being swung back to the position furthest from the cylinder, the moist, untempered clay is thrown into the trough above mentioned. The cylinder revolving rapidly, successive portions are

removed from the mass of clay, and carried through the opening between the plate and the cylinder by the scraping bars. At the same time the upper portion of the plate moves slowly towards the cylinder, thus keeping the mass of clay in close contact with the cylinder as successive portions are removed. The finely divided clay, after passing through the opening between the plate and the cylinder, falls upon the lower curved portion of the plate, and from thence to an incline, which carries it away.

Claim 6 is as follows:

"In a clay disintegrator, the combination, with cylinder, A, having a series of longitudinal grooves of the scraping bars, c, adjustably secured in said grooves, for the purpose specified."

In patent No. 368,898 a plain cylinder, set oppositely to the cutting cylinder, and revolving therewith in close proximity, so that the raw clay may be fed, shredded, and discharged in an even and continuous manner, in readiness to be taken directly to the pug or other mill, is substituted for the swinging plate described in patent No. 322,393. This additional cylinder serves as a feeder, continuously pressing the clay towards the shredding cylinder, whereby an abutment is furnished for the shredding cylinder to act upon, which, while being unyielding and unchanging as to location, is at the same time continuously changing as to surface, distributing the wear evenly throughout the circumference of the periphery of the feed cylinder, and thus not operating to change or vary the width of the space between the two cylinders as rapidly as had resulted from the wear upon the plate in the old construction. The two cylinders being arranged in such a manner as to be adjusted towards or from each other, it is only necessary, when the feed cylinder becomes worn to such an extent as to render the space between the cylinders too wide for practical use, to adjust them until the space is reduced to the width desired, thus enabling the cylinder to be used for a long time; the wear upon its surface not resulting in changing the character of the abutment, as has been the case in the old construction, wherein the abutting portion of the plate would soon be worn into a flat condition, not suitable for practical use, requiring the substitution of a new one at considerable expense. The improved construction also obviated the objection of the clay sticking to the feeding device, the feeding cylinder being continuously rotated in one direction. Claims 1 and 2 of this patent are as follows:

"(1) In the supporting frame of a clay disintegrator, a rotating cylinder longitudinally grooved, and carrying cutting bars in and projecting beyond the grooves, in combination with a smooth-faced rotating cylinder, adapted to carry and hold the clay against the cylinder having the cutting bars thereon, which latter cut or shred the clay, and pass the same between the cylinders, substantially as set forth. (2) In clay disintegrators, the combination, with the main supporting frame and with the rotating cylinder fixed therein, and having longitudinal cutting bars projecting beyond the face thereof, of a positive revolving companion cylinder, fixed opposite thereto in said frame, and having a smooth face or surface, with which said cutting-bars directly co-operate to shred or clip the clay as the same is fed by and passed between said cylinders, substantially as described."

The defenses are, to the first patent, anticipation and want of novelty; to the second patent, anticipation, want of invention, and non-infringement. Respondents rely upon eight prior patents. The *first* of these is the Butterworth patent of 1865, for an apple-grinding machine or cider-mill, in which is employed a cylinder having its periphery armed with knives or cutters having serrated or toothed edges, which form a series of cutting projections, with chisel-shaped edges. These cutters are so adjusted as to project beyond the periphery of the cylinder.

Second. The Eunis patent, September, 1865, for a machine for preparing paper pulp, in which an engine roll is found having on its periphery a series of cutters set in grooves in the periphery of a cylinder, so as to be in close proximity one to the other.

Third. The Frost patent, April 3, 1866, for an improved construction of paper engine or pulping machine cylinders, which consists in so applying the grinding plates or knives that they may be moved outwardly from the circumference of the cylinder as they wear under the operation of grinding the pulp, provision being made to hold them firmly in position as adjusted.

Fourth. The Van Name patent, January 8, 1884, which shows a construction of the peripheral surface of a roller for grinding-mills, with alternating blades of hard and soft material, arranged in grooves around the surface, and parallel with the axis. The blades or cutting knives can be renewed from time to time, but no provision is made for adjusting the projection of their edges from the cylinder.

Fifth. The Peabody patent for a cotton-seed huller, showing a revolving cylinder around the periphery of which, at equal distances apart, are arranged knives, each having a chisel-shaped cutting edge, and adjustable for the purpose of increasing or diminishing the cut.

Sixth. The Mayfield patent, January 10, 1871, for grinding-mills. The knives of the cutting cylinder are arranged tangentially. The cylinder is longitudinally grooved, and these grooves extend entirely through the rim of the cylinder, forming slots therein. The knives project inwardly through these slots, and are adjustably bolted inside the cylinder, the cutting edges of the knives projecting outwardly from the cylinder. These bolts engage in the knives so as to permit the adjustment of the projection. The Mayfields call their knives "plane-bits;" half the knives having smooth, sharp edges, the other half corrugated ones.

Seventh. The Smith patent, for an apparatus for preparing wheat for grinding, employing a cylinder similar to the cylinder of the Mayfield patent, with a series of plane-bits projecting from its periphery. These plane-bits or knives are adjustably bolted by screws and slots within the cylinder, while their cutting edges project through slots outwardly through the rim of the cylinder. The cylinder, however, instead of having the slots and knives its entire length, has the long knives made up of separate length sections, each knife being about half the length of the cylinder.

Eighth. The Rudy patent, March 9, 1875, for clay pulverizer, provided with solid fluted reducing cylinders, the grooves being either fine or coarse, and a single reducing cylinder, acting against the clay as it

rests in concave plate springs, after which it falls through a sieve, and descends to a second cylinder, and then to a third.

The respondent relies also upon the cylinder shown in model of Creager's wood-polishing machine as an anticipation. This is a cylinder or roller, provided on its periphery with series of projecting strips of glass, not different, materially, in form from the complainants' scrapers, and like them fitted into longitudinal grooves in the periphery of the cylinder. It appears from the testimony for the respondents that a machine constructed like the model which is in evidence was in successful operation on Canal street, in this city, in 1874. It was used for polishing or "slicking" boards, which were run between the cylinder and a support and pressure roller journaled underneath, and connected with an automatic adjustable contrivance.

On behalf of the complainants it is said that the Butterworth machine could not perform the work of the complainants' machine, for the reason that it operates against a yielding surface, and that the cylinder, if removed from a cider-mill and placed in a clay disintegrator, would not perform the office nor produce the result of complainants' cylinder, because of the sticky, adhesive condition of clay generally used in making brick, and that the knives, with their chisel-shaped edges, while fitted to perform the work of a cider-mill, would not be suited to the shredding of clay contemplated in complainants' machine. Suppose all this be granted. The question remains, is there any patentable difference? The strips of glass in the cylinder of Creager's wood-polishing machine are substantially of the shape of the steel scrapers in complainants' cylinder. "But," says the complainants' expert, "they are glass; they never would do our work. Our scrapers are steel." Exactly, but is the substitution of steel for glass, or, putting that aside, the substitution of steel scrapers for steel, chisel-edged knives, in adapting an old device for a new use, invention?

As to the substitution of steel for glass, the authorities, from *Hotchkiss v. Greenwood*, 11 How. 248, down, including *Hicks v. Kelsey*, 18 Wall. 670; *Terrhune v. Phillips*, 99 U. S. 592; *Gardner v. Herz*, 118 U. S. 192, 6 Sup. Ct. Rep. 1027; and *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. Rep. 437,—settle it that that is not invention. As to the adaptation of a new use of what is to be found in the prior patents put in evidence by the defendants, the case of *Aron v. Railway Co.*, 132 U. S. 90, 10 Sup. Ct. Rep. 24, is a strong authority against the complainants. The supreme court adopt and concur in the statement of the law by Judge WALLACE in the court below as follows:

"It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character, which were necessary to accommodate them to the new occasion."

Now as to complainants' patent No. 368,898. Every part of the combination there claimed is old. The rotating cylinder, longitudinally grooved, and carrying cutting bars in and projecting beyond the grooves, and the smooth-faced rotating cylinder employed as a feeder, are all found in the prior patents in evidence. Adjustably securing the scraping bars in the grooves is not claimed. If it were, that too is old. But the specification provides that the bars, instead of being replaceable, may be cast in pieces with the cylinder. There is nothing in fact new, excepting the substitution of steel bars for the glass projections on the Creager wood-polishing machines, already referred to.

But counsel urge that the complainants' machine accomplishes a new result, beyond the reach of any of the prior machines, and that not one of the cylinders shown in anticipation will serve the purpose of disintegrating clay,—all which may, for the sake of the argument, be admitted; and they cite cases to sustain their proposition that prior devices do not anticipate a patent unless they operate in substantially the same way to produce the same result. The cases cited support the conclusions reached therein upon the facts presented, but the claim that novelty and utility are conclusive of invention is, as a general proposition, misleading. They may be persuasive, and in some cases they are well-nigh conclusive, but it must be remembered that, without both novelty and utility, the question between invention and skill cannot arise, and that is the question presented in this case. Every year, with the constant advance of skill in all the useful arts, novelty of construction is and ought to be less and less significant as an indication of invention.

If any authority be necessary in addition to cases already cited, it may be found in very recent decisions by the supreme court of the United States. See *Buller v. Steckel*, 53 O. G. 1090, 11 Sup. Ct. Rep. 25. That case was upon a patent for an improvement in bretzel cutters, being an improvement in moulds or dies for stamping or cutting out bretzels. The patent was held invalid by Judge BLODGETT, (27 Fed. Rep. 219,) who says in his opinion, which is quoted with approval by the supreme court:

"It is true, I doubt not, that it required considerable mechanical skill to make a die which would cut out a bretzel from dough so as to imitate a hand-made bretzel, because the hand-made bretzel is somewhat clumsily shaped, as the parts are bent, twisted, and laid upon each other; and it was undoubtedly a matter requiring some study, effort, and experiment to make the shape of the die correspond with the external formation of the bretzel. This, however, seems to me not to involve invention, but mere mechanical skill. The cutter might be compelled to experiment some,—that is, cut several dies; but that is not invention. The proof also shows that a large number of persons, before these patentees, had attempted to make a machine which would cut bretzels, and considerable money and time seems to have been expended in efforts to produce such a machine; but the noticeable thing in regard to all these early efforts was the fact that most of those engaged in them were trying to draw out and twist the dough by machinery, rather than to cut or stamp dough from a flat sheet, while others were endeavoring to cut them with dies set in revolving cylinders; and as soon as the idea of cutting the

dough from a flat sheet was conceived, the difficulty seems to have vanished, and success followed the effort, as the only change made was to adapt the old letter dies to the shape of a bretzel."

Justice BLATCHFORD, speaking for the court, and calling attention to the language of the decision below, that most of the prior unsuccessful attempts to make a machine to cut bretzels were in trying to draw out and twist the dough by machinery, rather than to cut out the form of a bretzel by a single die from a flat sheet, or else were endeavoring to cut bretzels with dies set in revolving cylinders, adds:

"It also appears that those efforts were largely made in attempts to cut out the bretzel by two opposite dies, and that as soon as the idea occurred of cutting the dough by a single die from a flat sheet success came at once, by merely changing the shape of the old single die. It also appears, as suggested by the circuit court, that there was a prejudice against machine-made bretzels."

See, also, *Florsheim v. Schilling*, 53 O. G. 1737, 11 Sup. Ct. Rep. 20, (Nov. 10, 1890;) and *County of Fond du Lac v. May*, 53 O. G. 1884, 11 Sup. Ct. Rep. 98, (Dec. 15, 1890.)

These cases strongly support the conclusion of the court in this case that the bill must be dismissed, with costs, and it is accordingly so ordered.

THE ALERT.¹

CEBALLOS v. THE ALERT *et al.*

(District Court, S. D. New York. December 27, 1890.)

ADMIRALTY—PRACTICE—FIFTY-NINTH RULE.

Where the owner of the steam-ship A., which had been libeled by a cargo-owner, caused a steam-ship company to be made co-defendant under the fifty-ninth admiralty rule, and the evidence upon the trial showed clearly that the libelant was entitled to recover against the A., though it did not clear up the dispute between the co-defendants, *held*, that the libelant might take a decree against the A., and the case should be continued as between the two defendants, rather than to send them to a new suit.

In Admiralty.

North, Ward & Wagstaff, for libelant.

Goodrich, Deady & Goodrich, for the Alert.

R. D. Benedict, for the steam-ship company.

BROWN, J. The evidence taken in the cause, while it leaves no doubt that the libelant is entitled to a decree against the Alert, is, notwithstanding, insufficient to clear up the matters in dispute as between the steamer and the steam-ship company, who, as charterers, were brought into the cause upon the steamer's petition, and may possibly be bound

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

to respond for any judgment recovered by the libellant. After so long a delay, for the purpose of securing all attainable evidence as between the defendants, the libellant's right to a decree, as it now appears from the testimony, should not be longer postponed; and a decree may therefore be entered in his behalf as against the Alert, which is no doubt responsible to him, and an order of reference taken to compute his damages. The decree will be made without prejudice to the rights of the co-defendants as between themselves, or to any further decree that may be taken upon additional testimony as to the liability of the steam-ship company to bear the whole, or a part, of the same damages, or to indemnify the steamer in respect thereto. Instead of dismissing the steam-ship company, the case, as between the two defendants, should, I think, be continued as between them, rather than send them to a new action; not merely in order to preserve the testimony already taken, but that the company may also be bound by the adjudication in regard to the amount of damages, in case the company should ultimately be held answerable therefor; it being not improbable that controversy may arise as to the rule of damages as well as to the amount. An interlocutory decree may be entered in accordance herewith.

HARRISON v. ONE THOUSAND BAGS OF SUGAR.

(District Court, E. D. Pennsylvania. December 19, 1890.)

SHIPPING—CHARTER-PARTY—FREIGHT.

A charter-party provided for the "freighting of a complete cargo of sugar, say 2,500 T. weight," the vessel to proceed to Philadelphia from Hamburg. "The freight to be paid on unloading and right delivery of cargo, at the rate of nine shillings sterling per twenty cwt. on intake weight." The act of God and peril of the sea excepted. In drawing the charter the words "intake weight" were substituted for the printed word "delivered," at the end of the sentence. *Held*, that the freight was payable at charter rates on cargo not delivered, by reason of a peril of the sea, as well as on that part delivered.

Libel for freight by J. Harrison, master of the steamer Weatherby.

The charter-party was in the ordinary form of a freighting charter-party for the full capacity of the vessel, under which cargo could be received from other freighters, as in a general ship. The clause for payment of freight, as it stood in the printed form, read:—"The freight to be paid on unloading and right delivery of cargo at the rate of nine shillings sterling per twenty cwt. delivered." The word "delivered" was struck out, and "intake weight" substituted.

Curtis Tilton, for libellant.

A delivery of all cargo, except what was lost by excepted peril, is a right delivery of the cargo. *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99; *The Norway*, 3 Moore, P. C. (N. S.) 245; *Robinson v. Knights*, L. R. 8 C. P. 465; *Carv. Carriage by Sea*, § 549; *The Querini Stampalia*, 19 Fed. Rep. 126.

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

Freight is payable on cargo sold as perishable with shipper's knowledge and consent. *MacLachlan on Merchant Shipping*, § 436.

Morton P. Henry, for respondent.

No freight is collectible on cargo lost by peril of sea. 1 Pars. Mar. Law, 217; *Abb. Shipp.* 430; *Frith v. Barker*, 2 Johns. 327; *Spaight v. Farnworth*, 5 Q. B. Div. 115. It is where a lump sum is paid for the hire of a vessel that such sum can be recovered where cargo is partly lost. *Robinson v. Knights, Shipping Co. v. Armitage*, *supra*. No freight is payable on cargo sold, and not delivered. *Armroyd v. Insurance Co.*, 3 Bin. 437; *Hurtin v. Insurance Co.*, 1 Wash. C. C. 530.

BUTLER, J. The libel is for freight under a charter, the material provisions of which are as follows:—

"The ship * * * shall proceed to a wharf at Hamburg and there load in the customary manner from freighters' agents, a complete cargo of sugar, say 2,500 tons weight, * * * proceed forthwith to Philadelphia, and deliver the same alongside store. * * * The freight to be paid on unloading and right delivery of cargo, at the rate of nine shillings sterling per twenty cwt. on intake weight. * * * The act of God, the perils of the sea * * * excepted. The freight to be paid in cash at port of discharge at current rates of exchange * * * on the right delivery as aforesaid. The captain to sign bills of lading as soon as cargo is shipped, as presented, at any rate of freight required by charterers; any difference between bills of lading and chartered rate to be settled in cash before sailing, if in vessel's favor."

The vessel met with disaster from excepted peril, and part of the cargo being seriously damaged thereby, it was sold on the voyage for charterer's benefit, and the balance delivered at Philadelphia. The ship claims freight on the entire cargo taken in, while the charterer declines to pay on more than was delivered.

The question raised presents serious difficulty. The general rules applicable to the subject are well defined. In the absence of contrary stipulation, freight is earned only on cargo delivered. Where, however, the vessel contracts for a "lumped sum," she is, ordinarily, entitled to the full amount, though a part of the cargo be lost, without her fault. Where freight is payable according to measurement or weight, and there is difference in this respect between the ports of lading and delivery, the latter governs. Where parties, to avoid this result, stipulate for payment according to "intake" measurement or weight, the stipulation, ordinarily, operates to this extent, only, leaving the obligation to deliver unaffected. Where the charterer voluntarily accepts cargo on the voyage, the right to freight is not disturbed. The case before me does not fall distinctly within either class referred to. The contract is peculiar in certain features, and the question turns upon its construction. A printed form was employed, and but for the erasure of the word "delivered" and interlineation of the words "intake weight," in the second sentence above quoted, no question would arise. The payment of freight would be limited, in plain terms, to the cargo delivered. It would read, "the freight to be paid on unloading and right delivery of the cargo, at the rate of nine shillings sterling per ton of 20 cwt., delivered;" and if no other change had been made than to add the words "intake weight," there would still be no

question. The word "delivered," immediately following, would limit the freight to the part of cargo delivered; but this word being erased, it is, I think, clear that the parties must be held to have stipulated for payment on the entire "intake weight," unless the question is controlled by other language of the charter. In the absence of such other language the erasure must be regarded as a virtual declaration that the right to freight is not confined to the amount of cargo delivered, and the interlineation as a declaration that it is to embrace the quantity taken in. If the word erased had not been originally inserted there might have been room for an inference that the ordinary rule governing the subject, in the absence of contrary stipulation, was intended to apply, and consequently that the charterer was to pay only on the quantity delivered; but the erasure precluded such an inference. We cannot treat the exclusion of this word as an inadvertence; and if we do not, I repeat, the conclusion above stated (in the absence of the other language governing the subject) is irresistible. There is other language, however, to which the charterer appeals; does it govern this subject? In the second sentence quoted (and in which the erasure and interlineation appear) are the words "to be paid on unloading, and right delivery of the cargo;" and in the succeeding sentence this language is repeated in a slightly different connection. If the question of interpretation presented by this language was new, it might be difficult to answer. It was, however, directly involved in *Robinson v. Knights*, L. R. 8 C. P. 468, and again in *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99, and after very full consideration the language was construed to require a delivery in good condition of such part of the cargo only as was not lost from excepted peril. Nothing can profitably be added to what is there said by the several judges who delivered opinions. Every suggestion of counsel is considered and answered, and the conclusion reached is as applicable here as it was there. It may possibly be thought that the construction adopted in these cases required the exercise of some ingenuity, and that the reasoning seems strained; nevertheless the rule of construction is thus settled too firmly to be disregarded. That the freight contracted for in these cases was a "lumped sum" is immaterial as respects the question here under consideration. The language—identical with that now involved—was invoked to control and limit the right to freight as against the import of other terms of the charter, precisely as it is here. Here, however, the construction is freer from doubt. The erasure of language, which (as printed) was plainly intended to limit freight to the quantity of cargo delivered, and the allowance of that now invoked to stand, seems to demonstrate the justice of the construction stated. *Spaight v. Farnworth*, 5 Q. B. Div. 115, cited by the respondent, seems not to be in point. As I understand it, the question was not involved. The contract expressly provided for freight only on such part of the cargo as might be delivered. The language was, "Freight to be paid on deals and sawed lumber, on the intake measure of quantity delivered." Other features of the case before me, which were discussed, need not be considered. For the reasons stated I must regard the contract as binding the charterer to payment on the cargo shipped.

THE CITY OF PARA.¹*In re* THE CITY OF PARA.

(District Court, S. D. New York. January 16, 1891.)

1. SHIPPING—STRANDING—NEGLIGENCE.

A steam-ship, running past Old Providence island, in mild weather, had the land in sight for 40 minutes. A slight haze rendered distances deceptive, and the master supposed himself some 7 miles off shore. No soundings were taken and no calculations made to verify the supposed distance. In fact, the vessel was within a mile and a half of the shore, and afterwards struck upon a coral reef located on the charts with which the vessel was provided. *Held*, that her navigation was negligent.

2. SAME—LIMITATION OF LIABILITY—PROXIMATE CAUSE.

The ship-owners, not being privy to the faults which brought about the stranding, were *held* entitled to a limitation of their liability; and the taking of the westerly route, by the owners' direction, in consequence of some apprehension about the shaft, *held* not approximate cause of the stranding.

3. SAME—DAMAGES—LEX CONTRACTUS.

The damages recoverable against a vessel which has been negligently stranded, and hence damaged her cargo, include the loss of perishable cargo rendered worthless by delay, the partial damage to such cargo as has been brought into port, the costs and charges attending the salvage of the cargo, and damage by reason of differences in market prices from the delay in arrival; and the ship and bills of lading being American, *held* governed by our law, and exceptions of negligence invalid.

In Admiralty. On petition for limitation of liability.

Hoadley, Lauterbach & Johnson and C. Donohue, for petitioner.

Carter & Ledyard, S. Chubb, Geo. A. Black, and A. R. McMahon, for insurance companies.

BROWN, J. At 10:24 P. M. of May 17, 1888, the steamer City of Para, while on a voyage from Aspinwall to this port, struck on a reef about 1½ miles off the south-westerly point of Old Providence island. After several weeks she was got off, and towed to this port, where she was repaired. A part of her cargo was not damaged; other parts, consisting of perishable fruit, were either damaged, or rendered worthless, by the detention, and thrown overboard. Large expenses were incurred in getting the vessel off and bringing her, with what cargo remained, into port. These expenses have been paid mostly by the insurers of the different interests in ship and cargo. Large claims against the ship and her owners having thus arisen, upon the contention that the stranding was by negligence, or want of proper caution and care in navigation, the Pacific Mail Steam-Ship Company, as owners of the steamer, filed a petition to limit their liability, in case the stranding should be held negligent, at the same time denying this charge, and denying that the company was liable upon the alleged claims. An appraisalment of the vessel was ordered. This was made by taking her value as she was when she arrived in this port, less her proportion of the salvage expenses in getting her off and bringing her here. A bond was filed for the value as thus

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

appraised, and the case has been brought to trial upon the issue of negligence raised by the answers of the various insurers and owners of the cargo.

At the time of the stranding the weather was mild. There was a little haze or mist that tended to make estimates of the distance of the island somewhat deceptive. This was not sufficient, however, to prevent the island being seen about 40 minutes before the stranding; and the position of the ship had been accurately ascertained a few hours before, by observations taken the previous noon, and at 5 o'clock following. The western end of the island, when first seen, bore about one-half a point on the port bow. The master continued his previous course for 15 minutes, running straight for the land. He then changed his heading $1\frac{1}{2}$ points to port, bring the land one point on his starboard bow, and, after running 10 minutes more, again changed three-fourths of a point more to port. Fourteen minutes afterwards the ship struck. The master supposed the course taken would carry him 7 miles west of the land, instead of $1\frac{1}{2}$ miles, as the event proved.

The reef was one of the numerous coral reefs of that region, all of which were located upon the chart with which the ship was provided. The master intended to run to the westward of the reefs located upon the chart. The accident was due wholly to miscalculation as to the distance he was running from land. No soundings were taken, nor any calculations made, when near the island, in order to verify the supposed position of the ship. Upon this view of the facts, I cannot exempt the ship from liability. There was plenty of sea room to the westward. The position of the vessel at the previous noon and at 5 p. m. had been ascertained by observation. No real explanation is offered for running upon the reef, except the mere possibility of an unusual easterly current setting towards land, of which no specific proof is furnished. Admitting that it was desirable to make the western point of the island, no sufficient reason is suggested for not immediately turning to port when the south-western point of land was distinctly made a half point on the port bow, or for not sheering sufficiently, and by an ample margin, to avoid the well-known reefs of that region. After this, when the land appeared to broaden off rapidly, and later, when it came nearly abeam, it was not difficult to determine, by observations and calculations that could have been made within a few minutes, the speed of the vessel being known, that the land was much nearer than the captain supposed it to be. If, as alleged, the lead could not there be used to advantage, a verification of the position of the ship by such calculations, when approaching land in the vicinity of dangerous coral reefs, seems to me a manifest duty. It is impossible to accept running upon a mere surmise of the distance of the land in the vicinity of such reefs, and neglecting either to bear away when the land was made, or to verify by a simple and easy observation and calculation its supposed distance, as a reasonable compliance with the obligations of prudent and careful seamanship. *Bazin v. Steam-Ship Co.*, 3 Wall., Jr., 229; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. Rep. 934; *The Montana*, 17

Fed. Rep. 377. Upon this ground, therefore, I must hold the vessel and her owners liable for the damages caused by the stranding.

It does not appear, however, that the owners were in any way privy to the faults that brought about the stranding. Neither the condition of the shaft, nor the adoption of the western route, was its proximate or efficient cause. The owners are therefore entitled to a limitation of their liability according to the provisions of Rev. St. §§ 4283-4287.

The ship and bills of lading, being both American, are governed by our law; and the exceptions of negligence on the part of the master, crew, etc., furnished no defense. The other clause in the bills of lading, as respects proofs of damages, becomes immaterial. If available as regards any particular claim, the question can be presented to the commissioner by any of the contesting creditors, and the necessary facts will then more fully appear. The damages provable against the fund will include the loss of the perishable cargo, made worthless by the delay, and thrown overboard, as well as the partial damage to what was brought into port; and also all the costs and charges attending the salvage of the cargo,—that is to say, its proper proportion of the aggregate cost and charges up to the time of its arrival here, as well as any further damage, if any, by reason of any difference in market price from the delay in arrival. *The Giulio*, 34 Fed. Rep. 909; *The Belgenland*, 36 Fed. Rep. 504; *The Caledonia*, 43 Fed. Rep. 681.

The charge of the salvage costs and expenses chargeable against the ship have been paid, as I understand, by the owners of the ship, or by her insurers; and, having been once deducted in ascertaining the appraised value of the ship, cannot be again presented as a claim against the fund in court for distribution. The sums properly chargeable against the cargo, as for general average incurred in these salvage expenses, are damages caused to the cargo by the stranding. They have no preference, so far as any facts before me would show, over any other claims against the ship or the fund in court, for any other kind of injury to the cargo brought into port, or for the loss of that which was thrown overboard. So far as appears at present, these claims all stand upon an equal footing as respects the distribution of the fund. If there are any circumstances that affect the equality of the various claims, they can be presented to the commissioner before whom the proofs in behalf of each creditor, or damage claimant, will now proceed. A decree may be prepared in accordance herewith.

THE TANGIER.

SOCIETA ANONIMA AGRUMARIA DE NAVIGAZIONE DI PALMERO v.
ANGIER *et al.*

(District Court, S. D. New York. December 27, 1890.)

SHIPPING—DELIVERY OF FRUIT CARGO—SHORTAGE—ASSESSMENT OF DAMAGES—AVERAGE VALUE.

Upon a shortage in the delivery of a cargo of fruit, consisting of boxes of many grades, of different values, the libelant is entitled to the value of the particular grade to which his fruit belonged, if the grade of the missing fruit is identified. In this case, its grade not being established by any marks or numbers, through the failure of the bills of lading to specify the marks and numbers by any binding agreement, the custom of merchants was adopted of giving the average value per box of the whole cargo.

In Admiralty. Libel for damages for non-delivery of part of a cargo of oranges and lemons. Assessment of damages. For former report, see 32 Fed. Rep. 230.

Ullo, Ruebsamen & Hubbe, for libelants.

Butler, Stillman & Hubbard, for respondents.

BROWN, J. I cannot find, upon the record and the testimony, that the commissioner's report on damages is erroneous. The amount to be charged for customary commissions should, I think, be determined with reference to what had been previously fixed by a combination of the most important importing lines as being the most probable intention of the parties. As respects the shortage, I have no doubt, from the testimony, as well as from the rule of law, that, although where some boxes of fruit are missing through the steamer's fault she must respond for their value according to the grade and market value of the particular line to which the missing boxes belong, in case they are identified as belonging to any particular grade, yet, in order to have the benefit of this classification, such identification must be clearly established. When it is not established, through the great practical difficulty of procuring legal evidence, the average value per box of the whole cargo is the rule customarily adopted among the merchants, and may be followed by the law. In the present case there was no such identification in regard to the 54 missing boxes. Although Mr. Bonanno in some parts of his testimony seemed to indicate a certain number of boxes as belonging to certain grades, I regard his subsequent testimony and his cross-examination as showing that he had no positive knowledge on the subject. He finally declared expressly that neither he nor any other person could tell without papers that he did not have. The record does not show any suppression of evidence on the respondents' part. To constitute suppression there must be either the destruction of evidence, or the non-production of it after call on reasonable notice. In the present case there is no evidence of either. The record and the minutes of the proceedings do not show any call for the particulars of the sale of the boxes made by

the ship, or the marks and numbers of what was sold; and even these marks and numbers, if they had been called for and produced by the respondents, would have proved nothing, except upon further proof by the libelants of the marks and numbers of the boxes shipped, and there was no evidence of these. Doubtless great practical difficulty will often arise in the adjustment of claims for robbed or missing boxes, when fruit is shipped abroad, and bills of lading are given for it, without any definite agreement as to the marks and numbers of boxes shipped, or any binding recognition of the particular marks and numbers in the bill of lading. The desirableness of mutual accommodation at the port of delivery in such cases, by means of satisfactory security given and accepted to answer for differences and apparent losses, is manifestly extreme; but the law cannot impose arbitrary terms for the adjustment of difficulties that the parties by a loose and rapid method of business, for their own convenience, at the port of shipment, may ultimately bring upon themselves at the port of discharge. In such cases, if the parties cannot agree upon mutual accommodation, the result can only be mutual injury.

As regards the net proceeds of sale, if not agreed upon, a further reference may be taken. It should have been included in the former order. In other respects, the report is confirmed.

THE JAMES BERWIND.¹

THE CITY OF NEW YORK.

THE YOUNG AMERICA.

MOORE v. THE CITY OF NEW YORK AND TWO STEAM-TUGS.

DALY, Adm'r, v. PENNSYLVANIA R. Co.

(District Court, S. D. New York. January 2, 1891.)

1. COLLISION—STEAMER AND TOW—TOWAGE SIGNALS—DUTY TO ANTICIPATE TOW—DUTY OF TUGS TO SIGNAL FROM TOW.

As the steamer City of New York was coming down the East river, preparatory to rounding the Battery, about 7:30 o'clock A. M., she ran suddenly into a dense fog. A fleet of canal-boats in tow of two tugs, on a bawser of 400 or 500 feet, was at the time moving slowly from the bay towards pier 1, North river, and was stretching nearly one-third of the distance across the mouth of the East river. The tugs, two or three points on the steamer's starboard bow, were blowing signals indicating a tow. No signals were given by the tow. The steamer sank one of the canal-boats, and its owner was drowned. *Held*, that the fact of the frequent presence of such tows in that vicinity, coupled with the sudden nature of the fog, made the inattention of the steamer to towing signals only three or four points on her starboard bow, and her failure to anticipate a tow behind them, and to stop before it came in sight, a fault contributory to the collision.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

2. **SAME.**

The tugs in charge of the canal-boats were in fault for not providing that signals should be sounded from the tow, as well as from the tugs, when crossing the East river with a heavy tow, about 900 feet, in a thick fog, and at an hour when the Sound steamers were known to be due.

3. **TOWAGE—FOG—WHEN TOW EXEMPT FROM SIGNALING.**

A large fleet of boats lashed together, with no motive power of their own, and no appliances for giving signals, in tow of a tug, and absolutely in its charge, should be treated as a single mass or unit as respects signals, and the duty of giving the necessary signals from such a tow, on account of its length, in case of fog, devolves solely upon the tug.

4. **SAME—STATUTORY RULES.**

There is no statutory rule requiring signals to be given by a large fleet of canal-boats in tow in a fog.

In Admiralty. Suit for damage by collision, and suit to recover \$5,000 for death of plaintiff's intestate.

McCarthy & Berier, for libelants *Moore & Daly*.

Wing, Shoudy & Putnam, for the City of New York.

Robinson, Bright, Biddle & Ward, for steam-tugs *Young America* and *James E. Berwind*.

BROWN, J. At a few minutes past 7 o'clock on the morning of February 14, 1890, as the steam-boat *City of New York*, a side-wheel steamer plying between New London and New York, was rounding the Battery in coming out of East river in a dense fog, she came into collision with a fleet of canal-boats that had come up the bay, and was making towards pier 1 in the North river, in tow of the *Young America* and the *James E. Berwind*, and damaged two of the boats, causing the *Daly* to sink, and drowning the owner, who was on board. The second libel was filed to recover damages for this loss of life; the first, for damages to the canal-boat *Western Star*, which was immediately behind the *Daly* in the tow. There was not fog enough to cause much difficulty to the tow until she had nearly reached Governor's island, nor to the steamer, until she had reached Thirty-Fourth street. The weather then became thick. At the time of collision neither shore nor any landmark was visible from either vessel. In 10 minutes afterwards, the fog had considerably cleared up. For the steamer, it is contended that she was proceeding as slowly as possible, going under one bell only when below Thirty-Fourth street, and alternately stopping her engines, and working ahead, at intervals. The tide was strong ebb. Shortly before the collision, she passed under the stern of one of the South ferry-boats, that was crossing towards New York, with which she exchanged signals. She contends that no signals were blown by the tugs, or from the tow of canal-boats; and, if such signals had been blown, they would have been heard, and the collision avoided. The tow was not perceived until, according to the estimate of her officers, within 100 or 200 feet, when the steamer, they say, instantly reversed her engines. According to their estimate, she was making sternway in the water at the time of collision; the *Daly* being swung upon the steamer's stem through the effect of the North river ebb, which the tugs and tow were crossing, towards the slacker

water abreast of Castle Garden. The testimony of many witnesses, however, from the tugs and the tow leaves no doubt in my mind that signal whistles of three blasts, indicating a tow, were blown from the tugs, though no whistles were given from the tow, or from the vicinity of the tow, except a signal horn, blown by a woman on board of one of the canal-boats, when she saw the City of New York very near, too late, as I find, to be of any service.

It is extremely improbable that in a fog so dense as this there were no other whistles sounding than those of the South ferry-boat. The sounding of the bell on Governor's island, of the bells at the other ferries, and of the whistles from various other boats, as testified to by so many witnesses, accords with ordinary experience. The only explanation that can be given of the testimony of the officers of the City of New York that they heard none of these signals is that none of them seemed to them at the time to call for attention, and that they were therefore immediately forgotten. The steamer, coming down with the ebb-tide, itself running some three knots, though her own motion through the water was slow, was approaching the tug pretty rapidly; and it is quite possible that the whistles of the tugs, probably some three points on the starboard bow of the steamer, might seem to them out of the way of danger. The signals, however, that the tugs were certainly blowing—namely, three blasts—indicated a tow; and this, and the further fact that tows of precisely that character, of four or five tiers of boats, or more, upon a hawser of 400 or 500 feet, stretching, in all, nearly 1,000 feet, and going the same course as this tow, are a common and every-day occurrence, make it impossible to exempt the steamer from blame for inattention to signals three or four points to starboard. The very fact that the fog had come on suddenly made it natural and probable that the usual tows coming up the bay would be caught in it. I must hold the steamer, therefore, chargeable for not noticing these whistles of the tugs, and not anticipating the tow behind them, and stopping before it came in sight. Had the steamer expected this tow where it was encountered, she would have had no difficulty, as her officers admit, in avoiding it.

I think the tugs, also, must be held liable as contributing to the accident, for not providing that fog-signals should be sounded from the tow, as well as from the tugs, when crossing the East river from Governor's island, in so thick a fog at that time in the morning. The tow was taken across waters most dangerously exposed to collision, and at a time when several of the Sound steamers were known to be due, all of which would directly cross the path of the tow. The progress of the tow was very slow, occupying at least half an hour in crossing these dangerous waters, and stretching one-third of the whole distance across to Governor's island. In such a situation, reasonable prudence, aside from any express rule, required some signal to be given from the tow to locate its position, and to assist other vessels in avoiding it. *The City of Alexandria*, 31 Fed. Rep. 427, 429; *The Peshtigo*, 25 Fed. Rep. 489; *The Raleigh* and *The Niagara*, 41 Fed. Rep. 527. In the cases of *The City of Alexandria* and of *The Peshtigo*, *supra*, the boats in tow were held chargeable

with fault for not giving signals to indicate their places in the fog. But both these boats had means of giving such signals, and both were, in part, at least, responsible for the navigation. In the former case, the dredge had a steam-whistle, and the control of the tug; in the latter, the barge was steered by her own helm, and she was held for one-third of the loss. In cases like the present, where numerous boats are fastened close together into a compact mass, have no motive power either of steam, oars, or sails, and no helm or steering power of their own, and no appliances for giving signals, and take no part whatsoever in the navigation, but are absolutely in charge of the tugs, and under their control as bailees for the time being, so far as their navigation is concerned, when additional signals beyond those expressly required by the rules become necessary in fog on account of the length of the tow or hawser, (which the tug alone determines and controls,) the duty of giving such additional signals rests, I think, upon the tug exclusively, and not upon the tow. All such signals are incidents of the navigation, and are duties of navigation; and when the tug takes, as in this case, the whole charge of the navigation, she takes it with all its incidents and burdens, and the duty to give the requisite signals while she is actually navigating the tow rests, I think, on her alone. *Sturgis v. Boyer*, 24 How. 110, 122-125; *The Connecticut*, 103 U. S. 712. Although one or more persons are usually on board of such boats while they are being towed from one place to another, they are not there for any purpose of navigating or of signaling. As observed in *Sturgis v. Boyer*, *supra*, "from the nature of the undertaking, and the usual course of conducting it," such persons do not take, and are not expected to take, any part in the navigation, or in the sounding of signals. The canal-boats in the present case do not fall within any express statutory rules requiring them to give signals. They are not within the last clause of section D of rule 15, (Rev. St. § 4233,) because the boats were not at anchor nor moored; nor within the first clause, because they were not themselves "navigating by hand-power, horse-power, sail, or by the current." Tows like the present first began to come into use in 1875, *i. e.*, since the above provision of the Revised Statutes, and the act of 1871, from which it is derived, (16 St. at Large, 454,) were enacted. Those provisions have never been construed as applicable to such boats while in tow and exclusively in charge of a tug. Such signals, moreover, from a multitude of boats in motion, and all lashed together, would not allow any intervals of silence, such as the statute contemplates, and such as is absolutely necessary in order to hear other vessels, and navigate safely in reference to them; and they would therefore violate the purpose of all signals. For the purpose of signaling, such a tow as this, in the absence of any statutory requirements, should be treated as a single mass or raft of boats, and as much a unit as a raft of logs. Signals given from a single station on the tow, or along-side of it, would answer all needs and avoid all confusion; and such signaling by one for the whole, while in course of navigation, must necessarily fall upon the tug, as the one in charge of the whole, and answerable for all.

Decree for the libelants against the City of New York for one-half the damages, and the Young America and the James E. Berwind for the other half, with costs. The damages to the administratrix for loss of the life of her husband is fixed at \$5,000. As to the damages to the Western Star, if not agreed upon, a reference may be taken.

THE MONMOUTHSHIRE.¹

ALBERTSEN *v.* THE MONMOUTHSHIRE.

(District Court, S. D. New York. December 30, 1890.)

COLLISION—LIGHTS NOT VISIBLE TO ATTENTIVE LOOKOUT.

When several persons on watch, attentive to their duties, can see no lights on an approaching vessel during a considerable period when they ought to be seen, the defect will be ascribed to the other vessel, even when the precise reason why the lights are not seen does not appear; and specially so where circumstances appear that might have caused obscuration of the lights.

In Admiralty.

George A. Black, for libellant.

Wing, Shoudy & Putnam, for claimant.

BROWN, J. The evidence leaves no doubt that the bark Norway and the steamer, being near Singapore, were approaching each other about head and head. Their lights ought to have been visible to each other for about 10 minutes before the collision. The steamer's lights were seen; the bark's lights were not seen. The night was clear. The horizon behind the bark was dark. This would have aided in the easy recognition of the bark's lights if they were properly burning, and not obscured. Five witnesses from the steamer ought specially to have seen any such lights ahead that were visible, and four other witnesses would naturally have observed them before collision. All say they could not see any light. The hull and sails were seen by the different witnesses when from 500 to 1,400 feet away, and the steamer then sheered to port, and nearly avoided the bark; but she rubbed along the bows in passing, and carried away some of her gear. Against all this evidence on the steamer's part is opposed the testimony of only the captain of the bark, who says that his lights were properly burning, affixed to cranes aft of the mainmast, hanging about three feet outside of and above the rail; and that, when he saw the steamer's lights a good distance off, he got up on the rail, leaned over, and saw that his green light was properly burning. This evidence from a single witness is not sufficient to outweigh so many witnesses from the steamer, who testify that no such light was visible to them. It is not credible that so many persons on watch

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

should for 10 minutes not see a light ahead, if it were such a light as the regulations require, and not obscured. In many similar cases it has been held that when several persons on watch, apparently attentive to their duties, can see no light during such a considerable period, when it ought to be seen, the defect will be ascribed to the other vessel, even when the precise reason why the light is not seen does not appear. *The Narragansett*, 20 Blatchf. 87;¹ *The Royal Arch*, 22 Fed. Rep. 457; *The Alaska*, Id. 548, 551; *The Sam Weller*, 5 Ben. 293; *The Westfield*, 38 Fed. Rep. 366; *The Drew*, 35 Fed. Rep. 789. Still more, when there are circumstances such as exist in this case, viz., the lights being set far aft, and low down, and the vessel listing to starboard, that might cause the lights to be obscured. *The Johanne Auguste*, 21 Fed. Rep. 134, 140; *The Tirzah*, 4 Prob. Div. 33; *The Caro*, 23 Fed. Rep. 734. As the bark was coming head on, and was projected against a black horizon, I cannot find that there was negligence in not seeing her earlier. *The Gustav*, Holt, Rule Road, 34. Their combined speed was probably at least 12 knots, so that their approach was over 1,200 feet per minute. The steamer did all that was possible to avoid the bark from the time she was visible, so that she is free from blame. Porting her helm at last was the proper maneuver for swinging her stern to port. Had the bark herself starboarded after the steamer's red light was shut out, and when the steamer was known to be sheering to port, no doubt the collision would have been avoided. Libel dismissed, with costs.

CANFIELD *et al.* v. THE F. & P. M. No. 2.

(District Court, E. D. Wisconsin. January 5, 1891.)

COLLISION—BETWEEN STEAMERS—BEND IN RIVER—DUTY OF ASCENDING BOAT.

Where an ascending propeller, while approaching a narrow and dangerous bend in the Manistee river, receives notice that a steamer is entering the bend from above, it should wait until the other has descended, and if it attempts to pass in the bend, and a collision occurs, it will be held in fault.

In Admiralty.

T. J. Ramsdell and Shepard, Haring & Frost, for libelants.

Mr. Kremer and Mr. Hoyt, for respondent.

JENKINS, J. On the forenoon of the 19th day of October, 1887, the steam-barge James H. Shrigley, and the propeller F. & P. M. No. 2, collided in the Manistee river, and the question of the fault of such collision, if fault there was, is the subject of inquiry here. Manistee river is an outlet for the waters of Manistee lake, and, at a distance of two miles therefrom by the course of the river, empties into Lake Michigan. At a distance of one-half to three-fifths of a mile from its mouth there is an

¹11 Fed. Rep. 918.

abrupt bend in the river to the north, of about 45 degrees from its previous south-westerly direction. To the north of the bend the land is level for a distance of 70 feet, thence rising, within a further distance of 100 feet, to an elevation of some 70 or 80 feet. There sand-hills obstruct the view, so that steamers approaching each other from opposite directions have not sight of each other for the full distance of half a mile; but, within a distance of perhaps 1,500 to 2,000 feet, the spars of the approaching steamer may be seen by the other, the hull of the one being visible to the other only when within a few hundred feet. The life-saving station is located upon the north bank of the river, about 1,000 feet below the knuckle of the bend, and above the bend, and upon the same bank, and within a distance of 1,400 feet therefrom, are several docks. On the south bank of the river, and just below the bend, are Canfield and Wheeler's dock and salt shed, and from thence a boom extends up the river, 1,000 feet or more. A shoal puts out from the north bank around the knuckle of the bend for a distance of 60 feet into the river. There is also low water outside of the boom line for a distance of 15 to 20 feet, so that the available channel around the bend for vessels drawing 10 feet of water, or over, is quite narrow,—not over 80 feet in width. The deeper water is found at the south side of the channel, where it is some 12 feet in depth. Below the bend the river is 200 feet in width, with a depth of water at the docks of 18 feet. The current of the river varies in its rapidity with the seasons of the year. At the time of the collision it was between two and three miles an hour. The Shrigley was a vessel of 388 tons burden, 175 feet in length over all, and drawing 10 feet forward and 11 feet 6 inches aft. The No. 2 was a vessel of 658 tons, 190 feet in length over all, and drawing between 3 and 4 feet of water forward, and 10 feet 8 inches at the middle, and 10 feet aft. There were at this time three vessels lying at the dock on the north side, below the bend, and one at the salt dock on the south side. The vessels met in the bend, and there collided. Before either vessel had reached the bend, the Shrigley, descending the river, and while above the boom, gave two blasts, indicating her desire to pass on the south side of the river. The F. & P. M. No. 2, below the bend, and near the life-saving station, answered with a signal of one blast, whereupon the Shrigley repeated her signal, and the No. 2 answered with two blasts, assenting. It is not necessary to go into particulars in regard to the collision itself, except to say that the F. & P. M. No. 2 attempted to pass the Shrigley in the bend, passing to the north side of the river. Seeing a collision inevitable, the master of the F. & P. M. No. 2 backed his engine, the bow of his boat swung to starboard, and came into collision with the Shrigley.

Rule 5 of pilot rules for lakes and sea-board provides:

"Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks, or some other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam-whistle, which signal shall be answered by a similar blast, given by the pilot of any approaching steamer that may be within hearing. Should such signal be so

answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly."

There is no charge or proof here, either in the libel, answer, or evidence, of failure by either vessel to have timely given this signal. The court is bound to assume, therefore, that each vessel complied with the regulation. Assuming that the signals were given, each vessel understood that the other was approaching. The F. & P. M. No. 2, being the ascending vessel, was bound, if necessary, to stop, and avoid the descending vessel, as her movements could be controlled with less difficulty than those of the descending steamer. *The Galatea*, 92 U. S. 439. It was perhaps possible, under favorable circumstances, for two vessels to have passed each other in the bend, but it was hazardous. It was negligence unnecessarily to make the attempt, each vessel having timely warning of the other's approach. Prudence dictates that the ascending vessel should stop and place herself out of the strength of the current, permitting the descending vessel, carried along by force of the current, full swing around the bend.

Even upon the assumption that the signal required by rule 5 was not given, it satisfactorily appears from the evidence that the F. & P. M. No. 2, upon receiving the first signal of two blasts from the Shrigley, could have safely stopped, and should have stopped. She should not have incurred the unnecessary hazard of collision in the difficult passage of the bend. In this she was negligent. She was then 1,000 feet below the bend. There was sufficient opportunity to avoid all danger of collision. Proceeding in the face of a known danger, she negligently placed herself in a position where she was likely to inflict injury, and should respond for the consequences of her negligence. A decree will be entered for the libellant.

THE F. & P. M. No. 2.

STARKE *et al.* v. THE F. & P. M. No. 2.

(District Court, E. D. Wisconsin. January 8, 1891.)

1. COLLISION BETWEEN STEAM-VESSELS — BEND IN RIVER — DUTY OF DESCENDING STEAMER.

An ascending propeller, when approaching a dangerous bend near the mouth of the Manistee river, gave the signal required in such case by rule 5 of pilot rules for lakes and sea-board, and, receiving no answer, proceeded. A descending steamer failed to give the signal, and there was evidence that the signal from below was not heard by her officers. When still 1,000 feet above the bend, she was notified by another that the propeller was coming up the bend, but proceeded on her course, and shortly afterwards signaled that she desired to pass on the south side, which was promptly answered by assenting signals. At this time the propeller had entered so far into the bend that it would have been dangerous to retire, and, proceeding, a collision occurred. *Held*, that the descending steamer was in fault.

2. SAME—INTERPRETATION OF SIGNALS.

The assenting signal of the propeller could not be regarded as an invitation to proceed, since it was required by the rules, and was merely an indication that the steamer's desire to pass on the south side of the river was known and acquiesced in.

In Admiralty.

Mr. Krause, for libelants.

A. J. Dovel and F. M. Hoyt, for claimant.

JENKINS, J. This cause involves an inquiry touching a collision between the propellers Joys and F. & P. M. No. 2, in the afternoon of the 17th October, 1888, in the Manistee river. The *locus in quo* of the collision was the same as in *Canfield v. The F. & P. M. No. 2*, *ante*, 698, (herewith decided,) and is sufficiently described in the opinion filed in that cause. The F. & P. M. No. 2 upon entering the river sounded the signal required by rule 5, stated at length in the opinion in the *Canfield Case*, *supra*, and, receiving no response, proceeded on her course. The Joys, descending the river, failed to give the signal required by rule 5. When at a point above Brook's mill, and over 1,000 feet above the bend, she was notified by the tug Canfield that the F. & P. M. No. 2 was coming up into the bend. The master of the Joys responded: "I will give them a wide berth," and, as he states, checked the Joys down, "thinking the black boat would pass the bend before I got there, I was so far away; that was my idea at the time." Shortly or immediately after, the Joys sounded two blasts of her whistle, receiving prompt and assenting answer from the F. & P. M. No. 2, then opposite the Canfield salt-sheds, at the foot of the bend. There was a pile-driver lying at the upper end of the Canfield salt-shed, crossways in the river, the stern extending about 75 feet beyond the dock line. The Joys was some 600 feet above the bend, about opposite Kitlinger's dock, when she first sighted the F. & P. M. No. 2. Both vessels proceeded, the Joys hugging the south side of the channel so nearly as she could. The F. & P. M. No. 2 kept close to the north bank, "smelt the shoal water," and be-

gan to sheer. A collision then seeming inevitable, both vessels commenced to back. The F. & P. M. No. 2, owing to the force of the current, sheered to starboard, and directly across the bows of the Joys, the stem of the Joys striking the F. & P. M. No. 2 on the port bow.

It is unnecessary to consider the disputed question of the speed of the Joys, as upon other grounds I think this libel cannot be sustained. That the F. & P. M. No. 2 sounded the signal required by rule 5 is established. That it was not heard by the Joys is negative testimony, not countervailing the positive testimony in that behalf. The signal was heard by one witness upon the shore above the bend. It should have been heard upon the Joys. Attention to duty would have enabled the master of the Joys to hear it, if he did not. He admits that he did not sound the signal required. As towards an ascending boat sounding the signal the Joys was in fault. Failing such signal by the Joys, the F. & P. M. No. 2 had a right to assume that no vessel was descending, and to proceed upon her course up and around the bend. The Joys, when over 1,000 feet above the bend, was notified by the tug of the approach of the ascending boat, then not visible to the Joys. The latter vessel, being in fault in not previously giving the required signal, and not knowing the position of the ascending boat, should have stopped, and should not, by proceeding, have experimented in the face of danger. He assumed that the ascending vessel would make the bend before he got there. He should have made that assumption certain by stopping until that event had occurred. It was rash, hazardous, and negligent to do otherwise under the circumstances. When the signal of two blasts was given, the F. & P. M. No. 2 could not stop with safety. She was too far into the bend, and would have collided with the pile-driver. It was the duty of the Joys to stop, for she could safely have then so done, and her negligence had placed the other in a position which rendered it hazardous to stop.

It is a mistake to suppose that the assenting answer of the F. & P. M. No. 2 to the signal of the Joys was an invitation for the latter to proceed. She was required by rule to answer the signal. The answer was only an acknowledgment that the intention of the Joys to pass on the south side of the channel was known and acquiesced in. *The Garlick*, 20 Fed. Rep. 647; *The Rescue*, 24 Fed. Rep. 44; *The Greenpoint*, 31 Fed. Rep. 231; *The Admiral*, 39 Fed. Rep. 574. The F. & P. M. No. 2 did nothing in prevention of that design that did not result from the position she was placed in with respect to the Joys through the fault of the latter. The limit of obligation upon the F. & P. M. No. 2 was, when danger of collision was apparent, to adopt such preventive measures as were possible under the circumstances. This she did. The Joys was the offending vessel, by whose fault the situation was produced, rendering collision inevitable.

It is also insisted that the F. & P. M. No. 2 was in fault in not sounding danger signal upon receiving the signal of the Joys, according to rule 3. There is no ground for this contention. There was no misunderstanding of the course or intention of the other, and in such case only is

the rule applicable. The signal by the Joys was merely a notification that she chose to pass on the south side. This was assented to. The danger of meeting in the bend was notorious, and as apparent to one vessel as the other. A signal of danger would have given no warning to the Joys that she had not already received. Her master had expected to pass the ascending boat above the bend. He knew she was approaching and entering the bend. He knew that a meeting in the bend was hazardous. He would not stop when he could safely do so, although his omission of duty had produced the situation. He preferred to experiment with known danger, and the consequences must fall where they justly belong.

The libel will be dismissed.

THE ASHFORD.

O'BRIEN *v.* THE ASHFORD *et al.*

(District Court, S. D. New York. December 27, 1890.)

COLLISION—BETWEEN CANAL-BOATS—BURDEN OF PROOF.

Where two canal-boats collide while each is being towed by a tug upon a hawser nearly 400 feet long, and it appears that neither tug is going at an improper rate of speed, and that each canal-boat has sufficient steering gear to enable her to keep on her side of the canal, the owner who libels the other boat for damages cannot recover where the evidence does not show, by a fair preponderance of the proof, that the libellant's boat was at the time of the collision on its own side of the canal, or, if not, that the other boat might, by reasonable prudence, have avoided her.

In Admiralty. Libel for damages.

A. B. Stewart, for libellant.

Hyland & Zabriskie, for the *Ashford* and the *Bishop*.

Hull Fanton, *Henry D. Donnelly*, and *James J. Macklin*, for the *Lizzie Crandall*.

BROWN, J. On the morning of the 29th of September, 1889, as the libellant's canal-boat *F. W. Whalen* was proceeding westward in the Erie canal, in tow of the steam canal-boat *Lizzie Crandall*, on a hawser of about 375 feet, she came into collision with the canal-boat *Bishop*, which was upon a hawser of about the same length, and going east in tow of the steam canal-boat *Ashford*. The place of collision was about a mile and a half to the eastward of *Holly*, either at the point where the canal there bends to the southward, or a few hundred feet eastward of that point. The tow-path was there upon the northerly side of the canal, and in meeting and passing each other boats bound to the westward were required to take that side, and boats passing to the eastward to go to the right, or on the heel-path side.

More than the usual contradiction is found in the testimony. Almost every detail is a subject of dispute. In the perplexity that arises from so much contradiction, I am constrained to give controlling weight to the place where the Whalen was found, and from which she was taken when raised. Trustworthy testimony shows that when raised her bow was about 20 feet only from the southerly shore. The canal was there about 90 feet wide. There was indeed some opportunity for a change of position from the time the Whalen was struck until she sank, and there is evidence tending to show such a change; that she was first thrown by the force of the blow upon the tow-path, or northerly side, from which she rebounded, or was shoved off, until she approached near the opposite shore. But I cannot adopt this suggestion. It was the Bishop that after the collision was athwart the canal, so that her stern touched the northerly bank, and it was she that was shoved over towards the northerly shore, so as to let other boats pass, and she subsequently went down between the northerly shore and the Whalen, having just room for that purpose. I am satisfied that neither tug was going at an improper rate of speed, and that there was nothing in the conduct of either tug to have prevented the canal-boats avoiding each other when they were each at the end of hawsers nearly 400 feet long. Both canal-boats were supplied with appropriate and sufficient steering gear, and could be handled with ease. Either could have kept within her own half of the canal. At the time of collision no other boats were in the way. To warrant a decree in favor of the libellant, it must therefore appear, by a fair preponderance of proof, that the Whalen, at the time of collision, was on her own side of the canal; or, if not, that at least the Bishop might, by reasonable prudence, have avoided her. I do not think this burden sustained. The weight of proof is that the Whalen at the time of collision was wholly over upon the Bishop's side of the canal; and, with so little space left for her navigation, I cannot hold the Bishop to blame.

As respects the Lizzie Crandall, I think it is immaterial whether she was 20 feet, more or less, on the southerly side of the center of the canal at the time of the collision. She was nearly 400 feet distant, and any such difference of position in no way affected the duty or the ability of the Whalen not to run into the Bishop in passing her, or to keep on her own side of the canal. It is not necessary to determine the particular reason why the Whalen was not kept upon her own side, since the evidence leaves in my mind no doubt that she had sufficient appliances for easily doing so, and I am satisfied that she did not. The libel must therefore be dismissed; but, inasmuch as in some other particulars the case is not free from doubt, the dismissal will be without costs.

CROCKER NAT. BANK v. PAGENSTECHER *et al.*

(Circuit Court, D. Massachusetts. October 8, 1890.)

FEDERAL COURTS—JURISDICTION—REMOVAL—FOREIGN ATTACHMENT.

The provision of Acts Cong. 1888, c. 866, § 1, (25 St. U. S. 433,) that no suit shall be brought in the circuit court "against any person by any original process * * * in any other district than that whereof he is an inhabitant," applies only to suits commenced in that court; and it is no bar to the jurisdiction of the circuit court of a case removed to it from a state court that defendant was not a resident of the district, and that the state court had acquired jurisdiction by foreign attachment, without any personal service.

At Law.

Acts Cong. 1887, c. 373, § 1, (24 St. U. S. 552,) and Acts 1888, c. 866, § 1, (25 St. U. S. 433,) provide that "no civil suit shall be brought before either of said courts [circuit or district courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

William Gaston and Frederick E. Snow, for plaintiff.

Louis D. Brandeis, for defendants.

CARPENTER, J. This is a motion to dismiss the action for want of jurisdiction. The action was brought in the superior court of the state of Massachusetts on January 7, 1890, and the writ was served by foreign attachment, the sheriff returning that he was not able to find the defendants. On the return of the writ, notice of the pendency of the action was given by publication in a newspaper, pursuant to the statute of Massachusetts and to an order made in that behalf by the superior court. The action was then, on petition of the defendants, removed into this court, and the defendants file this motion to dismiss, for the reason—

"That at the time of the issuance of the writ and the commencement of proceedings herein the defendants were not inhabitants, residents, or citizens of the state or district of Massachusetts, but then were, and for a long time previous had been, and now are, residents, inhabitants, and citizens of New York; and that the defendants, or either of them, were not found within the state or district of Massachusetts, and no service of the writ or original process in this suit ever was, or ever has been, made upon them, or either of them, as appears by the return of the deputy-sheriff on the writ in this cause."

The argument of the defendants is that the court has no jurisdiction, under the provisions of the statute, (St. 1887, c. 373, § 1; 24 St. 552; and St. 1888, c. 866, § 1; 25 St. 433,) for the reasons,—*First*, that the defendants are not residents of the district of Massachusetts, and, *secondly*, that no personal service of process has been made upon them. For the support of the proposition that the courts of the United States can in no case have jurisdiction of any action in which there is not personal service they rely on the decision of Judge COLT in *Perkins v. Hendryx*, 40 Fed.

Rep. 657. It is, I suppose, clear that the judgment in that case could not have been rendered without finding or assuming that, as is briefly and broadly said in the opinion, the courts of the United States cannot in any case have "jurisdiction in suits founded on foreign attachment, and without personal service of process." But it is to be observed in the first place that the cases quoted in support of this proposition (*Toland v. Sprague*, 12 Pet. 300; *Sadlier v. Fallon*, 2 Curt. 579; *Chittenden v. Darden*, 2 Woods, 437) are all cases in which the action was originally brought in the circuit court, and they are decided, not on the broad ground that in no case can the courts of the United States have jurisdiction founded on foreign attachment without personal service, but on the ground that an action so brought does not come within the jurisdictional provisions of the eleventh section of the statute, (St. 1789, c. 20; 1 St. 73.) Those provisions prescribe the district in which suits shall be brought, and were so construed as to forbid the original jurisdiction of the circuit courts over actions in which there was no personal service on the defendant. But the question was not raised nor decided as to whether those provisions also control the jurisdiction in causes removed to the circuit court. Nor was this question apparently raised in *Perkins v. Hendryx*. The contention in that case seems to have been over the question "whether the act of the defendants in appearing in the state court, for the purpose of removing the case to this court, constitutes a waiver of any irregularity as to service of process." The opinion tacitly assumes that there is no distinction in this regard between cases originally brought in the circuit court and cases removed thereto, and therefore cannot be taken as an authority for the proposition on which the defendants rely. That this proposition of the defendants was not argued or decided in *Perkins v. Hendryx* seems also abundantly clear from the fact that the opinion of Mr. Justice GRAY in *Amsinck v. Balderston*, 41 Fed. Rep. 641, is not discussed or cited. In that case it is distinctly held that the provisions of law prescribing the district in which a suit shall be brought "apply only to actions commenced in a court of the United States," and that consequently the prohibitions therein implied have no application to cases removed into those courts. I agree with the reasoning of that decision, and thereupon, no less than on the authority of the case, I conclude that the motion of the defendants discloses no defect of jurisdiction, and must accordingly be denied and dismissed.

UNITED STATES v. WAN LEE.

(District Court, D. Washington, N. D. December 15, 1890.)

COURTS—DIVISION OF DISTRICT—JURORS.

The act subdividing the district of Washington, and fixing the times and places for holding terms of the circuit and district courts therein, in effect limits the jurisdiction so that crimes committed within the district are cognizable only in the courts for the respective divisions which include the places of their commission; and jurors must be drawn from the counties constituting the division for which the term is held at which they are required to serve.

(Syllabus by the Court.)

At Law. Indictment for breach of customs laws.

P. H. Winston, U. S. Atty., and *P. C. Sullivan*, Asst. U. S. Atty.

W. H. White, for defendant.

HANFORD, J. The defendant was indicted at the present term of this court for the crime of concealing smuggled opium, under section 3082, Rev. St. Having entered his plea of not guilty to the indictment, the case was brought on for trial, and thereupon, when the jury was called, the defendant interposed a challenge to the array on the ground that all the petit jurors in attendance at this term had been drawn and summoned from the northern division of this district, and not from the district at large. The court having denied this challenge, and the jury having been sworn to try the case, the defendant now objects to the introduction of any testimony, on the ground that the indictment is illegal and void upon its face, for that it does not purport to have been found by a lawful grand jury. The point of the objection is that the grand jurors were drawn exclusively from the northern division of the district, and they are described in the indictment as—

"The grand jurors of the United States of America, in and for the northern division of the district of Washington, duly impaneled, sworn, and charged to inquire of all offenses against the laws of the United States committed within the northern division of the district of Washington aforesaid."

It has been the practice, as the records show, to draw the jurors for each term of court from a jury-box prepared for each division of the district, containing names selected from inhabitants only of that division of the district for which the box is used; and the grand juries at each term have, under the instructions of the court, confined their inquiries to offenses committed within the division, or upon the high seas outside of the limits of any judicial district of the United States. It is claimed that this practice is erroneous, and is founded upon a misconstruction of the act of congress providing for the terms of the United States circuit and district courts in this district. By the act of congress fixing the times and places of holding the United States courts in the state of Washington, (26 U. S. St. p. 45,) the state is declared to constitute one judicial district. For the purpose of holding terms of court, this district is subdivided into four divisions. Certain named counties constitute the northern division so denominated in the act, and the courts

for said division are to hold their terms at Seattle. It is perfectly apparent on the face of the act that its only object is to bring the seat of justice near to the people. In a district so large as this, it would be a grievous burden upon the people to require litigants, jurors, and witnesses to leave their homes and occupations and travel to a remote place in the state to attend the court, as would be necessary in numerous instances if but one place in the state were provided for the sitting of the court. To relieve the people of this burden, the act was passed, and the only possible construction that can be given to it is the one that limits the jurisdiction of the court, when holding a term, to the territorial limits of the division for which that term is provided; and by a necessary implication the grand jury summoned to attend each term is a grand jury of the district for that division in and for which the term is held, just as the grand jury is denominated in this indictment. The court can only bring to trial at any term persons accused of committing offenses within the division; and the jurors, grand and petit, should, to accomplish the purpose of this act, be summoned only from that part of the district. This construction is in harmony with the provisions of section 802 of the Revised Statutes, and with the ancient customs and laws of our parent nation, as well as the constitutional guaranties of our own country. At common law, grand juries were convened in each county to attend the sessions of peace, and of oyer and terminer, held therein by the court of king's bench, and it was a grand jury of the county, and the sessions of court were held for the county, although the court was ordained and established for the entire kingdom. Under the act of congress, as a mere matter of convenience, several counties are grouped together, and a term of court is provided to be held at one place for all, and to answer the same purpose as to each, as if held in each. By analogy to the practice under the common law, the grand jury should be made up of qualified men residing in the division, and when organized it constitutes a grand jury for the division, just as it would be a grand jury for a single county if the term of court were for a single county. There is therefore nothing to be found in the principles of the common law to support the idea that a United States grand jury in this district must be drawn from the body of the district in its entirety, or that it must be denominated a grand jury of the district. There is no statute prescribing such a practice, and, with all due deference to the arguments of the learned counsel for the defendant, not a single reason has been suggested why it should be so. On the contrary, it would be utterly unreasonable and absurd to hold that, notwithstanding the manifest purpose of congress in enacting this law, we must still bring men from Spokane county to serve as jurors at Seattle, and take King county men to serve at Spokane Falls, and have the rights of citizens of Tacoma passed upon by men of Seattle; or that this defendant, a Chinaman, cannot have justice meted out to him in a lawful way without having jurors to try his case brought from Tacoma. In other districts it is often necessary for the expeditious dispatch of business to secure jurors from localities near the places where the courts are held.

This mode of procedure is quite common, and is authorized by section 802, Rev. St. I cannot believe that the validity of such procedure depends upon the fiction maintained in the record by describing the jurors as if they were drawn from the body of the district.

The northern district of New York is not subdivided, but terms of court are held at Buffalo, Albany, Rochester, and several other places in the district. I am reliably informed that it is the practice in that district to draw the jurors from the lists of qualified persons prepared for the state courts by county officers, so that the entire panel of jurors to serve for a term may be, and often is, composed of men all of whom are residents of a single county; and such juries have not heretofore been supposed to be unconstitutional or illegal, although the truth as to the territory from whence they come has not been covered by even a fiction in the record. All that the defendant can claim as a constitutional right is to have a jury of the district to try his case; that is, a jury every member of which resides within the district. He has no right to insist that every part of the district shall be represented in the make-up of the jury by residents of each place or locality. That would be impossible in any case.

The position taken that the act of 1890 was intended only to provide terms of court for the trial of civil cases is in my opinion untenable. The sixth section of the act repeals the only other statute relating to terms of this court, and we are without any law prescribing the times or places of holding terms for the trials of criminal cases, unless the terms provided for by the act of 1890 are general terms, for the transaction of all business of the court. The fourth section prescribes a rule by which to determine the venue of civil cases, and requires all issues of fact in civil causes to be tried in the division where the defendant, or one of several defendants, resides, unless, by consent of both parties, the case shall be removed to some other division. By implication, this section allows civil cases, with the consent of both parties, to be removed from one division for trial in another. I think the effect of this section is merely to fix a special rule for civil cases, and that it does not so limit the entire act as to make it applicable only to civil cases. Section 730, Rev. St., does not affect the question. That section gives the rule by which to locate the jurisdiction in criminal cases where the offenses are committed outside of any district. It would bear upon this case in exactly the same way if all the grand and petit jurors drawn to serve in this court were nominally and really drawn from the body of the district; for, although that section does confer upon the court and the grand jury jurisdiction to deal with criminal offenses committed out of the division in which the court may be at the time in session, it confers the same jurisdiction over offenses committed wholly without the district as well, and it makes no requirement as to the jurors who are to participate in the proceedings in such cases. The allegation of the indictment descriptive of the grand jury as being "sworn and charged to inquire of all offenses against the laws of the United States committed within the northern division of the district of Washington" does not make the grand jury illegal, nor the indictment void. If we assume that a properly constituted grand jury

would have the widest range of jurisdiction contended for, the offense charged against this defendant would be within its jurisdiction; and, if it is lawful to confine the jurisdiction within the narrower limits described in the indictment, the offense charged would still be within its jurisdiction. In whatever light we view the case, it is within the jurisdiction of this court, and of such a grand jury as by law should have been organized to pass upon it. The indictment is assailed, not because the case is not within the jurisdiction of the court or of the grand jury, but because the jurisdiction conferred by law is broader and more extended than the indictment alleges it to be. But I hold that where a court keeps within bounds, its judicial acts are not void because of its failure to assert all of the jurisdiction given to it by law; and I hold that the proceedings of the grand juries of this court heretofore organized are not void, even though the court should have erred in so interpreting the law as to restrain them from inquiring of offenses committed elsewhere in the district than within the division from which they were drawn. The authorities, so far as I have been able to discover them, do not throw a very clear light upon the subject. From the opinion of Judge HUGHES in the case of *U. S. v. Munford*, 16 Fed. Rep. 164, I infer that it has been the practice in the eastern district of Virginia to draw the jurors from the whole district, but to have separate jury-boxes at each of the places of holding court; but the practice of that district cannot guide us in this, because that district is not cut into divisions by a statute. Although section 572, Rev. St., requires terms to be held at different places in the district, it does not specify that the courts held at either place shall be for certain counties, or for any part of the district. In *U. S. v. Berry*, 24 Fed. Rep. 780, Judge KREKEL reached the conclusion that a criminal case could only be proceeded with in the division of the district wherein the offense was committed. In *U. S. v. Chaires*, 40 Fed. Rep. 820, Judges PARDEE and SWAYNE held that a plea to an indictment averring that the names of the persons placed by the jury commissioner and the clerk in the box were not drawn from the entire territory within the northern district of Florida, but were drawn from an alleged division of the district, showed no injury or prejudice to the rights of the defendants, and was bad in form and substance. Recently, in the case of *U. S. v. Dixon*, *ante*, 401, Judge HOFFMAN has given a decision which is directly contrary to the conclusion I have arrived at in this case. While conceding much for the experience and learning of that eminent jurist, I claim that the weight of the authorities tends rather to support than to bear against me in upholding the validity of this indictment.

NATIONAL TYPOGRAPHIC CO. v. NEW YORK TYPOGRAPHIC CO. *et al.*

(Circuit Court, S. D. New York. December 29, 1890.)

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.

Under Act Cong. March 3, 1887, providing that no suit shall be brought in the federal courts in a district other than that of defendant's residence, the circuit court will decline jurisdiction of a suit against a corporation created in a state other than that in which the court is sitting. Following *Filli v. Railway Co.*, 37 Fed. Rep. 65; *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1; *Myers v. Murray*, 43 Fed. Rep. 695.

2. SAME—PRACTICE.

A motion to set aside service of process because of defendant's non-residence will not be granted where his residence is in dispute, and there has been no opportunity to cross-examine him as to his statements in the affidavit on which the motion is based.

On Motion to Set Aside Service of Process.

Act Cong. March 3, 1887, provides, *inter alia*, that no suit shall be brought in the federal circuit and district courts in a district other than that of defendant's residence.

Betts, Atterbury, Hyde & Betts, for complainants.

Kerr & Curtis, for defendants Hall and Starring.

LACOMBE, Circuit Judge. After a careful perusal of the very able briefs submitted on both sides, and an examination of the decisions which have been rendered in the circuit courts since the passage of the act of 1887, I have reached the conclusion to abide by the rule laid down in this circuit in *Filli v. Railway Co.*, 37 Fed. Rep. 65, and in the eighth circuit, in *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1, and *Myers v. Murray*, 43 Fed. Rep. 695, rather than follow the one adopted in the fifth circuit in *Zambrino v. Railway Co.*, 38 Fed. Rep. 449, and in the third circuit in *Riddle v. Railroad Co.*, 39 Fed. Rep. 290. It is unnecessary to add anything to the discussion of the question in the various cases above cited. In view of the language of the supreme court in *Insurance Co. v. Francis*, 11 Wall. 210; *Ex parte Schollenberger*, 96 U. S. 377; *Railroad Co. v. Koontz*, 104 U. S. 5; and *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254,—the safe rule for the circuit courts seems to be to decline jurisdiction in cases such as this.

The motion to set aside service of process is granted as to the defendant the New York Typographic Company, and the other defendants except Starring and Hall. As to the latter, it is denied. Hall is concededly a resident of the district, and the objections raised on his behalf cannot be decided on this motion. As to Starring, the question of residence is in dispute, and the motion should not be granted where there has been no opportunity to cross-examine him as to the statements in his affidavit. As to the other defendants, their non-residence was practically conceded on the argument.

LAIRD v. INDEMNITY MUT. MARINE ASSUR. Co.

(Circuit Court, S. D. New York. December 29, 1890.)

FEDERAL COURTS—JURISDICTION—SUITS BY ASSIGNEE.

An action to recover on an insurance policy, and to reform the same, is an action "to recover the contents of a chose in action," within the meaning of Act Cong. March 3, 1887, providing that the federal courts shall not take cognizance of such actions when brought by an assignee, unless such suit could have been prosecuted in such courts if no assignment had been made; and, where both plaintiff's assignor and defendant are aliens, and no federal question is involved, the circuit court will decline jurisdiction.

On Motion to Remand to State Court.

Act Cong. March 3, 1887, provides, *inter alia*, that the circuit and district courts shall not take cognizance of actions "to recover the contents * * * of any chose in action in favor of any assignee," unless such courts would have had jurisdiction of such actions before the assignment was made.

Carpenter & Mosher, for plaintiff.

Buller, Stillman & Hubbard, for defendant.

LACOMBE, Circuit Judge. This is an action to recover upon a contract of reinsurance, and for reformation of the policy, if necessary. It is therefore an action "to recover the contents of a chose in action." *Shoecraft v. Bloxham*, 124 U. S. 730, 8 Sup. Ct. Rep. 686. The plaintiff is an assignee of the chose in action, and as, under the authorities, he is not within the exception of the first section of the act of 1887, this court can have no cognizance of his suit thereon, unless such suit might have been prosecuted here if no assignment had been made. *Simons v. Paper Co.*, 33 Fed. Rep. 193; *Newgass v. New Orleans*, 33 Fed. Rep. 196; *Rollins v. Chaffee Co.*, 34 Fed. Rep. 91; *Wilson v. Knox Co.*, 43 Fed. Rep. 481. His assignor is an alien corporation, and so is the defendant. No federal question is involved, and the suit could not have been prosecuted in this court between the original parties to the contract upon any theory of diverse citizenship, as neither of them is a citizen of any state of the federal Union. *Hepburn v. Ellzey*, 2 Cranch, 446; *Rateau v. Bernard*, 3 Blatchf. 244. Under the act of 1875 it was held that the restriction applicable to original suits by assignees was not applicable in cases brought originally in the state courts, and removed thence to a federal court. *Clafin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507; *Rosenbaum v. Insurance Co.*, 37 Fed. Rep. 724. This was upon the ground that "the exception out of the jurisdiction, as to suits begun in the circuit courts, contained in the [first section,] did not by its terms, nor by the immediate context, apply to suits begun in the state courts, and afterwards removed to the circuit courts." Under the act of 1887, (1888,) however, the second section of which provides for removal of causes when a federal question is not involved, and when no prejudice or local influence appear, is specially restricted to suits "of which the circuit courts of the United States are given jurisdiction by the preced-

ing section," and by the preceding section, (section 1,) such courts are not given jurisdiction of a suit to recover the contents of a chose in action in such a case as this. There must be a remand to the state court.

CARR v. FIFE *et al.*

(Circuit Court, D. Washington, W. D. January 7, 1891.)

1. JURISDICTION OF FEDERAL COURT—ACTIONS ARISING UNDER LAWS OF THE UNITED STATES.

A suit in which the plaintiff claims to have acquired a vested right to land by full compliance with the United States homestead law, and seeks to obtain a conveyance of the title from defendants, claiming the land under a patent issued to another, is a case arising under the laws of the United States, and within the jurisdiction of a United States circuit court.

2. SAME—MOTION TO REMAND.

Such a case, commenced in a district court of the territory of Washington, and which was pending at the time of the admission of the state of Washington, was transferred to the United States circuit court after the papers and record in the case had passed into the custody of the clerk of a state court, and after a stipulation had been signed and filed in said state court, whereby the parties agreed to submit the case to said court for its decision, and after the defendants had filed in said court a written request to have the case so transferred, but before the court had acted upon said stipulation, or done any act amounting to an assumption of jurisdiction of the case. *Held*, that the request was filed in the proper court, and was in time, and that a motion to remand for want of jurisdiction must be denied.

3. PUBLIC LANDS—CANCELLATION OF HOMESTEAD ENTRY.

The decision of the supreme court in *Lee v. Johnson*, (116 U. S. 43, 6 Sup. Ct. Rep. 249,) *held* to be conclusive upon a circuit court in a case involving identical legal propositions; and, without presuming to discuss the questions, *held*, in accordance with that decision, that in a contested case before the land department, the question at issue between the parties being as to the abandonment of a homestead, where the secretary of the interior found from the evidence that the contestee was not a *bona fide* homestead claimant, he did not exceed his jurisdiction in directing a cancellation of the entry, although the particular objection to the claim was not raised by the allegations of the contestant.

4. EQUITY PRACTICE—RIGHTS INVOLVED.

In a suit by a private individual against the holder of a title to land by patent from the government only the plaintiff's right can be tried; and questions as to non-compliance on the part of the patentee with the requirements of the law under which the patent was issued cannot be relevant.

5. RES ADJUDICATA—DECISION OF SECRETARY OF INTERIOR.

In the absence of fraud, and where no error is shown in deciding a distinct question of law, a decision of the secretary of the interior, holding a homestead claim to be invalid, and directing the cancellation of the entry, is final, and not subject to review in the courts.

6. WITNESS—ADMISSIONS OF DECEDENTS.

The plaintiff is incompetent to testify as to admissions of a deceased person, through whom the defendants deraign title to the property in controversy, made after having parted with his title, in a case wherein some of the defendants are sued in a representative capacity, as executors of a deceased party, who is accused of fraud and conspiracy; such testimony being offered with the object of proving such accusations.

7. FRAUD—PLEADING.

Relief on the ground of fraud cannot be granted upon mere inferences and suspicions.

(Syllabus by the Court.)

In Equity.

Thomas Carroll and John Arthur, for plaintiff.
Gahusha Parsons, for defendants.

HANFORD, J. In this suit the plaintiff claims to be the equitable owner of a tract of land to which the defendants have the legal title, derived through one Robert E. Sproule, who obtained a patent for it from the United States. The plaintiff alleges that he settled upon it in the year 1871, and thereafter acquired a vested right to it by full compliance on his part with the provisions of the act of congress commonly known as the "Homestead Law," and the several acts amendatory thereof and supplemental thereto; and he especially claims the benefits of the laws affecting the homestead rights of persons who were in the military service of the United States during the late civil war. The prayer of the complaint is for a decree adjudging that the plaintiff is the owner of the land; that the defendants hold the title thereto under the patent in trust for him; and for a conveyance of said title to him. The grounds alleged for this demand are error in law on the part of the officers of the land department in issuing the patent to Sproule, and fraud on the part of said Sproule and the defendants in procuring the cancellation of plaintiff's homestead entry.

The case was commenced in 1887 in the district court for the second judicial district of the territory of Washington, holding terms at Tacoma, and proceeded to a final hearing in that court, but was not decided. After the admission of the state, a stipulation was signed, whereby the parties submitted the case for decision to the superior court of the state of Washington for Pierce county, but said court never acted upon said stipulation, and, after it had been filed, granted a motion made by the defendants to remove the case to this court, and signed an order to so transfer it. The plaintiff thereupon filed a motion to remand the case to said superior court, for the reason that this court has no jurisdiction in the premises. I think, however, that this court has jurisdiction, and cannot lawfully remand the case. The decision of the case involves the construction and application of the acts of congress affecting the rights of settlers on the public lands of the United States who seek to acquire title to such lands from the government. The case, therefore, is one arising under the constitution and laws of the United States, and one of which this court, if it had been in existence when the case was commenced, might have had jurisdiction. It was pending at the time the territory of Washington was transformed into a state, and, by request of the parties defendant, it has been transferred into this court. From the facts here stated it follows that, by the provisions of section 23 of the enabling act, (25 U. S. St. 683,) the jurisdiction of this court has attached and is perfect.

It is objected that the request to have the case transferred to this court was not made to the proper court, and not made in time. Section 23 of the enabling act referred to prescribes no limitation as to the time within which the request should be preferred, and leaves the parties to ascertain for themselves the "proper court" to receive and act upon the

request. In this instance the request was made to the state court which had come into possession of the papers and record of the proceedings in the case, and was made prior to any act of the court in relation to the case amounting to an assumption of jurisdiction. The record shows that the first and only act of the state court has been to order the removal of the case to this court.

When the case came on for hearing, the plaintiff filed a motion to defer the trial, on the ground that the district judge who was presiding, and the only judge of the court in attendance, had been employed by some of the defendants as an attorney on matters not connected with the case since the suit was commenced, though prior to his appointment. It is not asserted that the judge is legally disqualified, and it is only insinuated that, because of transactions in the past, he is liable to be partial, and incapable of rendering a just decision. It would result in clogging the operations of the courts, and intolerable delays in most cases, to adopt the principle that no case can proceed before a judge who at any time may have had any business relationship with any party to it; and it would be mere weakness on the part of a judge to refuse to perform the functions of his office merely because of insinuations against his ability to act impartially. For these reasons, the motion to postpone was denied, and the case proceeded to a hearing upon the merits.

The record shows that in 1873 Sproule was allowed to contest the plaintiff's right to this land, and, as the result of said contest, after successive hearings before the register and receiver of the district land-office, the commissioner of the general land-office, and the secretary of the interior, the plaintiff's homestead entry was canceled on the records of the general land-office at Washington, and thereafter said Sproule was allowed to enter the land under the provisions of the pre-emption law, and on the 13th of December, 1875, a patent was issued conveying the title to him. Any further or more detailed statement of the facts in the case is unnecessary. In their argument counsel for the plaintiff have taken the position most favorable for him which they could take, by assuming that the pleadings and facts shown by the record are such as to present fairly the questions,—whether the officers of the land department had any power to cancel the plaintiff's homestead entry,—and whether the defendants are precluded from claiming any rights for themselves under the patent by reason of fraudulent practices in obtaining the cancellation of plaintiff's entry. I will, to abbreviate this decision, make the same assumption, and let the decision of those questions determine the case.

As to the first question, contradictory opinions have been given by the courts. On one hand, the supreme court of the state of Michigan, in an able opinion, has sustained fully the plaintiff's argument and contention in this case. *Johnson v. Lee*, 47 Mich. 52, 10 N. W. Rep. 76. On the other hand, the same case was taken upon a writ of error to the supreme court of the United States, and was by the court of last resort, after full argument and due consideration of the able opinion of the supreme court of Michigan, reversed. *Lee v. Johnson*, 116 U. S. 48, 6 Sup.

Ct. Rep. 249. This last decision meets and overrules every argument made touching this point, and it is conclusive upon this court, so that any discussion of the question here would be idle. I am constrained, therefore, to hold that the secretary of the interior had authority to inquire and decide as to the validity of the plaintiff's claim to this land.

The questions which the secretary was called upon to decide were as to the good faith of the plaintiff,—whether he had actually, within the time limited by law, established his residence upon the land, with the intention of acquiring it for a home; whether he had continued to actually reside upon the land; whether he was really engaged in improving the land, or in good faith intending to do so; or whether he was only making a colorable pretense of residing upon and improving the land for the purpose of stripping it of its valuable timber, and acquiring it for speculative purposes, without complying with the terms of the homestead law. These are all questions of fact, and the secretary's decision thereon was final. No other questions appear to have been involved in the contest in the land department. Certainly the case, as it has been submitted in this court, does not present or disclose any error of the secretary in deciding a distinct question of law. The fact that no question of law was involved or passed upon by the secretary is a sufficient answer to the comments made on the circumstance that the secretary's opinion has never found a place in any of the published reports of land-office decisions. The patent to Sproule has been assailed on the ground of alleged failure on his part to comply with the conditions prerequisite to obtaining title under the pre-emption law. It is charged that the overzealous land-office officials have exacted a forfeiture of plaintiff's rights on insufficient grounds, and, with amazing inconsistency, issued a patent to Sproule with undue and unusual haste, although he never made even a colorable show of compliance with the law; but this issue cannot come into this case. This is not a suit to destroy the title conveyed by the patent. The plaintiff's object is rather to acquire that title for himself. Unless he can succeed in this, it matters naught to him in what manner or to whom the government disposes of the land; and, if he is entitled to recover the land, it matters not how fully Sproule may have lived up to the requirements of the pre-emption law. I conclude, therefore, that the action of the department of the interior in canceling the plaintiff's homestead entry cannot be reversed for any mere error.

Next to be considered are the charges of conspiracy and fraud. The most serious specification is that the register of the land-office after the contest notified plaintiff by letter to the effect that the contestant had failed to prove abandonment, and thereby deceived him by leading him to suppose that a decision in his favor had been rendered, whereas the record was made to show that the decision was adverse to him. This is supported by only the plaintiff's own testimony, not corroborated even by production of the letter; and it is refuted by a letter to the commissioner of the general land-office, written by the plaintiff two days after the date of the decision by the register and receiver, in which he sets forth fully his claim to the land and his grievances regarding the contest,

and shows very clearly that he understood then that the case was to be passed upon by the commissioner. This letter further shows that the writer of it, instead of enjoying the feeling of self-complacency of a successful litigant, rather indulged in the bitterness natural to a man while smarting under a consciousness of being the victim of an unjust decision. In further refutation of this charge, the record shows that the attorneys who had conducted the case for the plaintiff in the land-office, and who were then, and are now, men of first-class reputation, and eminent in their profession, appealed the case to the commissioner, and after his decision again appealed it to the secretary, and filed their arguments in plaintiff's behalf, which were duly considered. I do not credit the plaintiff's claim that he did not know of the adverse decision, or of the appeal taken in his behalf, but, even if he did not know, his rights were as well guarded as they could have been were he fully informed. The plaintiff's testimony, given after the deaths of Sproule and of E. S. Smith, to the effect that Sproule, after their having parted with all his interest in the land, made certain admissions to the effect that he had been instigated and induced by said Smith to make the contest, is not legal evidence, and should be disregarded; but, even if received and if uncontradicted, taken together with all the evidence offered on behalf of the plaintiff, it falls a long way short of being sufficient to warrant the court in divesting the defendants of the valuable land in controversy, and giving it to the plaintiff. E. S. Smith did not acquire his interest in the land from Sproule, and he did not acquire it until several years after the issuance of the patent. In view of these facts, the testimony as to remarks by him to the effect that plaintiff's claim would be jumped; that it ought to be jumped; that the land would be taken from the plaintiff on account of his failure to reside upon it as the homestead law required, etc.,—affords no ground for even an inference that he was a party to any conspiracy to rob plaintiff of the land by means of unfair or fraudulent practices in the land-office.

The defendants other than Smith's representatives acquired their interests in the land by means of foreclosure proceedings against Sproule, and execution sales upon judgments against him, which proceedings and sales were several years after the patent was issued. The only ground alleged for charging them with fraud in this matter is that they are known to have been friends of Smith, and to have had dealings with him in other matters of business. In short, the court is expected to condemn these parties, and strip them of their title to this property, on general principles; but the court must decline to meet these expectations. There is no recognized exception to the rule that fraud will not be inferred, and that to obtain relief on this ground the acts constituting the fraud must be distinctly alleged and clearly proven. The only remaining specifications of the charge of fraud are that the case was decided in the department of the interior without due consideration of the plaintiff's rights. Both the commissioner and the acting secretary of the interior, who decided the case, have certified that due consideration was given to the case, and against this there is no evidence whatever except the fact that the decision

was adverse to the plaintiff. The argument is that, with an intelligent understanding of the evidence in the case and the law applicable, there could not be an honest difference of opinion as to the plaintiff's rights. I think that I have fairly stated this point, and that in stating it I have sufficiently answered it. Certainly the court cannot, upon a mere inference, based upon nothing but a difference of opinion, decree a reversal of the action of the highest officers of one of the executive departments of the government because of official misconduct and fraud on the part of said officers. The plaintiff has failed to make a case entitling him to any relief according to the principles of equity, and, without considering the affirmative defenses pleaded, a decree dismissing the suit, with costs, must be awarded.

EASTON *et al.* v. HOUSTON & T. C. RY. CO. *et al.*

(Circuit Court, E. D. Texas. January 13, 1891.)

CLERK'S FEES—DEPOSIT OF EARNEST MONEY.

Rev. St. U. S. § 995, provides that all moneys paid into any court of the United States or received by the officers thereof in any cause pending or adjudicated in such court shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, provided that the delivery of such money upon security, and according to agreement of parties, under the directions of the court, may be allowed. The fee-bill (Rev. St. U. S. § 838) allows "for receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid." *Held*, that where a decree ordering the sale of mortgaged railroad property requires the payment of earnest money into court at the time of the sale, to be returned in case the same is not confirmed, and afterwards, by consent of parties, the decree is modified so as to allow certified bank-check to be given instead of cash, and requiring the commissioner to deposit the same with a trust company, the clerk of the court is not entitled to receive any percentage thereon as a fee. *Distinguishing Ex parte Prescott*, 2 Gall. 146, and *Thomas v. Railway Co.*, 37 Fed. Rep. 548.

In Equity.

Ford & McComb, for intervenor.

Baker, Botts & Baker, for complainants.

PARDEE, J. In the final decree, directing the sale of the mortgaged property in this cause, among other provisions, was the following:

"That of the purchase price bid on such sale a deposit, amounting to the sum of one hundred thousand dollars, (\$100,000.00,) shall be paid in cash to the commissioner at the time of sale, and shall be deposited in the registry of this court to the order of the cause. If separate bids be made and accepted for separate portions of the property to be sold, then the deposit so made shall not be less than seventy-five thousand dollars on the purchase of the main line of the railway and its appurtenances, and twenty-five thousand dollars on the purchase of any other portion. In addition to the deposit or deposits made at the time of the sale such further portions of the purchase price shall be paid in cash and deposited as the court in this cause may from time to time direct, the court reserving the right to resell in this cause the premises and property herein directed to be sold, or any part sold separately, upon the fail-

ure of the purchaser or purchasers thereof, or their successors or assigns, to comply within twenty days with any order of the court in that regard. And in case of any resale on the failure of the purchaser or purchasers to comply with the terms of the bid or the orders of the court relative to such additional partial payments as may from time to time be directed, all sums paid in by such purchaser shall be forfeited as a penalty for such non-compliance. If any sale for which a deposit is made be not confirmed by the court such deposit shall be returned to the bidder."

It was further provided in said decree that "any party to the cause, also any intervening petitioner, who has duly filed his petition herein, and also the receivers, may at any time apply to this court for further relief at the foot of this decree, as well as for such modifications thereof in respect to the distribution of the proceeds of sale," etc. Thereafter, on the petition of the complainants and the consent of the defendants, that part of the decree, to-wit: "And it is further ordered, adjudged, and decreed that of the purchase price bid on such sale a deposit, amounting to the sum of one hundred thousand dollars, shall be paid in cash to the commissioner at the time of sale, and shall be deposited in the registry of this court to the order of the cause,"—was, by proper decree, modified and changed so as to read: "That of the purchase price bid on such sale a deposit, amounting to the sum of one hundred thousand dollars, shall be paid in cash to the commissioner at the time of sale, and he is authorized and directed to receive certified bank check or checks, or bank certificates of deposit, for one hundred thousand dollars, satisfactory to him, in payment of such deposit; and he shall deposit the same with the Central Trust Company of New York, subject to his own order, as special commissioner, to be held subject to the order of this court." The special master commissioner, in reporting the sale of the railway property, reported that the provisions of the decree in relation to the deposit were complied with. The clerk, by his intervention, claims that the decree was modified without authority, and that he is entitled to a registry fee on the sum of \$100,000, relying upon the provisions of the fee-bill, (Rev. St. § 828,) to-wit:

"For receiving, keeping, and paying out money in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid," in connection with section 995 of the Revised Statutes, to-wit: "All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court: provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, and according to agreement of parties under the directions of the court."

The court had the right to modify the decree. The original decree provided for modifications upon proper application, and the complainants petitioned for the one in question, and the defendants consented thereto. The modification seems to have been a proper one under the circumstances of the case. The money affected by it was earnest or forfeit money. In a contingency it was to be restored in its entirety to the purchaser, and was undoubtedly his money until the sale should be

confirmed. If it had been deposited in the registry of the court, as provided in the original decree, and the sale had been set aside, it could not have been restored in its entirety to its owner, because, in that case, the clerk's fee would have attached, and properly so; for then he would have had the responsibility of receiving, keeping, and paying out the money. The proviso of section 995, Rev. St., stipulates that that section shall not be construed to prevent the delivery of money described in the statute upon security, and according to agreement of parties under the directions of the court. The deposit of the earnest money in this case was upon security satisfactory to the parties, and according to their agreement under the direction of the court. The cases of *Ex parte Prescott*, 2 Gall. 146, and *Thomas v. Railway Co.*, 37 Fed. Rep. 548, are cited in support of the clerk's claims in this case. *Ex parte Prescott* was a case where certain prize proceeds deposited in banks subject to the order of court were held chargeable with clerk's commission under a statute which provided that the clerk of the district court shall, among other fees, be entitled to 1½ per cent. on all money deposited in the court. The question decided by Judge STORY was whether the prize moneys aforesaid had been deposited in court. In deciding that, and allowing the clerk's commission as claimed, Judge STORY said:

"Where the language of an act is plain and clear, the cases are not to be excepted from the generality of the expressions unless such exceptions are fairly implied or necessarily drawn from the purview. The statute does not speak of money coming into the hands or possession of the clerk, and to ingraft such a qualification upon the language would be legislation, and not judicial construction."

It may be noticed that the fee-bill in force at the time *Ex parte Prescott* was decided is entirely different from the present law in relation to the registry fee of the clerk; instead of being upon moneys deposited in court, it is now "for receiving, keeping, and paying out money in pursuance of any statute or order of court." In the case of *Thomas v. Railway Co.*, *supra*, the proceeding before the court was to vacate an order made by consent of the parties that certain moneys (the proceeds of a judicial sale) be deposited in the hands of a master to the credit of the cause, the same to be paid upon the master's checks, countersigned by the solicitor for the complainant, on the ground that such order had been improvidently made in violation of section 995 of the Revised Statutes. The syllabus of the case credited to the court is as follows:

"Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage ought, in pursuance of Rev. St. § 995, to be deposited with a designated depository of the United States, and the clerk is entitled to his commission thereon."

The question really decided in that case was that the deposit agreed to by the parties was not the delivery of money upon security according to the agreement of the parties under the direction of the court, and the order was vacated.

If the present case was one to vacate the modified decree providing for the deposit of the earnest money with the Central Trust Company

the decision just referred to would be very strongly in point. Here the question is simply whether the clerk is entitled to commissions upon moneys which he has not actually received, kept, and paid out in pursuance of any statute or order of the court, because, as he claims, the money was paid into court, and should have been deposited with the treasurer or some designated depository. The adjudged cases laying down the better rule in this matter are *Upton v. Tribblecock*, 4 Dill. 232, note; *In re Goodrich*, Id. 230; *Leech v. Kay*, 4 Fed. Rep. 72; and *Ex parte Plitt*, 2 Wall. Jr. 453,—where it is held that the commission allowed to the clerk under section 828, Rev. St., “for receiving, keeping, and paying out in pursuance of any statute or order of court,” cannot be claimed unless the money passes through his hands. The intervention should be dismissed, and it is so ordered.

AMERICAN BISCUIT & MANUF'G CO. v. KLOTZ *et al.*

(Circuit Court, E. D. Louisiana. January 8, 1891.)

RECEIVERS—COMBINATIONS TO RESTRAIN TRADE.

Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the premises where the business was conducted, and contracted to carry it on as the purchaser's agent, for a salary. After operating under this arrangement for a time, he repudiated the sale, resumed possession under the old firm name, and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant, and his partner as intervenor, filed a cross-bill for rescission of the sale for fraudulent representations, and tendered back the stock. Complainant was practically a “trust,” organized to monopolize the business, and had already secured control of 85 leading bakeries in 12 different states. Held that, while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as equity would not encourage a combination in restraint of trade, and probably illegal, under Act Cong. July 2, 1890, “to protect trade and commerce against unlawful restraints and monopolies,” and Act La. July 5, 1890, for the same purpose.

In Equity.

T. J. Semmes and Bayne, Denegre & Bayne, for complainant.

W. S. Benedict and Rouse & Grant, for defendants.

Before PARDEE and BILLINGS, JJ.

PER CURIAM. This cause is submitted upon an application for a receiver. Some time in May last, the defendant Klotz, and Fitzpatrick, his partner, composing the firm of B. Klotz & Co., sold to the complainant their biscuit and confectionery manufactory for the price of \$259,000, and an assumption of the debts of B. Klotz & Co., amounting to \$42,000, which it was understood and agreed should be paid out of the income from the future business. The visible property was estimated to be of the value of \$101,000, and the good-will of the business to be of the value of \$200,000. The price was paid in stock of the complainant's corporation, estimated to be of value at par; that is, to be worth

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100 cents on the face value. The purchase was completed, price paid, property delivered, the factory and good-will transferred by Klotz & Co. to the complainant. Klotz leased his bakery premises to complainant for the term of years, and contracted in writing to become, and did become, the agent of the complainant, at a salary of \$—— per year. Klotz continued to carry on the business as agent for the complainant down to some time in November, when he repudiated the sale and the lease, erased the name of complainant from the bakery, as agent, transferred the policies of insurance from the complainant to himself, as an individual, then to B. Klotz & Co., and, for and in the name of the late firm, resumed the possession of all the property he had sold to the complainant, and the conduct of the business of the bakery and the confectionery establishment. He did this without resort to any legal proceedings. He thereafter held possession adversely to the complainant, and excluded it from the bakery. In this state of things, the complainant filed its bill for an injunction, and for an account and for a receiver, against Klotz and W. A. Schall, who was alleged to be co-operating with him in the possession adverse to the complainant. Klotz has filed an answer, and he, together with his former partner, Fitzpatrick, who intervened by petition *pro interesse suo*, have filed a cross-bill asking a rescission of the entire transaction, *i. e.*, the sale and the lease, and tendering the stock which had been received by them as the consideration of the sale. Numerous exhibits and affidavits have been adduced by each party upon this hearing. The recital thus given shows that, in an order inverted from what would be expected, we have before us a cause in which a party who has sold and delivered a business to another, and become his agent, and, as such agent, was in possession of the property sold, sets up a possession adverse to his principal, asks for a cancellation of the sale, and the purchaser and principal asks that the agent shall account, shall be enjoined from asserting any claim hostile to his principal,—in a word, for a confirmation of its rights under the purchase.

The immediate question before us is, what disposition shall be made of the *res*, the business of the bakery and manufactory, pending this contest? The vendor and agent asks that he be allowed to remain in adverse possession. The purchaser and principal asks for a receiver. It is clear that, as to this provisional disposition of the *res*, the defendant Klotz cannot be allowed to gain anything by his ouster of his vendee and principal. He must stand with those equities, and none other, which existed before the ouster. The case as to the appointment of a receiver must be reviewed and determined as if he (Klotz) had filed his bill averring possession as agent, which he asked to have changed by a decree into a possession as owner, through the cancellation of the sale and the lease; that is, he must aver a legal title in the American Biscuit & Manufacturing Company, which he seeks to have avoided and annulled. If, as in this case, he seeks to do all this by reason of fraud, and he establishes the fraud, a court of equity will not refuse to hear him. He would not be estopped, for fraud vitiates and sets aside even estoppels. *Herm. Estop.* par. 22, p. 244; *Pendleton v. Richey*, 32 Pa.

St. 58, 63. But, while he is not estopped from proceeding to set aside the sale and the lease by reason of his agency and his obligations as trustee, he comes into court assailing and seeking to cancel a legal title; for until that is done his possession is that of the complainant. Under these circumstances, until the hearing, the practice in the courts of chancery is not to disturb the possession under the legal title prior to the final decree, unless a case of monstrous wrong is established. *Stilwell v. Wilkins*, Jac. 280, reported in full in *Edwards on Receivers*, p. 28, Lord ELDON, when a similar question was presented, observed:

"The point that struck me was whether, on a bill to impeach a sale for fraud, the court interposes so strongly before the hearing as to take away the possession from persons holding it under the effect of deeds not yet set aside by decree."

—And he holds that "it was not the general habit of the court." There the case was so monstrous, and the proof was so strong, that "it was hardly possible that the transaction could stand," and the legal title was interfered with.

This is a leading case, and gives what we find is the rule. The possession under the title is not disturbed unless the proof of fraud is so strong as to lead the court to the clear conviction that it will, on the final hearing, be established. The fraud set up and relied upon by the defendant and intervenor is false and fraudulent representations by the agents of the complainant in this: that they represented that the stock was fully paid-up stock, whereas, in truth and fact, it was none of it paid up in money, and only paid up in part, and, to the extent of that part, by transfer of plants or bakeries and manufactories at an estimated value as capital. The stock delivered to the defendant and intervenor was not paid up until it was issued to them, and was paid for by a transfer of the bakery and good-will; and then it became paid up, and they were discharged from all liability to be made to contribute as shareholders therefor. The testimony as to what was represented by complainant's agents about the stock being paid up is conflicting; but, when viewed in connection with the circumstances under which the stock was received, fails to satisfy us, upon this preliminary hearing, that any false representations are proved to have been made. The case of the defendant and intervenor, set up in their cross-bill, whereby they oppose the appointment of a receiver, is that of parties who seek to rescind a deed on the ground of fraud, which upon this hearing they fail to establish.

So far we have considered the question of appointing a receiver of the property in controversy *inter partes*, and mainly from the stand-point presented by the defendant's showing, and thereon such appointment seems proper, and we should accord it, but for an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties. We are not satisfied that the complainant's business is legitimate. While the nominal purpose of the complainant's corporation, as stated in its charter, is the manufacture and

sale of biscuit and confectionery, its real scope and purpose seems to be to combine and pool the large competing bakeries throughout the country into practically what is known and called a "trust," the effect of which is to partially, if not wholly, prevent competition, and enhance prices of necessary articles of food, and secure, if not a monopoly, a large control, of the supply and prices in leading articles of breadstuffs. The case shows that an insignificant number of shares of complainant's stock was unconditionally subscribed for, apparently enough to qualify directors; but the great mass was taken and held by irresponsible parties, to be used in parceling out as full-paid stock to such leading and successful bakeries throughout the country as could be induced to come in on an agreed value of the property and a large estimate of good-will. Each bakery when secured to be carried on by its former managers, subject, however, as to control of funds, territory, prices, and competition, to the central management; all profits pooled, and of course division thereof to be made on the basis of the stock assigned to each bakery. Under this arrangement complainant has already secured the control, and pooled the business, of 35 of the leading bakeries in 12 different states of the west and south, and is evidently seeking more constituents. The act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," expressly prohibits, under severe penalties, "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," and declares punishable "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the common trade or commerce among the several states." The enforcement of this act is, by the statute, devolved upon the circuit courts of the United States. The first and third sections of an act of the legislature of Louisiana, approved July 5, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies, and to provide penalties for the violation of this act," declare:

"Section 1. That every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, is hereby declared illegal."

"Sec. 3. That every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the limits of this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word "monopolize" cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean "to aggregate" or "concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of oth-

ers; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law "combination in the form of trust" would seem to point to just what, in popular language, is meant by pooling.

Now it is to be observed that these statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc.; and, further, that the language is altogether silent as to what means must be used to constitute the offense. The offense is defined to "combine in the form of trust, or otherwise, in restraint of trade or commerce," and "to monopolize, or attempt to monopolize, any of the trade or commerce." To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense. One just and decisive test of the meaning of the expression "to monopolize" is obtained by getting at the evil which the law-maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force. If this is the meaning of the defining words, does not this corporation, thus glutted with the 35 industries of 12 states, disclose an "attempt to monopolize?" So far, therefore, as the complainant's business is a combination in restraint of trade, or is an "attempt to monopolize, or combine, in the form of a trust, or otherwise, any part of trade or commerce," as these words are properly defined, the law stamps it as unlawful, and the courts should not encourage it. Aside from this, the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right, but of judicial discretion. *Fosdick v. Schall*, 99 U. S. 235. It falls within that class of interlocutory remedies which courts must grant or withhold, according to a discretion conscientiously exercised, upon a consideration of all the facts which a cause presents, involving the rights of the parties and the interests of the public. The attempt to accumulate in the hands of a single organization the business of supplying bread itself to so large a portion of the poor, as well as the rich, people of the United States should not be favored by a court of equity. It carries with it too much of danger of excluding healthy competition, thereby increasing the difficulty to the general public of participating in a most useful business, as well as adding to the possibility of multitudes of citizens being temporarily, at least, compelled to pay an arbitrary and high price for daily food.

Whatever we may feel compelled to do, on the final hearing of this cause, towards recognizing the complainant's legal rights, and compelling a faithless trustee to account, we are clear that at this preliminary stage,

with our present impressions of the character and general scope of complainant's business, the court ought not, by the appointment of a receiver, to aid complainant to perfect, and perhaps to enlarge, his combination or trust; and the refusal to appoint a receiver can result in no serious and lasting injury to complainant, because the shares of stock of complainant company, forming the entire consideration of complainant's purchase, have been tendered in court, and may be impounded, to be held as security for any damages susceptible of proof resulting from defendant's mismanagement of the property pending the suit. The motion for a receiver is denied.

MURDOCK v. CITY OF CINCINNATI *et al.*

(Circuit Court, S. D. Ohio, W. D. January 7, 1891.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — WAIVER OF NOTICE — DUE PROCESS OF LAW.

An owner of land abutting on a street, by petitioning for its improvement, and agreeing, not only to pay his own assessments, but also to answer for any deficiency in the collectibility of the assessments against other abutting owners, waives his right to notice or an opportunity to be heard before the assessments are levied; and the proceedings of the city authorities, who levied the assessment in the exercise of the power conferred on them by law, and in compliance with the petition, cannot afterwards be impeached by such abutting owner, as being without due process of law, for the lack of such notice or an opportunity to be heard.

2. SAME — PENDENCY OF ACTION IN STATE COURT.

The institution of an action in a state court by the city against the abutting owner for the collection of the assessment affords him the opportunity of presenting every objection, either under the constitution of the United States or under the constitution and laws of the state, going to the validity of the assessment; and the judgment rendered in such action will constitute due process of law.

3. SAME — FEDERAL QUESTION.

Whether or not complainant is personally liable for an assessment made for the improvement of a street before he became the owner of property abutting thereon is not a federal question.

In Equity.

Rankin D. Jones, for complainant.

Theo. Horstman, for defendants.

JACKSON, J. The complainant seeks to enjoin the city of Cincinnati, its agents and officers, from collecting or enforcing against him or his property certain foot-front assessments, levied and imposed to meet and defray the expenses incurred in improving Grand, Hawthorn, and Phillips avenues, in said city, on which complainant's lot or parcel of ground bounded and abutted. It is not denied that the laws governing the city of Cincinnati confer upon its authorities full power to make assessments to defray the costs and expenses of improving streets and avenues therein by the foot front of the property bounding and abutting upon such improvements. By sections 2263, 2264, Rev. St. Ohio, the city council are authorized to assess the costs and expenses of acquiring and of improving

streets either upon the general tax-list, in which case the assessment is imposed upon all the taxable real and personal property in the corporation, or the same "may be assessed on the abutting, and such adjacent and contiguous, or other benefited, lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made." Such assessments may be made payable in one or more installments, and at such times as the council may prescribe. It clearly appears that the city authorities directed the improvements, and made the assessments in question to defray the expenses thereof, in accordance with the provisions of the statutes relating to the subject. But it is claimed on behalf of complainant that, although the laws authorizing the assessments complained of were complied with, they, and the proceedings taken thereunder by the city authorities, are wanting in "due process of law," because said assessments are allowed and permitted to be made without notice to, or a hearing, or an opportunity of hearing, by, the owner or owners of the property to be assessed, and because, in fact, no notice was given to complainant, nor any opportunity of hearing afforded him in relation thereto. This is the sole federal question presented by the record or involved in the case. The complainant relies upon the opinion of this court in the case of *Scott v. City of Toledo*, 36 Fed. Rep. 385, in support of his contention. But this case is clearly distinguishable, in several important particulars, from that of *Scott v. City of Toledo*, and is not properly controlled by that decision. It is shown here that complainant actually petitioned the board of public affairs of Cincinnati for the improvement of Hawthorn and Phillips avenues, and for the assessment for the whole cost of such improvement, to be made and collected in 10 annual installments, etc.; "and in consideration of the city's making said improvement," he, and each of the signers of said petitions, agreed with each other and with said city, and jointly and severally bound himself, to make good to the city any deficiency in the collectibility of the assessment, caused by insufficiency of values of property of those not signing the petitions. In respect to Grand avenue, his predecessor in title had signed and presented to said board a similar petition. In compliance with said petitions, after due and proper steps to ascertain the costs of the improvements, and the propriety of making the same, the board of public affairs recommended the making of the improvements asked for, and reported to the council the necessary ordinances on the subject, which were passed, and assessments made, and directed to be collected in 10 installments, on the basis of the foot front of the property abutting on the improvements. Due notice of those proceedings was given to complainant. After advertising for bids, the work was let out and completed with the full knowledge and acquiescence of complainant. While said petitions for the improvement of said avenues did not, in express

terms, state upon what basis or plan the city authorities should make the assessments to pay for the same,—whether in proportion to the benefits which might result from the improvement, or according to the value of the property to be assessed, or by the foot front of the property bounding and abutting upon the improvement,—the petitioners set forth that they were severally the owners of property “represented by the foot front abutting upon” the avenues asked to be improved, and opposite their respective signatures the number of foot front was given in figures. If the petitions thus presented did not impliedly request that the assessment should be made on the foot-front plan or basis, it very clearly left that matter to the discretion of the city authorities. Under such circumstances, is complainant in position to claim that he has had no notice of the assessment or opportunity to be heard in respect thereto? The proceedings on the city’s part were in accordance with the provisions of law relating to the subject. Those proceedings were had and taken at complainant’s written request, and in conformity therewith. Can he now be heard to complain that there was a want of notice or opportunity to be heard in respect to what he had thus previously petitioned should be done? He not only petitioned for the improvement to be made, but expressly requested that the assessment to pay for the same should be made and collected in 10 equal annual installments, and furthermore agreed to answer for any deficiency in the collectibility of the assessment caused by insufficiency of values of property of those abutting owners not signing the petition. The Ohio decisions hold that the property owner, under such circumstances and conditions, is estopped from denying or impeaching the assessment. Whether or not such conduct constitutes a technical estoppel, it is not necessary to here discuss or determine. It is, however, a clear waiver of the right to insist upon notice, or an opportunity to be heard, in respect to steps taken or proceedings had in pursuance of the property owner’s express request. When the city authorities exercise power conferred by law at the instance and special request of the party to be assessed, and in the mode desired, it would be an anomaly in the law if such party could afterwards impeach the proceedings, and have them declared void for want of notice or an opportunity to be heard.

Proceedings, whether *ex parte* or adversary, which result in the taking or depriving a person of his private property, are not wanting in “due process of law” if such person has, in advance, consented to the same. His request that they should be had is the equivalent of notice, or a waiver thereof. It would be absurd to say that a party, who had, by written petitions or power of attorney, requested or authorized a court of competent jurisdiction to enter up a judgment against him for a given sum, or for a sum to be ascertained, was entitled to notice of what the court did under and in pursuance of his authority, in order to give validity to its action. The judgment entered by the court without notice, but in conformity with the prayer of the petitions, would not be wanting in “due process of law.” The previous request by the party to be affected, for the exercise of power conferred by law upon public officials,

is the substitute for notice; and the proceedings taken in conformity with such request and the provisions of law are not subject to the objection of being wanting in "due process of law," for lack of notice to, or an opportunity of hearing by, the petitioner.

Aside from the fact that the assessments complained of, or two of them, at least, were made at the special instance and request of complainant, and other owners of property abutting on the improvements, it appears that the city of Cincinnati is now proceeding by civil suit in the state court against complainant to collect the assessments in question. To that suit complainant may interpose any and all defenses going either to the validity or regularity of said assessments. Said suit gives him a full opportunity to be heard, and affords him the privilege of presenting every objection that can possibly be made, either under the constitution of the United States or under the constitution and laws of Ohio, to the validity of the assessments. It cannot be questioned that the judgment which may be rendered against complainant in said suit will constitute "due process of law."

Whether complainant is personally liable for the assessment made for the improvement of Grand avenue before he became the owner of the property abutting thereon, is not a federal question. If he or his property is held liable for that assessment, he, no doubt, may look to his grantors for indemnity under the covenants of their deed. In the foregoing respect, the present case is essentially different from that of *Scott v. City of Toledo*, 36 Fed. Rep. 385. It is not properly controlled by the opinion in that case, but is controlled by the decision of the state and supreme courts in the case of *Corry v. Campbell*, 3 Wkly. Cin. Law. Bul. 174, cited by counsel for respondents, which presented the same questions, and under substantially the same state of facts. The conclusion of this court is that complainant's bill should be dismissed, with costs to be taxed, and it is accordingly so ordered and decreed.

UHLE *et al.* v. BURNHAM *et al.*

(Circuit Court, S. D. New York. December 31, 1890.)

1. DEPOSITION—MOTION TO SUPPRESS—WAIVER OF OBJECTIONS.

Failure to make a timely motion to suppress a deposition is a waiver of any objection as to the manner of taking it.

2. SAME—NOTICE OF TAKING.

Notice under Rev. St. U. S. § 863, that plaintiff will proceed to take depositions of certain witnesses in three different cities on the same day, is not such reasonable notice as the statute requires, and such depositions should be suppressed.

3. SAME.

Where defendants' counsel appears and objects to the taking of the depositions on the ground that the notice is unreasonable, the fact that he afterwards proceeded to cross-examine the witnesses is not a waiver of the objection.

4. SAME.

It is not an answer to a motion to suppress such depositions that defendants have given a similar notice of intention to take depositions.

At Law. For motion to remand, see 42 Fed. Rep. 1.

Charles Putzel, for plaintiffs.

Elihu Root, for defendant.

LACOMBE, Circuit Judge. As this case will be on the trial calendar for January 5th, and both sides are solicitous that the motions now under consideration be promptly disposed of, a brief memorandum is all that can be filed with this decision.

(a) The motion and the counter-motion for production on the trial of the books and papers of Jules Arbib & Co. were practically agreed to by both sides upon the argument. An order may be taken requiring both parties to produce, on the trial, all such books and papers which were in their possession, or under their control, at the time of the service of notices of these motions, or which have since come into their possession or under their control.

(b) The motion to suppress depositions. No such motion is made as to the depositions of the witnesses examined in Kansas City, nor as to one of the witnesses (Charles Nechter) examined at Chicago. By not making a timely motion to suppress, the defendants must be deemed to have waived any objections to the manner of taking the testimony of those witnesses. Motion is made, however, as to the other Chicago witness, (Pilotte,) and as to the deposition taken in St. Louis. It appears that, on November 24th, plaintiffs' counsel served a notice under section 863, Rev. St. U. S., that he would, on November 29th, proceed to take the depositions of certain witnesses at St. Louis, Mo., and would also, on the same day, proceed to take the depositions of certain other witnesses at Chicago, Ill. Under the same section he also gave notice, on November 24th, that he would proceed to take the depositions of various witnesses at Kansas City, Mo., on November 28th. On the last-named day the examination of witnesses was begun in Kansas City, and such examination was actually in progress on November 29th; in fact, it was not completed till some time subsequent to December 6th. Motion to suppress the depositions taken at Chicago and St. Louis is now made, upon the ground that, under the circumstances, no such reasonable notice as the statute requires was given. The motion should be granted. The practice pursued was wholly irregular. The method of taking testimony by deposition, allowed by section 863, is a convenient one; and when, for any reason, greater elasticity in conducting an examination than would be possible under a commission with written interrogatories is desired, it is a useful substitute for the latter mode. But it was never intended by the framers of that section that a party might be able to compel his adversary, perhaps at enormous cost, to retain and fully instruct separate counsel in a dozen different cities. Moreover, his personal presence might well be necessary to secure, by suggestions to his counsel, such proper cross-examination as would prevent a failure of justice. Nor could he, in many cases, determine, in advance of the direct examination, in which one of a dozen different places his personal attendance might be most required. The party taking such simultane-

ous depositions would not necessarily experience the same embarrassment, for, by means of carefully prepared written questions, he might safely intrust the examination to clerks, or even to the officer taking the deposition. Such a practice should not be sanctioned by the court; it would be unreasonable, and grossly oppressive. Whoever seeks to avail of the provisions of section 863 must so regulate his notice that the opposite party and his counsel may be able to attend, at the place and time named, entirely unhampered by other engagements which he himself has imposed upon them. The defendants have not waived the objection. Both at St. Louis and at Chicago they appeared by counsel specially retained for the purpose, and objected upon the express ground that the notice given was unreasonable. That thereafter such counsel endeavored, as best he could, to cross-examine is immaterial. The plaintiffs' counsel was duly notified that his practice was irregular before he began to take the testimony, and if he persisted in going on, in the face of the objection, he did so at his own risk. None of the cases cited by the plaintiffs' counsel sustain his contention that the objection was waived by cross-examination, because in none of them was the objection specifically taken before the direct examination began. Moreover, in many of them the objections were technical, and dealt with matters of mere form; the objection here taken is substantial and fundamental. Nor is it a sufficient answer to this motion that the defendants have themselves given a similar notice for taking the depositions of witnesses in Kansas City and in Louisville, Ky., on December 29th and 31st, respectively. It will be time enough to deal with those depositions when they reach here. If the examination in the one place should continue so long as to make it unreasonable to expect the same counsel and the same party to attend to the other, then the defendants' practice will be as irregular as the plaintiffs' has been, and upon proper objection and motion their testimony will probably share the same fate as that of their adversaries.

(c) The motion to be relieved from the stipulation to try the case on January 5th is more difficult to dispose of. The conflicting affidavits of both sides are numerous and lengthy. One of the plaintiffs is here from Saxony waiting for the trial, and it will undoubtedly be a hardship to him to allow a further postponement. It is to be borne in mind, however, that apparently the great bulk of the testimony is to be taken outside of this city,—a fact which must have been known to his counsel from the beginning of the case; and that, although issue was joined in February, the motion to remand to the state court decided in May, and note of issue for the October term was filed in September, no steps were taken by the plaintiffs to secure any of this testimony until the latter part of November, except the issuing of a commission to Bremen, which was evidently intended to obtain evidence of no special moment, as the plaintiffs' counsel felt able to press for trial on December 5th, without waiting for its return. Had the testimony of the Missouri witnesses been taken a month earlier, the various matters, now the subject of discussion, would have been presented to the court sooner, or the de-

fendants' laches in presenting their side of the case would be more apparent. In view, therefore, of the fact that when the case was first reached for trial the defendants were under a stay, (till the return of the Bremen commission;) that their counsel was then actually engaged; and that the voluminous Kansas City depositions were then being taken, presumably requiring the attendance of party as well as counsel,—I am inclined to grant the motion to relieve the defendants from the stipulation, leaving the trial judge, when the case next appears on the day calendar, to make such disposition of it as a just regard for the rights of both parties may then suggest.

(d) The motion to amend the answer. Under the pleadings as they stand, the defendant seems to be sufficiently protected, except possibly as to the defense of payment. If the plaintiffs on the trial show sales (and contracts for sale) of their goods to the defendants, through Jules Arbib & Co. and Auffmord & Co., as mere selling agents, and it further appears that the defendants were chargeable with knowledge that these firms were such agents only, then it would seem that they should have availed of that knowledge earlier in preparing their defense, and should not have waited so long before moving to amend. If they were not so chargeable, or if from the complaint taken, in connection with the transactions which form the subject-matter of the action, they were fairly warranted in assuming that it was not for the purchases from those firms that they were called upon to account, the court can, upon the trial, allow such amendment as will enable them to show that those purchases were paid for. In order, therefore, that an amendment at this stage of the case may not be availed of as an excuse for further postponement, I shall deny the motion without prejudice to its renewal on the trial should the evidence warrant it, and without prejudice to its renewal as a chambers motion should there be a further adjournment of the trial.

CHASE *v.* UNITED STATES.

(*Circuit Court, D. Indiana.* November, 1890.)

CLAIMS AGAINST UNITED STATES—AUTHORITY—POSTMASTER GENERAL.

Under Act Cong. March 2, 1861, § 10, (12 St. at Large, 220,) providing that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment," the postmaster general is not empowered to lease on behalf of the government a building for a post-office for the term of 20 years, and such lease, taken by the postmaster in May, 1870, cannot be enforced against the government after it has vacated the premises.

At Law.

A. C. Harris, for plaintiff.

Smiley Chambers, U. S. Atty.

GRESHAM, J. On July 17, 1866, John K. Snider leased to the United States for a term of 10 years a lot, and building standing thereon, in the

city of Lafayette, Ind., to be occupied as a post-office. The lessee held the premises until December 24, 1869, when the building was destroyed by fire; the lessor, in the mean time, having conveyed the title and his interest in the lease to James Montgomery. On May 1, 1870, Montgomery executed a lease to the United States, represented by John A. J. Cresswell, then postmaster general, for described portions of a building, which Montgomery covenanted in the instrument he would erect upon the same lot. The lease was for a term of 20 years, at an annual rental of \$1,500, payable in equal quarterly installments. The lessor agreed, at his own expense, to furnish and keep in repair, to the satisfaction of the postmaster general, all boxes and fixtures necessary for a post-office. Montgomery erected a building according to the terms of the lease, and the lessee went into possession. On April 15, 1870, Montgomery assigned his interest in the lease to Chauncey C. Tuttle, who, on February 10, 1871, assigned to Hiram W. Chase. Chase died January 25, 1889, testate, and the plaintiff duly qualified as executrix of the will. The lessee, on May 1, 1886, without complaining that the lessor or any of his assignees had failed to comply with the terms of the lease, vacated the premises, and refused to pay rent thereafter. The declaration avers that, after the assignment to Chase, and while the premises were occupied by the lessee, Chase from time to time laid out and expended for furniture, fixtures, and required changes, \$2,000, and that he was engaged in making further repairs and additions, at the request of the postal officers, when the premises were vacated. Judgment is demanded for \$6,000, the rent claimed for the unexpired term of the lease. The defendant demurred to the declaration.

The executive officers of the government have no power to bind it by contract, unless there be statutes expressly or by clear implication authorizing them to do so. The annual appropriations which are made by congress to defray the expenses of the executive departments do not authorize heads of those departments to bind the government by contract beyond the time for which such appropriations are made applicable. It is true that when this lease was executed it was the duty of the postmaster general to establish post-offices for the convenience and accommodation of the people, and that an appropriation had been made to enable him to discharge that duty and pay rent for that year. This authorized him to lease buildings, not for a term of years, but for one year,—the time for which the appropriation was applicable. If the postmaster general was authorized to lease the premises for 20 years, he was authorized to buy them for the government in fee, and it will not be contended that he could have done that. Section 10 of the act of March 2, 1861, (12 St. at Large, 220,) provides that—

“No contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the war and navy departments, for clothing, subsistence, fuel, quarters or transportation, which, however, shall not exceed the current necessities of the year.”

There was no statute in force on the 4th day of February, 1870, or the 1st day of May of the same year, other than that in which an appropriation was made to pay for the use of buildings occupied as post-offices, which authorized the postmaster general to make a contract of lease. The tenancy commenced on the 1st day of May, 1870, and continued from year to year until the 1st day of May, 1886, when the government abandoned possession and refused to pay rent thereafter. If the premises had been held longer, but less than a year, the government might have been liable for another full year's rent as tenant by the year.

Demurrer sustained.

HAKE v. BROWN *et al.*

(Circuit Court, S. D. New York, January 9, 1891.)

1. TAXATION OF COSTS—DEPOSITION FEES—TRAVELING EXPENSES.

In the second circuit, the rule is settled in favor of taxing the fees for taking depositions before the examiner, pursuant to equity rule 67 of the supreme court of the United States.

2. SAME—PRINTING RECORDS AND BRIEFS.

In the second circuit, the charge for printing records and briefs in compliance with the circuit court rules will be taxed.

3. SAME—WITNESS' EXPENSES.

Where, in taking depositions, an adjournment for so long a time as to warrant witnesses in returning home between appearances is had by the fault of the unsuccessful party, the additional traveling expenses will be taxed to him.

For opinion on the merits, see 37 Fed. Rep. 783, and *ante*, 283.

Briesen & Knauth, for complainant.

Walter D. Edmonds, for defendants.

LACOMBE, Circuit Judge. This is an appeal by the complainant from the taxation of defendants' costs.

1. His first exception is to the item of "deposition fees, \$60." This includes the taking of the testimony of 24 different witnesses before the examiner, pursuant to rule 67 of the equity rules of the supreme court. The depositions of these witnesses were admitted or used in evidence on the trial. The complainant cites the cases of *Strauss v. Meyer*, 22 Fed. Rep. 467, and of *Tuck v. Olds*, 29 Fed. Rep. 883, in support of his contention. In this circuit, however, the question has been settled the other way, and no sufficient ground for reconsidering the views expressed in the earlier decisions is shown. The clerk's taxation in this particular is therefore affirmed. *Stimpson v. Brooks*, 3 Blatchf. 456; *Wooster v. Handy*, 23 Fed. Rep. 49; *Spill v. Manufacturing Co.*, 28 Fed. Rep. 870; *Factory v. Corning*, 7 Blatchf. 17. See also the opinion of Judge JACKSON in *Ing-ham v. Pierce*, 37 Fed. Rep. 647.

2. Complainant next objects to the charge for printing the record and brief, in compliance with the rules of this court. Whatever may be the decisions in other circuits, it is settled in this circuit that this is a proper item of disbursements. Cir. Ct. Rule May 18, 1878; *Dennis v. Eddy*, 12 Blatchf. 195.

3. The defendants also have appealed from the clerk's refusal to allow more than one traveling fee to the same witness, when the taking of his testimony required his attendance on several different occasions, and intervals between the witness' successive appearances were so long as to warrant his return to his home, and therefore require additional traveling expenses to secure his attendance on the adjourned day. In only one of these cases, however, does it appear from the record that such adjournment was caused by the sole fault of the complainant. For that attendance, the additional traveling fees may be allowed. In all the other cases the clerk's taxation is affirmed.

NORRIS *et al.* v. UNITED STATES.

(Circuit Court, W. D. Louisiana. January 5, 1891.)

1. ACTION FOR TIMBER CUT ON PUBLIC LAND—BURDEN OF PROOF.

Where, in an action by the United States to recover the value of logs cut on public land, the plaintiff's evidence shows that the defendant purchased from the trespasser and converted to his own use a large number of logs, among which were some of those cut from the public land, the burden is on the defendant to show that all the logs so bought by him were not so cut.

2. CONFUSION OF GOODS.

Where the logs so cut were mixed in the river with a large quantity of other logs, so that the identical logs could not be conveniently separated, the United States thereby acquired a proportionate interest in the entire mass of logs, under Rev. Civil Code La. art. 528, which provides that, "when a thing has been formed by a mixture of materials belonging to different proprietors, * * * if the materials cannot be separated without inconvenience, their owners acquire in common the *pro rata* of the thing."

At Law. Error to district court.

J. L. Bradford, for plaintiffs in error.

M. C. Elstner, U. S. Atty., for defendant in error.

PARDEE, J. The United States brought suit in the district court for this district against the defendant Mrs. Norris, as executrix of Mrs. Matilda Jones, for the sum of \$1,507, with legal interest from judicial demand for the manufactured value of certain logs unlawfully and tortiously cut and removed during the summer and fall of 1884 by one George Airhart, in Calcasieu parish, a knowing and willful trespasser upon public lands of the United States, which said logs cut and removed were by said Airhart sold and delivered to the said Mrs. Jones, and by her converted to her own use. The petition charged that Mrs.

Norris was liable as executrix of Mrs. Jones, and individually as one of the heirs of Mrs. Jones. The defendant appeared, and filed exceptions to the plaintiff's petition: (1) That, as she was sued as one of the heirs of Matilda B. Jones, the other co-heirs should be joined as the defendants; (2) that as executrix of Mrs. Matilda B. Jones, if liable at all, [all of which was denied,] she, the said executrix, is only bound to make civil reparation for the same, and is not bound for punitive damages. Thereafter the court ordered "that the exceptions filed herein in behalf of defendants stand as an answer." A jury being impaneled, the cause was heard and submitted, the jury finding a special verdict as follows:

"We find special facts that 300 logs were cut by Airhart from public lands as a trespasser; that besides this 300 logs he cut 300 from his own land; that he put the 600 into the river; that Norris, the defendant, bought five hundred and forty of said 600 logs from Airhart; that Norris paid Airhart \$520 for the logs (540) bought from him; that \$520 was paid for the whole of the logs, and Airhart received from Norris, defendant, one-half of the \$520.00 for logs cut by Airhart as a trespasser, and is liable therefor to plaintiff; that the 300 logs cut by Airhart as a trespasser, 270 of which reached Norris, defendant, and which were paid for by him, averaged 225 feet to the log, worth five dollars per thousand, and 50c. stumpage for 135 trees; that Norris in purchasing from Airhart was in good faith."

Thereupon the court rendered judgment in favor of the plaintiff, and against the defendant, the executrix, in the sum of \$243, with legal interest from May 13, 1887, until paid, and all costs of suit. The amount of the judgment seems to have been arrived at by calculating the number of feet in 270 logs at 225 feet to the log, and then by allowing \$4 per thousand as the value for which defendant was responsible. If the verdict had been followed, the judgment should have been, in one aspect, for \$260, the amount which Norris paid for the logs, and for which the verdict says the defendant is liable, or for the sum of \$303.75, the actual value of the timber converted, at \$5 per thousand, as found by the jury. This error, however, if error it be, is one in favor of the appellant, and she cannot complain thereof.

On the trial of the case the court charged the jury as follows:

"That if the jury are satisfied from the evidence that the logs, or any part thereof, alleged in the petition to have been sold and delivered to defendant or her agent, were, without any fault or act of hers or her agent, and before the same came into his or her possession and control, mixed up in a large mass of other logs of several thousand in number in such a way that the identical logs described in such petition could not be conveniently separated from the mass, and that defendant, after such admixture, purchased and received delivery of such a portion of the mass as had by the several owners thereof been set apart as equivalent to the *pro rata* interest therein of George Airhart, then they should find for the government for the number of logs thus taken out of the mass by defendant, unless she can show by satisfactory evidence that such number did not contain any part of the logs described in petition as cut from the particular lands therein set forth."

To which charge the defendant excepted, and reserved a bill of exceptions, and the defendant requested the court to charge—

"That if the jury are satisfied from the evidence that the logs or any part thereof, alleged by the petition to have been sold and delivered to the defendant or her agent, were, without any fault or act of hers or her agents, and before coming into her or her agents' possession and control, mixed up with a mass of other logs of several thousand in number in such a way that the identical logs described in the petition could not conveniently be separated from the mass, and that defendant, after such admixture, purchased and received delivery of such a portion of said mass as had by the several owners thereof been set apart as equivalent to the *pro rata* interest therein of George Airhart, then they should find only against the defendant for the number of logs thus delivered to defendant out of the general mass which the evidence shows were actually cut and removed from the lands described in petition."

Which charge, as requested, the court refused to give, and the defendant excepted to such refusal and reserved a bill of exceptions.

The defendant prosecutes this writ of error, and assigns as error the charge as given, and the refusal of the court to charge as requested. Appended to the bills of exceptions is the following statement by the court:

"In this case it was shown by the evidence, not in any way contradicted by the defendant, that George Airhart cut from public lands, as a trespasser thereon, a number of logs; that he put all the logs so cut in the river, and in the usual way they were floated in small cribs or single logs a distance below, where a man employed, not as agent of any one, in the business of collecting and booming timber, caught the logs so cut by Airhart, and a large lot of other logs, and boomed them together. The same man put all the logs, several thousand in number, indiscriminately into cribs or blocks of logs, putting some logs of one brand with some of another brand into the same crib. Then the defendant Norris became a purchaser of a number of these cribs of timber, and in settlement for the number purchased by him he paid Airhart for the number of logs or feet of timber which he had, as was not denied, put into the river. The logs purchased by the defendant were all, each of them, branded in the mark of their respective owners. It was shown that the man who boomed the several thousand logs and cribbed them kept a list of the different brands in each crib. This list was kept by him in the interest of the purchasers and owners of the logs. It was shown, too, without dispute, that when the man had finished putting all the logs in the cribs, the several different owners of the logs agreed among themselves, instead of claiming the logs of their respective brands, to take logs in the cribs showing sufficient feet in timber to satisfy their claims or shares in the whole number of logs so boomed and cribbed. On this undisputed showing the court charged that the plaintiff should recover for the whole number of logs put in the river by Airhart as a trespasser on public lands, because defendant paid him (Airhart) for that number of logs; and, if defendant did not, as a fact, get any of the particular logs so cut by Airhart, it was within his power, and it was incumbent upon him, to show how many he did get."

Counsel for appellant complains that the effect of the charge as given is to relieve the plaintiff from the consequences of a plain failure to follow his property by competent evidence into the possession of the defendant, and to allow the plaintiff to eke out his case by requiring the defendant to prove affirmatively that the certain logs he did receive were not the logs unlawfully taken from the plaintiff by a third party.

The plaintiffs' right to recover against the defendant is based upon the proposition that their property came to the possession of Mrs. Jones, v.44f.no.10—47

and was converted by her to her own use. As it is not charged that Mrs. Jones was a trespasser, the defendant cannot be liable simply because Mrs. Jones bought and paid for the plaintiffs' property. She must have also received it and converted it.

The charges given and refused are based upon the proposition, and it seems to be supported by the evidence as stated, that the logs claimed by the United States had been mixed up in a large mass of other logs, of several thousand in number, in such a way that the identical logs claimed by the United States could not be conveniently separated. The defendant bought a number of these cribs. It is a fair inference that in the cribs were some of the identical logs belonging to the government. In the nature of things, the plaintiffs could not prove how many of those logs actually came to the defendant's possession. According to the statement of the court, it was within the power of the defendant to show how many of the identical logs claimed by the United States came into Mrs. Jones' possession. The statement of evidence shows that the information was kept in the interest of the purchasers, and therefore the court says "it is a matter peculiarly within defendant's knowledge." Wharton in his work on Evidence, (volume 1, § 367,) says: "It has been sometimes said that, when a fact is peculiarly within the knowledge of the party, the burden is on him to prove such fact, whether the proposition be affirmative or negative." In *Ford v. Simmons*, 13 La. Ann. 397, the supreme court of the state of Louisiana holds: "The *onus probandi* lies upon a party who is obliged to free himself from liability by proving a fact, when the knowledge of it is supposed to be more within his reach than that of his adversary." In *Bowman v. McElroy*, 15 La. Ann. 663, the same court lays down the rule: "Where one of the parties to a suit has more means of knowledge concerning the matter to be proved than the other, the *onus* is on him;" citing, among other authorities, 1 Greenl. Ev. § 79. From an examination of the above and other authorities, I am of the opinion that in cases like the present the plaintiffs must make out a case of liability on the part of the defendant, and then, if the exact extent of the liability depends upon evidence not within plaintiffs' power to produce, but peculiarly within the defendant's, the ruling putting the burden on the defendant may be cautiously applied. In this case the plaintiffs show, by a presumption fairly arising from the facts proved, that a part of their property came to defendant's possession, and was converted. They failed to show exactly the extent of the possession and conversion, but they show that defendant bought and paid for the whole amount in controversy. In this state of the proof, it seems as though the application of the rule in question would work very little if any hardship to the defendant.

I am of the opinion, however, that the charge complained of has other grounds to support it. It is heretofore shown that the basis of the judge's charge was that the logs of the United States had been mingled indiscriminately with a mass of other logs, of several thousand in number, in such a way that the identical logs could not be conveniently separated. Under such a state of facts, the law of Louisiana provides as follows:

"When a thing has been formed by a mixture of other materials belonging to different proprietors, neither of which can be considered as the principal substance, if the materials can be separated, the proprietor, without whose consent the mixture was made, may demand the separation. If the materials cannot be separated without inconvenience, their owners acquire in common the *pro rata* of the thing in proportion to the quantity, quality, and value of the materials belonging to each of them." Rev. Civil Code, art. 528.

Under this article, after the logs of the United States were commingled with those of other log-owners, so that the materials of the mass could not be separated without inconvenience, the United States acquired, in common with the other log-owners, the *pro rata* ownership of the mass. The evidence shows that by agreement this same *pro rata* ownership was allowed to Airhart, the trespasser, and that this same share was sold to defendant's testatrix, and was received and converted by her. It was for this share that the charge held the defendant liable. The suit is one in which the United States are following their property practically stolen from them, and they have the right to follow it through all the changes it went through, as long as identity was possible.

Upon consideration of the whole case, this court is not prepared to hold that there was error in the charge given, or in the refusal to charge as requested. The judgment of the district court will be affirmed, with costs; and it is so ordered.

NORRIS *et al.* v. UNITED STATES.

(Circuit Court, W. D. Louisiana. January 5, 1891.)

ACTION FOR TIMBER CUT FROM PUBLIC LAND—VERDICT.

In an action by the United States against an executor for the value of timber cut from public land and sold by the trespasser to defendant's testator a verdict finding that the trespasser cut the logs, and that defendant got them without finding that the logs were cut from the land described in the petition, or from government land, or that they ever came into the possession of defendant's testator, is insufficient to sustain a judgment against defendant.

At Law. Error to district court.

J. L. Bradford, for plaintiff in error.

M. C. Elstner, Dist. Atty., for defendant in error.

PARDEE, J. The United States brought suit against Mrs. Annie E. Norris, wife of William B. Norris, executrix of the last will and testament of her deceased mother, Mrs. Matilda B. Jones, to recover the value of certain timber or trees cut from the public lands of the United States, viz., N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, sec. 7, T. S. 7, R. 7 W., La. meridian, N. O. land district, and also E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of said section, being vacant public lands, by trespassers, and unlawfully converted by the said Mrs. M. B. Jones, in her life-time, to her own use. Said Mrs. Norris pleaded several exceptions and a general de-

nial, and thereafter, the case coming on before the court and jury for trial, the jury rendered the following verdict:

"We, the jury, find as facts in this case that Parker cut two hundred and twenty logs from the land subsequently entered, to-wit, S. $\frac{1}{4}$, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, sec. 7, T. S. 7, R. 7 W. This cutting was made in 1883 and 1884, and that said lands were entered and paid cash for entry September 27, 1886; that Parker never lived upon nor entered upon or improved the said lands, and is not living on said lands to-day; that Parker cut forty logs off E. $\frac{1}{2}$, same section, vacant lands; that Norris got thirty of the last-named logs and one hundred and eighty of the first-named logs, the logs averaging two hundred and twenty-five feet, and worth five dollars (\$5.00) per thousand at the bay where Norris received them, and fifty cents a tree standing, for one hundred and five trees."

Upon this verdict the court rendered the following judgment:

"In this case, by reason of the verdict of the jury, and by reason of the law and the evidence being in favor thereof, it is ordered, adjudged, and decreed that the plaintiffs do have and recover of the defendant, Mrs. Annie E. Norris, executrix, the sum of one hundred and eighty-nine dollars, (\$189.00,) with legal interest from May 13, A. D. 1887, until paid, and all costs of suit."

From this judgment this writ of error is prosecuted. On the trial several bills of exception were taken to the charges and refusals to charge on the part of the court. It does not seem necessary to consider them, because it does not appear that the verdict as above recited warranted any judgment whatever against the defendant. The 220 logs found to have been cut by Parker in 1883 and 1884 are not found to have been cut upon any lands described in the petition, and there is nowhere in the verdict a finding that any of the logs found to have been cut by Parker were cut off from government lands, or ever came to the possession of defendant's testatrix. The verdict does not appear to warrant any judgment whatever against the defendants. It is therefore ordered, adjudged, and decreed that the judgment of the district court in the case of Mrs. Annie E. Norris be avoided and reversed, and that the case be remanded to the district court, with directions to award a trial *de novo*.

UNITED STATES *v.* NORRIS *et al.*

(Circuit Court, W. D. Louisiana. January 5, 1891.)

REVIEW ON APPEAL—EVIDENCE NOT PRESERVED IN RECORD—INSTRUCTIONS.

Where, in an action by the United States to recover the value of timber wrongfully taken from public land and sold by the trespassers to the defendant, the evidence is not preserved in the bill of exceptions, the ruling on instructions as to measure of damages, based upon the assumption that defendant bought the timber in good faith, cannot be assigned as error. Following *U. S. v. Wingate, ante*, 129.

At Law. Error to district court.

M. C. Elstner, for the United States.

J. L. Bradford, for defendant in error.

PARDEE, J. The United States having sued the defendant Mrs. Annie E. Norris, wife of William B. Norris, for the sum of \$3,000, for the value of timber unlawfully cut by trespassers on the public lands, and converted by the said defendants to their own use, recovered a verdict of \$105, upon which judgment was rendered for the sum of \$105, with 6 per cent. interest thereon, etc., from which judgment the United States prosecutes this writ of error.

The only errors assigned relate to the charges and refusals to charge by the court, as set forth in the following bills of exceptions:

"Be it remembered that upon the trial of this cause, the evidence being concluded, the court, among other things, charged the jury as follows, to-wit: 'That, the defendant being in good faith in the purchase of the timber in open market, and at the usual place for delivering logs to her mill, the government can recover against defendant only the value of one dollar (\$1.00) per thousand at or on the land where the timber was cut ready for hauling,'—to which ruling plaintiffs excepted, and took this their bill of exceptions, and ask the same to be entered of record. Be it further remembered that the plaintiffs ask the court to charge the jury as follows: 'If the jury finds that W. B. Norris, agent for the defendant, purchased the timber in question at or near his mill, or in the water-way leading thereto, they will find against the defendant in the sum of five dollars per thousand; or, if they find that he paid for said timber five dollars per thousand, they will find for that sum,'—which charge was refused by the court; to which refusal, as well as for the charge given, plaintiffs excepted, and tender this their bill of exceptions, and ask the same to be entered of record," etc.

These bills of exception recite no evidence, and the case seems to be identical in all respects with that of *U. S. v. Wingate*, lately decided in the circuit court for the eastern district of Texas, reported *ante*, 129, and for the reasons there given the judgment of the district court must be affirmed.

UNITED STATES v. NORRIS *et al.*

NORRIS *et al.* v. UNITED STATES.

(Circuit Court, W. D. Louisiana. January 5, 1891.)

At Law. Error to district court.

M. C. Elstner, U. S. Atty.

J. L. Bradford, for Mrs. A. E. Norris.

PARDEE, J. The United States brought suit in the district court against the defendant to recover the value of certain timber and logs unlawfully removed by trespassers from vacant public lands, and by the defendants received and converted. After various exceptions were filed, which seem to have been disregarded because filed too late, the defendant filed a general denial. A trial was had before a jury, which found a verdict for the plaintiff, and against the defendant, in the sum of \$687.50, whereupon the defendant filed a motion for a new trial, on the ground that the verdict was excessive, and contrary to the law and the evidence. The motion for a new trial appears to have been dis-

posed of by agreement between the parties that it should be granted, for thereafter, without mentioning it, a waiver of trial by jury was entered and the cause was submitted to the court. The court found the following statement of facts:

"Henry Gill, in 1877, desiring to enter the following described lands: N. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, sec. 12, in T. S. 7, R. 8, W., lying in Louisiana, Calcasieu parish, public lands at that time,—Gill made application and affidavit under homestead laws, and paid thirteen and ninety-seven one-hundredths dollars (\$13.97) as the fee required by the government. He did not go upon the lands, and made no improvements thereon at any time or kind; that in 1883 and 1884 Gill sold to Lanier & Nixon all the right to cut all the timber on the said lands; that Lanier & Nixon gave him a trifling sum for the right to cut the timber. Lanier & Nixon trespassed upon the lands, and cut five hundred pine logs therefrom. The five hundred logs measured one hundred and twenty-five thousand feet. The logs lying cut on the ground were worth \$1.25 per thousand. After they were put in the water to be converted the logs were worth \$5.50 per thousand. W. B. Norris, as the agent of his wife, the defendant in this suit, bought the five hundred logs from Lanier & Nixon at \$5.50 per thousand. He did not know that said logs were cut by them from the described lands. Norris bought and received the logs at the general place where he bought logs for defendants' mill in open market at the ordinary prices for timber. Gill, desiring in 1889 to take the benefit of the law of 1880, (June 15th, section 2 thereof,) was allowed by the government officers in the land-office to pay \$1.25 per acre to the government for said lands, and he was allowed a credit on the sum to be paid by him for the \$13.97 paid by him in 1887, when he made his application. Gill now has title to the said land. On this statement of facts the court orders and decrees that plaintiff have judgment against the defendant in the sum of one hundred and sixty-seven and twenty-five one-hundredths dollars, (\$167.25,) with legal five per cent. interest from date of filing petition in said suit."

The reasoning and opinion of the court are found in 41 Fed. Rep. 424. On the statement of facts as found by the court the defendant asked the court to rule as follows:

"That under the special finding of facts it is good law to hold that the United States, plaintiff in this suit, by their legislative act, being the law of June 15, 1880, § 2, condoned the failure of the homestead enterer, Henry Gill, to enter upon, improve, and cultivate land covered by his homestead entry, according to the requirements of the homestead acts; and that, having received from him in 1889 the full price at which the lands were held for sale in 1877, issued to him the usual evidence of such payment, the said United States, as the plaintiff in this suit, cannot recover from the said Gill, or any person cutting timber on said lands under his authority, any civil damages for said cutting or the removal of said timber from said land when the cutting and removal were done after the said Gill made his homestead entry, and before he bought the land in 1889."

This ruling was refused by the court, and bill of exceptions reserved. The plaintiffs also reserved a bill of exceptions to the finding that the defendant, being a purchaser in good faith, was responsible to plaintiffs only in the sum of \$1.25 per thousand. Both parties have sued out a writ of error; one complaining that too small a judgment was given in his favor, and the other that any judgment at all was given against him.

The questions presented here as to the effect of the homestead entry and the rule of damages are identical with those decided in the case of *U. S. v. Norris*, ante, 740, and the decision in that case must control the present case. It is therefore ordered and adjudged that the judgment of the district court be and the same is reversed, with costs, and that this cause be remanded to the said district court with instructions to enter judgment for the plaintiff against the defendant in the sum of \$687.50, with legal interest from judicial demand, and for all costs.

RILLSTON v. MATHER *et al.*

(Circuit Court, W. D. Michigan. January 19, 1891.)

1. MASTER AND SERVANT—NEGLIGENCE—DANGEROUS PREMISES—PROVINCE OF JURY.

In an action for personal injuries, it appeared that plaintiff was employed by defendants in an engine-room, in which there was a steam-heater, composed of coils of pipe, and in which defendants kept dynamite and boxes of fulminating caps. The latter were attached to fuses after being brought to the engine-room. This had been done by others until a few days before the accident causing the injuries sued for, when plaintiff was ordered to do it. Plaintiff was injured by an explosion which occurred, as he testified, one morning as he entered the engine-room. The heater was very hot at the time, some of the caps and dynamite were quite near it, and the engine jarred the building. The caps were extremely dangerous to one not understanding them, and the defendants failed to give the plaintiff warning of the danger. There was conflicting evidence as to how the accident was caused, and it might have been caused by the way plaintiff handled the caps. *Held*, that it was proper to submit the case to the jury.

2. SAME—NOTICE OF DANGER.

Where the master puts the servant into employment attended with dangers of a latent character, he is bound to give the servant information of the incidents of the peril in which he is placed, if it is not reasonably to be supposed that the servant understands them.

On Motion for New Trial.

F. O. Clark, for plaintiff.

Hayden & Young and *A. C. Dustin*, for defendants.

SEVERENS, J. Upon the trial of this cause it appeared that the plaintiff was employed by the defendants, who were working a mine in the northern peninsula of Michigan, in the management of that part of their machinery for lifting the ore out of the mine which was situated in an engine-room, as it was called, located near the opening of the shaft, upon the surface. The engine in this room was operated by steam, brought there from the boiler-works by an under-ground steam-pipe. The engine propelled the drums, which were in the same room, and which, by means of a car, cables, and tramway, drew up the ore and returned the car therefor by alternating motion. There was also in this room a heater composed of collected coils of pipe, supplied by steam from the boiler, the steam admitted to the heater being controlled by a valve. While the plaintiff was thus employed, the defendants, for greater convenience in supplying explosives to the men working in the mine, put into and kept in this engine-room a quantity of dynamite, which was allowed to be put and scattered somewhat in different parts of the room, but near the heater, where it could be kept warm. They also put there, in boxes containing 100 each, exploders or fulminating caps, which were attached, after being brought there, to one end of a fuse. The fuse and cap thus attached were carried into the mine with the dynamite, and there connected and exploded by those specially charged with that part of the work. Until within a few days (according to the plaintiff's testimony not more than one or two) before the accident which followed, another man had been employed by the defendants to attach the exploders to the fuse in the engine-room where the plaintiff was at work. But that

man was sent to other employment, and the plaintiff was ordered to do his work of attaching the fuse to the exploders, which was done by inserting the end of the fuse into the open end of the cap, and pinching the latter tightly on. One morning soon after, while the plaintiff was coming into the engine-room, as he testified, an explosion of great violence occurred, filling the plaintiff's face with fragments of the copper of which the caps were made, and throwing him out through the door upon the ground. Very shortly after, a much more complete explosion occurred, scattering the engine-house, and leaving in its place a deep hole in the earth. The plaintiff was badly injured, and made totally blind. How the accident occurred was not clearly shown and was in doubt. There was evidence tending to show that the heater was very hot at the time; that some of the caps and a good deal of the dynamite were quite near it; and that there was a jarring motion of the building while the engine was running, and that both of these causes might contribute to the explosion. There was also evidence that the same might have occurred from the plaintiff's own incautious and perhaps careless handling of the caps and fuse; and this, to the judge, seemed the probable cause. But upon all these points the evidence conflicted. The caps were shown to have been of high sensibility, of a good deal of explosive power, and extremely dangerous to one not understanding their nature.

Under instructions as to the law substantially in accord with the doctrine as hereinafter stated, the jury rendered a verdict for the plaintiff in the sum of \$10,000. The defendants move for a new trial, and the principal, I believe the only, ground of complaint is that the court should not have submitted the case to the jury, but should have directed a verdict for the defendants.

I am satisfied that the case was properly left to the jury upon the questions of fact, and that no substantial error in law of which the defendants can complain was committed at the trial. In my opinion, upon more careful consideration, the case of *Smith v. Car-Works*, 60 Mich. 501, 27 N. W. Rep. 662, was rightly decided, and is not in conflict with the decisions of the supreme court of the United States in holding that where the master puts the servant into employment attended with dangers of a latent character,—dangers which are not obvious to the common understanding, but known only to those educated and peculiarly informed upon the subject,—he is bound to give the servant information of the incidents of peril in which he is placed, if it is not reasonably to be supposed that the servant understands them. Beyond any doubt, it may be affirmed as settled that the employer is in duty bound to provide for reasonable security, having regard to the nature and extent of the danger to the employe in the prosecution of his work. *Hough v. Railway Co.*, 100 U. S. 213; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.

This principle has been most frequently applied to cases involving the duty of the master to provide reasonably safe and proper tools and machinery for his work. But such cases are mere illustrations of the principle which, in its reason, is applicable to any case where the employe

is placed in circumstances which may involve peril, from whatever sources arising. And, on the other hand, it is also settled that, as a general rule, the employe who engages in or continues in a hazardous business assumes the risk of such dangers peculiar to it as are obvious. *Hough v. Railway Co.*, *supra*; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166. And when it is said that he assumes the risk of dangers which are obvious, we have defined the limitation of the rule, and made the suggestion of its counterpart. If the danger be not obvious, the employe does not assume the risk. The duty of information is devolved on the master. If it is given, and the servant goes on with the employment, he takes the risk. This would seem to be the logical deduction from the propositions laid down in the cases already cited. The rulings and instructions upon the trial were substantially in accord with these propositions, and, upon a review of them, I cannot think there was any error; at least not any of which the defendants can complain upon the trial.

It is said that the evidence showed that the plaintiff had been a miner for many years, and must have known the dangerous character of the explosives by which he was injured. It is quite true that the plaintiff had been in such employment for a long time, but there was evidence which, if believed, showed that his experience in mining did not include blasting, and that it did not necessarily bring him to any definite knowledge of the peculiar properties of such materials as these exploders. My own conclusion upon the testimony as to the facts would have been different from that reached by the jury, but I think the questions, as presented, were of such a nature that the court was bound to submit them to the jury, and, having done so, under instructions as to matters of law not now complained of, their verdict must be respected. *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. Rep. 118.

The motion for a new trial must be denied.

UNITED STATES v. McCALLUM *et al.*

(Circuit Court, D. Massachusetts. January 16, 1891.)

1. IMMIGRATION—CONTRACT LABOR—NEW INDUSTRIES.

Defendants contracted with a resident of France to come to this country and work for them in the manufacture of "French silk stockings," which were shown to be articles materially different from ordinary silk stockings. It was shown that there had been manufactured here stockings whereof the feet were the same as those of the "French silk stockings," but the legs were different, and made by different machines. *Held*, that the manufacture of the complete "French silk stockings" was a new industry, within the exemption of 23 St. U. S. p. 332, c. 164, imposing a penalty on the importation of contract labor.

2. SAME—NECESSITY—EVIDENCE.

Machines for the manufacture of "French silk stockings" were already in use in this country for knitting the feet, and there was evidence that a skillful workman might learn to run them in a few weeks. It was shown for defendants that their machines stood idle until they imported the Frenchman in question, and that they

had advertised for men to run them, but had failed to find any that were competent. *Held*, that the evidence did not disclose such efforts on defendants' part as to show a necessity to resort to foreign workmen, and they are liable for the penalty.

At Law.

Frank D. Allen, Dist. Atty., and *Henry A. Wyman*, Asst. Dist. Atty., for the United States.

George M. Stearns and *William H. Brooks*, for defendants.

CARPENTER, J. This is an action brought to recover a penalty under chapter 164 of the Acts of the Second Session of the Forty-Eighth Congress, (23 St. 332,) and was heard by the court without a jury.

It appeared that the defendants, on the 20th of October, 1885, contracted with Paul Glouton, resident at Troyes, in France, to emigrate to this country and work for them, at their factory in Holyoke, in Massachusetts, in the manufacture of silk stockings, and that he accordingly emigrated to this country, and commenced, and for a considerable time continued, to work under the contract. The defendants contend that Glouton's engagement was to work for them in a new industry not established in the United States. The testimony shows that for several years before 1885 silk stockings had been manufactured with considerable success in this country, there having been at different times manufactories in Laconia, in New Britain, in Northampton, in Waltham, and perhaps in other places. It appears, however, that there is a certain sort of silk stockings known as "French silk stockings," which, before the year 1885, had not been made in this country. They differ from the other sorts of silk stockings in two particulars: *First*, in having only a single seam in the foot; and, *secondly*, in a certain firmness and elasticity, and a certain smoothness of surface, which are due to the peculiar structure and operation of the French knitting-machines. Before that year these French machines had been imported and successfully used in this country in the manufacture of silk stockings whereof the feet had the characteristics of the genuine French stocking, while the legs were knitted in machines of other construction; but it appears that the complete product known as a "French silk stocking," having both feet and legs knitted on French machines, had never been produced in this country. Under these circumstances, I conclude that the manufacture of this peculiar sort of goods is to be considered as a new industry not then established, within the meaning of the statute. I think the statute intends to except from the penalty therein denounced the manufacture of any distinctly new product, whether it be or be not included within a general class of goods now produced among us. The manufacture of stockings was established, and probably it may be said that the manufacture of silk stockings was established, before the passage of the statute. But the product here in question differs in appearance, in certain useful qualities, and, to some extent, in the method of manufacture from anything theretofore made; and I think the making of it is to be called a new industry.

The question next to be considered is whether skilled labor for the purpose could have been obtained otherwise than by the bringing in of

Glouton. French machines were already in use for the knitting of stocking feet, and it does not appear that the operation of these machines is materially different in the manufacture of the feet and the legs of stockings. Glouton gives it as his opinion that a skillful workman, (meaning doubtless a skillful knitter,) after a few weeks, could learn to run them. The workman Oliver, who was skilled in English machines, learned to run the French machine without instruction at Northampton. The defendant McCallum testifies that the French machines imported by his firm stood idle from March until Glouton came to operate them; that they were broken when they first came, and required to be put in order, and in the mean time the defendants were attempting to get men to run them. It appears that they advertised in newspapers published in those neighborhoods where knitting is done; that one of their workmen wrote to two relatives in Nebraska, who, as he supposed, could run the machines; and that they were not able to find any person competent to do the work. It also appears that two of their workmen attempted, without success, to run the machines. On consideration of the whole evidence, I come to the conclusion that the defendants have not used such reasonable efforts to run their machines as would have disclosed the fact they must resort to foreign workmen; and that such reasonable efforts would have enabled them to discover or to train workmen competent to do the desired work. The defendants are therefore liable to the penalty of the statute.

COHN *et al.* v. ERHARDT.

(Circuit Court, S. D. New York. December, 1890.)

CUSTOMS DUTIES—CLASSIFICATION—JAPANNED WARE.

Hooks and eyes manufactured of iron, and coated with a hard, brilliant, black varnish, known as "japan," are dutiable as "japanned ware," under Schedule N of the Tariff Act of March 3, 1883, and not as "manufactures of iron," under Schedule C of that act.

At Law.

Action to recover back customs duties alleged to have been illegally exacted by the defendant, collector of the port of New York. The merchandise involved in the present suit was imported by the plaintiffs from Europe in April and June, 1889, and was classified for duty by the defendant, collector, as "manufactures of iron," under Schedule C (Heyl, new, paragraph 216) of the Tariff Act of March 3, 1883, as follows: "216. Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*." Against this classification the plaintiffs duly protested, claiming that the goods were dutiable under the provision of Schedule N (Heyl,

new, paragraph 457) of said tariff act as "japanned ware of all kinds, not specially enumerated or provided for in this act, forty per centum *ad valorem*." Upon appeal by the importers to the secretary of the treasury the latter official affirmed the decision of the collector. The uncontradicted evidence produced by the plaintiffs upon the trial proved that the articles in question were hooks and eyes, manufactured of iron; that they had been coated with a black varnish, known as "Japan," composed of asphaltum, linseed oil, and turpentine, and baked in an oven at a temperature of from 250 to 300 degrees of heat; that this process was known in the trade as "japanning," and that plaintiffs' hooks and eyes were in fact "japanned." The defendant introduced the evidence of witnesses from the "notions" and commission trade dealing in like hooks and eyes, and proved that such trade did not deal in "japanned ware," and did not know the term; that plaintiffs' articles were bought and sold as hooks and eyes, japanned hooks and eyes, or black hooks and eyes. The defendant also produced the evidence of extensive manufacturers of "japanned ware," who testified that what was known in their trade as "japanned ware" consisted of a great variety of articles used almost entirely in house furnishing, such as tea-trays, toilet-sets, dust-pans, cash and tea boxes, bread and cake boxes, umbrella stands, tumbler drainers, pails of various sizes and descriptions, wash-stands, cuspidors, wine-coolers, tea caddies, dressing-cases, coal-hods, shovels, and tongs, crumb-pans and brushes, and numerous others; and that these witnesses did not peal in goods like plaintiffs' samples at the time of the passage of the tariff act of 1883. On cross-examination these witnesses admitted that there were numerous other articles of various kinds which were japanned, and which were not included in their list of "japanned ware." At the close of the testimony, plaintiffs' counsel moved the court to direct a verdict for the plaintiffs on the ground that the goods were, according to uncontradicted testimony, japanned, and that the words used by congress in the statute were not used in a commercial, but in a descriptive, sense, and that, consequently, the articles were dutiable under the tariff act as "japanned ware of all kinds." The counsel for the defendant moved the court to direct a verdict for the defendant, contending that plaintiffs' importations were never known in trade as "japanned ware;" that this term had a distinct commercial meaning in trade and in commerce at the time of the passage of the tariff act, and that such commercial meaning covered only the class of goods enumerated as "japanned ware" by defendant's witnesses, and known as such in the trade dealing in "japanned ware;" that congress must be presumed to have legislated with reference to such trade meaning of the words "japanned ware;" and that such trade meaning must be adopted in construing the tariff act. Also that the provision in paragraph 216, "manufactures of iron," etc., was more specific than the provision of paragraph 457, for "japanned ware," since the testimony showed that certain wooden articles were sometimes japanned.

Charles Curie and Wm. Wickham Smith, for plaintiffs.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge. The articles here enumerated are indisputably "japanned." As such they are within the phrase "japanned ware of all kinds" in the tariff act. To take them out of that clause, trade testimony is all that is relied upon. The extreme extent to which such testimony goes in this case is this: that in a branch of trade which deals in a very large number of articles, those articles which it deals in and which are japanned are called "japanned ware" to distinguish them apparently from the articles in which that trade deals which are not japanned. It appears, however, by the testimony of the same witnesses that there are a very great many other goods which are japanned in which they do not deal. What the particular trade that deals in those other goods calls them does not appear; but that they are "japanned ware," within the ordinary meaning of the term, is plain. It seems, then, that the trade testimony is not sufficient to show that, in the general trade and commerce of this country, the words "japanned ware" have received such an exclusive and peculiar trade meaning that they cover only the articles of tin-ware, or what not, that the witnesses here have told us that they dealt in, and do not cover the other articles of metal, of wood, etc., which, it appears, are dealt in in trade, and are japanned, and which are, in the ordinary use of the English language, very plainly covered by the phraseology "japanned ware of all kinds." For that reason I deny the motion of the defendant, and direct a verdict for the plaintiffs.

UNITED STATES v. BROOKS.

(District Court, D. Washington, N. D. December 9, 1890.)

CRIMINAL LAW—BILL OF PARTICULARS—DISMISSAL—EMBEZZLEMENT.

An indictment charging an ex-collector of customs with embezzlement being so indefinite that the court was unable to understand whether it involved but a single transaction or a series of peculations, the court ordered that a bill of particulars be furnished, and continued the case to allow time to prepare it. At a subsequent term, upon the case being called for trial, the district attorney declared his inability to furnish the bill of particulars, and moved to discontinue the cause. *Held*, that the statement of the district attorney was equivalent to an admission of a lack of evidence to sustain the charge, and, as the prosecution must fail, the motion was granted, notwithstanding the defendant's protest and demand for a jury trial.

(*Syllabus by the Court.*)

On Indictment for Embezzlement.

Patrick H. Winston, U. S. Atty.

A. R. Coleman, for defendant.

HANFORD, J., (*orally.*) The defendant in this case was indicted by a grand jury in the district court of the third judicial district of Washington territory, holding terms at Port Townsend, for the crime of grand larceny, by embezzlement of funds belonging to the United States, alleged to have been received by him in his official capacity as collector of customs for the district of Puget sound. The indictment alleges that

a certain gross sum of money came into his hands officially as collector of customs; that he has not accounted for all of it, but has embezzled a part of it. The case was pending at the time of the change from the territorial to a state government, and in due time this court, as successor of the territorial district court, assumed control of the case, and the defendant was arraigned in this court upon that indictment. On being arraigned, he asked to be furnished a bill of particulars. Upon due consideration, the court was unable to understand, from the facts stated in the indictment, whether the government intended to charge him with having received at one time the amount of money alleged to have come into his hands, and from that single amount appropriated a part, or whether it was claimed that at different times during his incumbency in office he had received sums aggregating a gross sum, as mentioned, and had appropriated a part of each of the different sums, or whether it was claimed that the sum total of all his receipts while in office was the gross sum mentioned, and that, after allowing him all proper credits upon a statement of account, there remained a balance for which he was indebted to the United States, or, in other words, a shortage upon a settlement equal in amount to the sum alleged to have been embezzled by him. If the latter contention is the theory on which this indictment was framed, it is obvious that a plea of not guilty would put in issue every cash transaction of the custom-house during the time that Mr. Brooks was in control as collector. It would require a considerable time in the trial. It would require here the presence of a multitude of witnesses, in order to prove all the different items of debit and credit. This being so, for the sake of economy in time, and to save the annoyance and expense of bringing here so large a number of witnesses from almost everywhere, the court deemed it reasonable on the part of the defendant to ask for this bill of particulars, and also deemed that the interest of the government required that it should be furnished before the trial of the case, and therefore granted the motion and continued the cause, for the purpose of affording the government an opportunity to furnish this bill of particulars. The United States attorney now states to the court, on the case being called for trial, that he is not able to furnish this bill of particulars, and therefore asks permission of the court to dismiss the prosecution.

I certainly think that, if the government is unable to furnish the bill of particulars, it is unable to go on with the prosecution. If it cannot state the items of the account, it certainly is not in a position to prove these items; and, as the court will not permit the defendant to be convicted or punished until his guilt is established by some proof, it is impossible to proceed with this prosecution further. The defendant objects to a dismissal of the case, and claims that he is entitled to have a verdict of not guilty from a jury to vindicate him from the charge that has been made, and which appears to be unsupported. I will grant the United States attorney's motion, and in doing so will answer the objection of the defendant in this way: I consider that the mere formal matter of a verdict will add nothing to his vindication. If the jury

were called here, I would be obliged to direct them to render a verdict for the defendant for want of evidence against him; and such a verdict would not be at all different from the ruling which I make in allowing the case to be dismissed for want of evidence to support it.

UNITED STATES v. HARNED.

(District Court, D. Washington, N. D. December 9, 1890.)

Mr. Winston. I move to dismiss—discontinue—this bill of indictment. The amount charged in it to have been embezzled by the defendant Harned constitutes a part of the larger amount alleged to have been embezzled by the defendant Brooks in the case just disposed of. I have no testimony to proceed upon in one case more than another. The government is without testimony to sustain the indictment, being unable to get the items of account from the department; therefore, I ask the court for permission to discontinue the indictment.

Mr. Coleman. The statement we made in the other case, your honor, would be applicable to this one, and on the same grounds we desire a verdict in this case. We have a statement certified from the commissioner of customs, showing that the government was at that time indebted to Mr. Brooks, who was Mr. Harned's principal, instead of Mr. Brooks being a defaulter; that it is impossible that Mr. Harned could have been an embezzler, his principal having been largely a creditor of the government at that time. We think, as we stated before, under these circumstances, we are entitled to a verdict of a jury, and we ask for it.

The Court. I will grant the United States attorney's motion, and the remarks made in the case of *U. S. against Brooks, ante*, 749, are in a large degree applicable to this case; this being but another count, really, upon the same indictment against the custom-house officials. The same order will be made. The defendant will be discharged, and bail exonerated.

UNITED STATES v. WILSON.

(District Court, D. Colorado. January 15, 1891.)

UTTERING COUNTERFEIT MONEY—WHAT CONSTITUTES—CONFEDERATE MONEY.

The putting off a note of the late Confederate States of America as lawful money upon an ignorant man, in the night-time, is not the offense contemplated by Rev. St. U. S. § 5415, punishing the passing, uttering, or publishing of any note in imitation of the circulating notes "issued by the banking associations acting under the laws of the United States," and it is not indictable thereunder.

On motion to Quash Indictment.

J. D. Fleming, U. S. Atty.

David Plessner, for the prisoner.

HALLETT, J., (orally.) The indictment against Wilson is for passing a counterfeit note, under section 5415, Rev. St. It appears in the indictment that the note passed was a Confederate States note, "payable two years after the ratification of a treaty of peace between the Confederate States and the United States," and it bore some general resemblance to the treasury notes and national bank notes of the United States. It is said that it was put off upon an ignorant man, in the night-time, and without much examination on his part. The question which arises upon this motion is whether this can be called a counterfeit note, as having any likeness or similitude to the treasury notes and bank notes in general circulation; and I am of opinion that it cannot be recognized as having that character. The statute is:

"Every person who falsely makes, forges, or counterfeits," etc., "any note in imitation of or purporting to be in imitation of the circulating notes issued by the banking associations now or hereafter authorized or acting under the laws of the United States, or who passes, utters, or publishes, or attempts to pass, utter, or publish, any such note of the associations doing a banking business, knowing the same to be falsely made, forged, or counterfeited, and who falsely alters," etc., "any such circulating note,"

—shall be punished as prescribed in the statute. It is only necessary to say that the offense defined in this section, and in other sections which have been referred to in argument upon this motion, is that of passing, uttering, or publishing any counterfeit note. The note must purport to be issued by such an association doing a banking business. This, so far as disclosed, was not a counterfeit note at all. It was a genuine note; that is to say, it was a genuine note of the Confederate States of America, and therefore it was not counterfeit in the sense of this statute or of any statute. And then it was not on its face, or in any way, a note of any national bank, or of the United States. There were no words to make it such. The counterfeit referred to in the statute must, at all events, have a greater resemblance to the current money of the United States than to anything else. This note, in the size and shape and color, and in the denomination of the figures upon it, has some resemblance to current notes in circulation as money; but that is not enough to make it a counterfeit of the circulating notes of the United States. The offense which this man committed in putting out this note was recognized at the common law as cheating, and it has been under consideration in the other case, which was decided this morning. The offense was that of cheating, and it was by a false symbol or token. The token was the note, and the putting it off upon another as money was the precise offense of cheating at the common law. It was imposing upon another, inducing him to believe that the paper which was offered him was in fact money when it was not. Here is a section of Bishop's Criminal Law, vol. 2, § 435, in which a case very analogous to this is referred to:

"This doctrine has been carried so far in England that, where a man passed out to another person for change a bank-note, saying it was for five pounds, when really it was, as he knew, for only one pound, and received the change as for a five-pound note, he was held to have committed this offense, though

the person to whom he passed the note could read. Said Lord CAMPBELL, C. J.: 'We are all of opinion that the conviction was right. In many cases a person giving change would not look at the note; but being told it was a five-pound note, and asked for change, would believe the statement of the party offering the note, and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretenses.'

That is this case exactly. This defendant offered the prosecuting witness the Confederate note as money. He made him believe it was money, and got change from him upon that understanding, and thereby cheated and defrauded the prosecuting witness of the money. This offense may be prosecuted under the statute of the state, if the state authorities are inclined to pursue it; and we will turn over the defendant to the state authorities if they want him for that purpose.

UNITED STATES v. WOOD.

(Circuit Court, D. Rhode Island. January 17, 1891.)

1. PERJURY—SUFFICIENCY OF INDICTMENT—PENSION CLAIM.

An indictment for perjury alleged that defendant, "in a case then pending before the commissioner of pensions of the United States, being a special examiner into the merits of the pension claim of one Edwin Brackett," did falsely swear, etc. *Held*, that the indictment was sufficient, although it failed to allege that the B. mentioned was the same B. who in his pension claim alleged himself to have been a member of Company F, Second R. I. Volunteers.

2. SAME.

After stating facts which constituted perjury, it was not necessary that the indictment should charge, in terms, that defendant did commit perjury.

At Law.

This was a motion in arrest of judgment after a verdict of guilty. The indictment was drawn under Rev. St. § 5392, and alleged that Robert Wood—

"In a case then pending before the commissioner of pensions of the United States, being a special examination into the merits of the pension claim of one Edwin Brackett, who claimed to be entitled to a pension from the United States by reason, among other things, of the loss of the thumb of his left hand, and of injuries to his face, incurred on or about the second day of April in the year of our Lord one thousand eight hundred and sixty-five, while in the service of the United States, * * * did knowingly, willfully, maliciously, corruptly, feloniously, and contrary to said oath, state and subscribe certain matters and things material to said inquiry into the merits of said pension claim of said Edwin Brackett, and did swear, amongst other things,"

—and so forth, setting out the alleged deposition, and falsifying the statements thereof, and concluding that the said statement "was false, and he, the said Robert Wood, then and there well knew the same to be false, all of which he, the said Robert Wood, then and there well knew, against the peace," etc.

The prisoner moved in arrest—*First*, because the indictment—
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"Did not specify with sufficient certainty that the Edwin Brackett named therein was the Edwin Brackett who, as a late member of Company F, 2d R. I. Vols., made an application for a pension, and that his was the pension case in which the defendant is charged with making an untrue statement under oath."

And, *secondly*, because the indictment "did not specifically set forth that the defendant falsely and intentionally committed perjury in the premises."

Rathbone Gardner, Dist. Atty., for the United States.

Hugh J. Carroll, for defendant.

CARPENTER, J. I am of opinion that the indictment sufficiently describes the matter or case in respect to which the false affidavit is charged. It is of course possible that there may be a person named Edwin Brackett other than that person who in his petition for pension alleged himself to have been a member of a certain company in a certain regiment; and it is quite possible, also, that these two persons may have been members of the same company. In either case, in pleading the judgment in this case in bar of another prosecution, the prisoner here would effectually defend himself by alleging and proving that the offense there alleged is the same offense for which he was formerly convicted.

Nor do I think it necessary to the validity of the indictment that the grand jury should conclude by charging, in terms, that the prisoner committed perjury. It is sufficient to allege such actions as constitute perjury according to the provisions of the statute.

The motion in arrest of judgment will therefore be denied and dismissed.

Ex parte JUGIRO.

(Circuit Court, S. D. New York. January 7, 1891.)

APPEAL—PRACTICE—CITATION.

Under Rev. St. U. S. §§ 763, 764, allowing an appeal to the United States supreme court in certain cases, and Sup. Ct. Rule 8, subd. 5, providing that the appeal and citation, when issued more than 30 days before the first day of the next term of the supreme court, must be made returnable on that day, the judge of the circuit court, who is required by Rev. St. U. S. § 993, to sign such citation, cannot fix any earlier return-day.

Habeas Corpus.

Roger M. Sherman, for petitioner.

LACOMBE, Circuit Judge. The prayer of the petitioner for a writ of *habeas corpus* to inquire into the cause of his detention at Sing Sing prison, in this district, under a conviction in the state court in violation, as he alleges, of the constitution and statutes of the United States, having been denied, and order thereupon duly entered, he now appeals there-

from to the supreme court. Such an appeal, under sections 763 and 764 of the United States Revised Statutes, as amended by the act of March 3, 1885, is accorded to him as an absolute statutory right. The appeal and citation, when issued more than 30 days before the first day of the next term of the supreme court, must be returnable on the first day of said term. Sup. Ct. Rule 8, subd. 5. The judge of the circuit court, who, by section 999, Rev. St. U. S., is required to sign such citation, has no discretion to fix any earlier return-day. This is the second application to this court for a writ of *habeas corpus* by this petitioner under the same conviction, and two of the grounds upon which he bases his present application—viz., the alleged fact that persons of his race and color were excluded, because of their race and color, from the jury list and panel; and the alleged fact that proper counsel were not assigned to him by the state court—existed when he made his former application. Whether this is the second or the twenty-second application, however, is immaterial. Under the statutes as they stand, it seems to be left for the petitioner alone to determine, not only how many times he will apply for the writ, and whether he will appeal from its denial, but also how often he will, by such appeal, invoke the operation of section 766, Rev. St. U. S., which provides that, until final judgment thereon, any proceeding against his person under state authority shall be null and void. What the precise effect of the peculiar phraseology of the last-cited section may be, whether, pending such appeal, it operates as a stay, or merely as a warning that whoever, under state authority, may take any proceeding against the person of the petitioner does so at his peril, is not now before this court for decision. The only matters now presented on the appeal are its formal allowance, and the fixing of the return-day, as to both of which this court has no discretion.

AMERICAN LINOLEUM MANUF'G CO. v. NAIRN LINOLEUM CO.

(Circuit Court, D. New Jersey. December 22, 1890.)

PATENTS FOR INVENTIONS—SUITS FOR INFRINGEMENT—EXPERT TESTIMONY.

On a suit for infringement of letters patent, where complainant calls an expert witness to point out resemblances between the patent and the alleged infringing device, and asks him to interpret the claims of the patent in so doing, he cannot be required to refrain from considering the prior state of the art in giving his testimony.

In Equity. Objections to testimony before examiner. Motion to strike out.

Walter D. Edmonds, for complainant.

Edward N. Dickerson, for defendant.

LACOMBE, Circuit Judge. The question presented on these motions is briefly this: Whether, when a complainant calls an expert to explain

the meaning of his patent, he may insist that such expert shall, both on direct and cross examination, be strictly confined to an interpretation of that patent, without any consideration of or reference to the state of the art prior to the letters patent. The complainant contends that, inasmuch as it is well-settled law that the letters patent sufficiently prove novelty and patentability, a *prima facie* case is made out, when proof is also given of infringement by the defendant. That is undoubtedly so, if the complainant chooses to confine himself to the letters patent, and a statement of the acts done by the defendant. In that case the court will interpret the words of the patent in the sense in which they are ordinarily employed, and, with the knowledge of the invention thus acquired, will determine whether the acts done by the defendant amount to an infringement. Here, however, the complainant did not choose to rely upon his letters patent alone, but called an expert to point out resemblances between the patent and the alleged infringing process; a stipulation having set out specifically what that process in fact was. Such testimony is admissible on the theory that the language of the patent is obscure, that judges are not always supposed to possess the requisite knowledge of the meaning of the terms of art or science used therein, and that it would be unintelligible to the court unless its words and phrases were translated or explained by one skilled in the art,—by one who, from his experience, is able to say that such words and phrases conveyed to those skilled in the art, when the patent was granted, some meaning broader or narrower or otherwise different from what they would convey to others not thus skilled. Unless the expert's testimony goes to that extent, it is superfluous, because the court will be able, without it, both to interpret the letters patent and to recognize infringement. If, however, such testimony is found necessary, and an expert is called, he should not be required to discharge his mind of the very knowledge as to the prior state of the art, which alone qualifies him to testify as such expert.

In the case at bar, timely objection was made to the fifth question, which reads as follows:

"Please compare the process of producing oxidized oil made use of by the defendants, as described in said admission and testimony, and also the mechanism made use of by them in the application of said process, as similarly described and shown in the drawings referred to, with the subject-matters described in the said letters patent, and specifically claimed in the claims thereof, and point out such resemblances as you may find to exist between the process and apparatus as used and as patented; and, in giving your answer and interpreting claims of said letters patent, you will please refrain from any consideration of or reference to the state of the art prior to the letters patent in suit relating to such process and apparatus, except such as may appear upon the face of the patent itself."

This question, of course, assumes that the witness is to ascertain the meaning of the letters patent; otherwise, he would have no basis of comparison with the defendant's process. It expressly notifies him that he is expected to interpret its claims. Such testimony being admissible only from one skilled in the art, this question, which requires him

to ignore the very experience which alone makes him a competent witness, is itself incompetent. Inasmuch, however, as the question was answered, and as it is not usual to rule upon objections in these cases fragmentarily, the testimony may remain in the case, if complainant so wishes, but subject to cross-examination on the lines indicated by the cross-questions submitted on this argument.

SIMMONDS *et al.* v. MORRISON *et al.*

(Circuit Court, S. D. Ohio. January 24, 1891.)

1. PATENTS FOR INVENTIONS—NOVELTY—DASH-RAILS.

Letters patent No. 339,307 were issued to Robert W. Logan, April 6, 1886, for a detachable dash-rail, to be fastened to leather-covered dash-boards by means of clamps. Patents for rails for wooden dash-boards substantially similar, except as to the mode of fastening, had been previously issued; and various kinds of attachments had been fastened to leather-covered dashes in substantially the same manner as complainant fastened his dash-rail. *Held* that, as both the form of complainant's dash-rail and his method of fastening it were old, the fact that he had applied the fastening device to a new use did not constitute a patentable novelty, and that his patent was void.

2. SAME—ESTOPPEL.

The fact that defendants have appropriated complainant's device bodily, and have used it and sold it in preference to prior structures, does not estop them from questioning its patentability.

3. SAME—ANTICIPATION—EVIDENCE.

In an action for the infringement of the patented dash-rail, testimony of one of the defendants, who is corroborated by several disinterested witnesses, that he had made a dash-rail identical in form, application, and conception with that described in the patent sued on, some 12 years before its issuance, is sufficient to establish an anticipation of complainant's patent, though defendant made but the one dash-rail, and then ceased their manufacture until after the issuance of the patent.

In Equity.

This suit is for the infringement of a patent for a rail for dash-boards, issued April 6, 1886, to Robert W. Logan, complainants' assignor, being No. 339,307.

The object of the patented device is declared in the specification to be "to provide a rail which can be quickly and easily attached to any dash-board after it is otherwise complete, and also easily detached when it is desired to do so, (as when it needs replating,) thus making a more desirable rail, and one which can be used on the cheaper grades of vehicles, giving them the well-known advantage of the rail, with but slight addition in cost."

The specification further provides that the dash-board may be of any ordinary and desired construction. The rail is mounted, and extends along the top edge, and down a short distance on each end, to form handles, as is usual. It is secured in position by supports on the top and at the ends. These should be sufficient in number to properly support it from the top of the dash, two being shown in the drawings. They are preferably formed integrally with the rail, extending down therefrom far enough to support it the desired height from

the edge of the dash-board. Two lips are formed on the lower end of each support. These extend down on each side of the top edge of the dash to a point just below the center of the bulge therein, and thus, after the rail has been put in position, a slight blow on these points operates to bend them in under the bulge of the dash, and aid in securing it in position. The supports are clamped to the ends of the dash-board at one end, and have the lower ends of the rail secured to their outer ends. The clamp part preferably consists of two jaws, which extend back on each side of the end piece of the dash-board frame to the rear thereof, and are provided with bolt-holes in their ends for the bolts, which pass through said holes and the dash-board, and by means of nuts tightly clamp the jaws to the end piece, and secure the support in position. The patentee states that he does not desire to limit himself to any specific form of clamp. In their outer ends the supports are preferably provided with vertical holes, through which the lower ends of the rail are inserted, they being secured therein by nuts on their lower ends, as shown in the drawings. He suggests that the supports might be formed in piece with the rail, or secured thereto in any other manner, without departing from his invention; but he regards the construction shown as preferable, as by means of the nuts the rail can be drawn down tightly upon the top edge of the dash, and thus made secure and rigid in position.

He also shows a rail formed in two parts, adapted to screw together in the central portion, thus rendering it adjustable to dash-boards of various lengths, whereby it can be easily and quickly applied to any vehicle, without fitting or extra expense.

He also shows the top part of the rail dispensed with, and only the ends attached by his improved means, to form handles, and states that by his construction a rail is provided, not only much cheaper to put on, but one that is easily detached when desired, as, when the plating becomes worn off, it can be at once removed, replated, and readjusted in position without injuring the dash in any manner, thus making a desirable and cheap rail. He makes this further statement:

"I am aware that supplemental dash-boards have been secured to the dash-board proper by being clamped to the top edge thereof, and said dash-board thus rendered more effective, but I do not regard this as a substitute for my invention, which is equally applicable to and desirable on said supplemental dash-board when used as on the dash-board proper. As will be readily seen, if at any time it is desired to use such supplemental dash-board on a dash-board provided with my rail, said rail can be readily removed, placed upon said supplemental dash-board, and the whole put in position."

The first and second claims, which are alleged to be infringed, read as follows:

"(1) The combination, with a dash-board consisting of the ordinary metallic frame and leather covering, of a detachable rail provided with supports having clamps, whereby it is secured to the finished edges of said dash-board, and held free therefrom, substantially as shown and described.

"(2) The combination, with the dash-board, A, of the rail, B, provided with the supports, B¹, engaging with the top edge of said dash-board, and the sup-

ports, B², engaging with the ends of said dash-board at one end, and being secured to the ends of said rail at the other, substantially as set forth."

C. & E. W. Bradford, for complainants.

John W Strehlie, for defendants.

SAGE, J., (*after stating the facts as above.*) From the state of the art as exhibited in the evidence in this cause it appears that before the introduction of leather-covered dashes, wooden dash-boards were used, especially in light vehicles; and dash-rails attached to the finished wooden dash-board were patented as long ago as July, 1870, to Noyse and Stratton, No. 105,362. There is shown in that patent a dash-rail with supports to hold it free from the finished edges of the dash-board, and to attach it to the board. The supports have only one lip, instead of two, as in the patent sued on, and the dash-rail is attached to the dash-board by means of a screw and nut. Another form of rail, standing free from the finished wooden dash-board, and secured thereto by posts and supports, is shown in patent to Warner, No. 128,933, July 9, 1872; and still another in patent to Munson, No. 149,878, April 21, 1874. These patents make it clear that the rail and the form of the rail of complainants' patent are old.

Clips of various kinds to hold attachments to leather-covered dashes were old and in common use before the date of the alleged invention described in complainants' patent. In patent No. 264,145, September 12, 1882, to Gibbs, for rein-holder, there are shown supports connected by a small rail or cross-piece, and clipped to the finished edge of a leather-covered dash-board. The specification sets forth that the device is capable of being attached upon the dash-board of any vehicle. The base is a curved or narrow casting, in the shape of an inverted U, the wings of which have openings at each end, provided with thumb or set screws for attaching them to the dash of the vehicle. Fig. 3 of this patent shows a device not differing in any essential degree from that shown in Fig. 2 of the patent in suit.

There is also shown in patent No. 263,908, September 5, 1882, to Howell and Burdick, for rein-holder, a clip-spring for attaching the holder to the dash-board, which is a complete anticipation of the clip shown in complainants' patent. Patent to Kinlock, April 26, 1881, No. 240,732, for supplementary dash-board for vehicles, designed to keep out of the vehicle body the dust, mud, etc., flung by the horse in traveling, shows a rectangular or other shaped shield or fender, provided with clasping or clamping devices at one edge, whereby it may be readily set, and securely, but removably, held upon the ordinary dash-board of a vehicle at the elevation and angle required. This, too, is a complete anticipation of the complainants' clip.

Patent to Peters, No. 225,019, March 2, 1880, shows a fastening attachment for vehicle dashes, which is also a complete anticipation of the complainants' clip. It shows a clip and foot adapted to grasp a half-round rod. The clip is bolted above and below the dash-rod, and shows a concave bearing placed between the dash-rod and the dash-foot

proper, and extending upwardly and downwardly, so that the bolts securing the clip in position pass through this concave bearing, and keep it also in position. The clip is in the shape of a horseshoe, with a screw-thread cut on each end. These ends pass through the dash-foot, and are secured in place by nuts. This, too, is a complete anticipation.

But it is urged for the complainants that none of these devices would serve the purpose of that described in the complainants' patent. Thus it is said that no dash-board rail is shown or described in the Peters patent, and that the Kinlock patent differs from that shown in the complainants' patent in this: that the clasping or clamping devices are not adapted to embrace closely the upper part of the frame of the dash-board, but extend down along the dash-board, so as to form a sufficient leverage to hold the shield and supplementary dash-board at the proper angle; also that, there being no provision for handles at the ends of the dash-board, as in complainants' patent, they being wholly wanting, and the device shown in Kinlock not being a dash-rail in any sense of the word, it does not anticipate. Similar distinctions are drawn between the complainants' device and that shown in the Howell and Burdick patent and in the Gibbs patent. In other words, the claim is, in substance, that because the complainants have applied this old device to a new use, they are entitled to a patent, and, inasmuch as the complainants' improvement displays novelty and utility, they are entitled to a decree.

These propositions are so utterly unsound, and so in conflict with the authorities, that it is not worth while to enter upon any extended consideration of them; but it is a proper occasion for two or three observations with reference to some authorities cited. Judge NELSON's charge to the jury in *McCormick v. Seymour*, 2 Blatchf. 240, that "novelty and utility in the improvement seems to be all that the statute requires as a condition to the granting of a patent," is cited. This quotation does not, of itself, convey the true and full meaning of the charge. In the sentence immediately preceding he says that "the improvement upon a machine, which is the kind of invention here, must be new, not known or in use before, and must be useful,—that is, the person claiming the patent must have found out, created, and constructed an improvement which had not before been found out, created, and constructed by any other person; and it must be beneficial to the public, or to those persons who may see fit to use it." In another part of the charge he says that, "in order to take the separator of the defendants out of the charge of infringement, it is necessary that they should satisfy you that it is substantially and materially different from the plaintiff's; in other words, that it involves some new idea in its construction not to be found in the plaintiff's. If it is found there, of course it is an appropriation of his invention; if not, then it is an independent improvement, and not in violation of the plaintiff's right." Again: "If the defendants have taken the same general plan, and applied it for the same purpose, although they may have varied the mode of construction, it will still be, substantially, and in the eye of the patent law, the same thing." And, again,

referring to the defendants' device, he says: "If it embodies the same ideas, and its arrangement carries out the same idea,—if this is the true view of the question involved,—then undoubtedly it is an infringement."

Taking all these together, it may well be insisted that when he spoke of novelty and utility he referred to inventive novelty, and not mere novelty in construction. But if the citation made by counsel expresses correctly the statement of the law by Judge NELSON, all that it is necessary to say about it is that he has been overruled again and again. The case before him was under the act of July 4, 1836, and the question discussed raised under section 6 of that act.

In *Thompson v. Boisselier*, 114 U. S. 11, 5 Sup. Ct. Rep. 1042, the supreme court say that a patentee must be an inventor, and he must have made a discovery, and that the statute has always carried out this idea. The court then say:

"Under the act of July 4, 1836, (5 St. p. 119, § 6,) in force when these patents were granted, the patentee was required to be a person who had 'discovered or invented' a 'new and useful art, machine, manufacture, or composition of matter,' or a 'new and useful improvement in any art, machine, manufacture, or composition of matter.' In the act of July 8, 1870, (16 St. p. 201, § 24,) the patentee was required to be a person who had 'invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof;' and that language is reproduced in section 4886, Rev. St. So it is not enough that a thing shall be new, and in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the constitution and the statute, amount to an invention or discovery."

The same subject is discussed in *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. Rep. 1027, and in cases *passim* from that time down until now. 1 Robinson on Patents, from page 210 to 228, is referred to in support of the proposition, but it is sufficient to quote from note 2, on page 228:

"A combination may result either from mechanical ingenuity and experiment or from the exercise of inventive skill. In the latter case only is it an invention, and the subject-matter of a patent."

An excellent statement of the law on this subject was made by Judge SHIPMAN in *Stanley Works v. Sargent & Co.*, 8 Blatchf. 344, and 4 Fish. Pat. Cas. 445:

"Utility is not an infallible test of originality. The patent law requires a thing to be new, as well as useful, in order to entitle it to the protection of the statute. To be new, in the sense of the act, it must be the product of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well known. But the effect produced by a change is often an appropriate, though not a controlling, consideration in determining the character of the change itself."

The proposition made by counsel for the complainants that the defendants, having appropriated the complainants' device bodily, and used and sold it in preference to prior structures, are estopped from questioning its patentability, is as novel as it is unsound. The facts referred to are strong evidence of utility; but to establish that they would create an estoppel, as claimed, would convert the patent law into a mere contrivance to promote monopolies, and there would be nothing for the court

to do in any like case but to enter a decree for the complainant, without reference to the validity of his patent.

Even if the views above expressed, that the novelty of the complainants' device is not sufficient to sustain their patent, be set aside, the case is clearly against them.

There is shown in evidence a device which in conception, form, and application is identical with that described in the patent sued upon. The testimony is that this exhibit shows a rail exactly like the one made by the defendant Joseph Morrison at some time between the years 1872 and 1874 for John Roberts, carriage maker, then doing business on Sixth street, in Cincinnati. His testimony is that an apprentice boy, whose name was Phares, brought a covered dash to his shop, with orders to put a rail on it. The statement made by Phares at the time, as Morrison testifies, was that the dash-frame should have been constructed with a welded rail on it, plated, but by mistake that had been omitted. Morrison took the dash, and, after examining the manner and form in which the whip-socket (shown in Exhibit No. 4, which, it is in evidence, was used in 1880) was fastened to the dash-frame, (which, as shown in Exhibit No. 4, was attached to the dash-frame by a clip, which also is a complete anticipation of complainants' device,) he made the rail as shown in Exhibit No. 1, and delivered it to Roberts. He testifies that he is unable to fix the date more specifically, because all his account-books were destroyed subsequently by fire. He further says that the dash-rail of that exhibit was secured to the dash-frame by means of clips and screws, as shown in the exhibit, which is precisely the mode of attachment of complainants' rail; and that Henry Phister, lock-smith on Sixth street, Cincinnati, tapped the holes in the clips that held the rail to the dash. He also testifies that that was the only detachable dash-board rail of that sort which he made, and that the reason he made no other was that the rail was not substantial enough, in that the clamps were not fastened tight enough to the dash-rail. He also testifies that he saw that dash, with the rail in position, on a vehicle in Roberts' place of business.

Morrison is corroborated by William H. Phares, who is now a fireman in the Cincinnati fire department; by Henry Phister, the locksmith; by the defendant Corcoran; and by John H. Shobrook. Mr. Roberts died in the summer of 1887.

Phares testifies that he worked for Roberts at the time stated by Morrison; that the facts occurred as detailed by him; and that the finished dash and rail were similar to Exhibit No. 1, excepting that they were filed and finished up in better shape. He fixes the time as in September or October, 1873.

Phister testifies that he drilled holes on some clamps "on a little job" like Exhibit No. 1, for Morrison, and that it was in 1873, and that he understood at the time that they were intended to hold a rail over the top of a dash-board.

Corcoran, Morrison's partner and his co-defendant, also saw the rail in 1873, and testifies that it was similar to Exhibit No. 1.

Shobrook, carriage maker and blacksmith, says that some 13 or 14 years ago he saw a dash with rail like Exhibit 1, which was made by Morrison for Roberts, by whom Shobrook was then employed, and that to the best of his knowledge and belief it was placed on a vehicle.

There was an effort made to discredit Morrison by showing that he is contradicted by three witnesses as to what occurred with Simmonds (complainant, and one of the three witnesses) at an interview in 1885, but he is so strongly corroborated that I entertain no doubt of the substantial truth of his testimony concerning Exhibit No. 1, nor that the dash-rail he made in 1872 or 1873 was used on a vehicle. It cannot be regarded as nothing more than an abandoned experiment. It is a complete anticipation of every feature of the device patented under which the complainants claim.

The bill will be dismissed, with costs.

ROBBINS v. WHITTLE.

(Circuit Court, D. Massachusetts. January 21, 1891.)

PATENTS FOR INVENTIONS—NOVELTY—IMPROVEMENTS IN SPRING-BEDS.

In view of the prior state of the art, as shown by various patents granted between January, 1876, and August, 1882, letters patent No. 270,453, granted January 9, 1883, to James J. McCormack, for a device to strengthen the frame of spring-beds, consisting of a rod running through the center of such frame, and connecting the sections of which it is composed, is void for want of patentable novelty.

In Equity.

J. George Seltzer, for complainant.

John Dane, Jr., for defendant.

COLT, J. This suit is brought for infringement of letters patent No. 270,453, dated January 9, 1883, granted to James J. McCormack for improvements in spring-beds. The specification states that the invention relates to that class of spring-beds which are adapted to be folded longitudinally, and has for its object to keep the bed from sagging at its center, and to strengthen the frame. The only part of the McCormack bed which it can be pretended is new is a rod running through the center of the bed, and connecting the two sections or frames of which the bed is composed. Every other element mentioned in the two claims of the patent were old and well known at the date of the McCormack invention, and it is only the form of the rod or bar described in the McCormack patent that is new; for connecting rods, extending between the ends of the same section frames, are clearly shown in the prior Keenholts patents.

In view of the prior state of the art, as shown in the following patents: Nos. 10,179, issued August 8, 1882, to S. H. Reeves; 251,241, issued December 20, 1881, to George Keenholts; 212,443, issued February 18,

1879, to William B. Crich; 179,190, issued June 27, 1876, to William B. Hatch; 171,776, issued January 4, 1876, to William Chase; and 251,242, issued December 20, 1881, to A. Keenholts,—I must hold the McCormack patent void for want of patentable novelty. A decree may be entered dismissing the bill.

PULLMAN PALACE CAR CO. *v.* WAGNER PALACE CAR CO. *et al.*, (two cases.)

(Circuit Court, N. D. Illinois. January 20, 1891.)

PATENTS FOR INVENTIONS—CAR-BUFFERS—COMITY BETWEEN CIRCUIT COURTS.

In *Pullman Palace Car Co. v. Wagner Palace Car Co.*, 38 Fed. Rep. 416, letters patent No. 373,098, issued November 15, 1887, to the Pullman Company, as assignee of Henry H. Sessions, for an improvement in the connections between cars, was sustained by the circuit court for the northern district of Illinois, mainly on the ground that the buffer-plates of the two cars were kept in contact under constantly opposing spring pressure, while rounding curves as well as upon a straight track, thus to a large extent overcoming the tendency to oscillation. In that suit George M. Pullman filed an affidavit showing that the oscillation was in fact largely overcome by the device, even upon roads of greatest curvature. In *Pullman Palace Car Co. v. Boston & A. R. R. Co.*, *ante*, 195, the subsequent patent, No. 403,137, issued May 14, 1889, to George M. Pullman, for a vestibule connection between cars, in combination with a device similar to that of the Sessions patent, and intended to accomplish the same purpose, and the drawings for which were almost identically the same, was afterwards sustained by the circuit court for the district of Massachusetts upon the ground, among others, that it was not anticipated by the Sessions patent. In this suit Sessions gave testimony in behalf of the Pullman Company, limiting his invention to the exact device described by the specifications, and the Pullman Company contended for a construction thereof which would necessarily prevent the buffer-plates from being in contact under pressure while rounding curves. *Held*, that the Massachusetts decision was inconsistent with the Illinois decision, and therefore comity did not require the Illinois court to enjoin an infringement of the Pullman patent on the strength of the Massachusetts decision.

In Equity.

Offield & Towle and J. S. Runnels, for complainant.

George S. Payson, for defendants.

Before GRESHAM and BLODGETT, JJ.

GRESHAM, J. On May 13, 1887, George M. Pullman filed in the patent-office his application for a vestibule connection for railway cars, and, after several rejections, patent No. 403,137 was granted to him on May 14, 1889. Later in the same year, the Pullman Company, as assignee of the patent, commenced a suit in the circuit court of the United States for the district of Massachusetts against the Boston & Albany Railroad Company for infringement. In October, 1890, that court sustained the patent, and enjoined the defendant, and on the strength of that decree the complainant in this suit insists that it is entitled to a preliminary injunction. On April 29, 1887, Henry H. Sessions filed an application for an improvement on a railroad car, and, after one or more rejections, a patent was issued to the complainant in this suit as assignee of Ses-

sions. This patent was issued on November 15, 1887, and numbered 373,098. A few days later the Pullman Company filed a bill in this court against the Wagner Company for infringement of the Sessions patent, and on April 21, 1889, a decree was entered sustaining the patent and enjoining the defendant.

Under the well-established rule of comity, the decree in the Boston case entitles the complainant to the injunction prayed for, unless the court which rendered that decree gave a construction to the Sessions patent at variance with this court's construction of it. In other words, if the opinion of this court (38 Fed. Rep. 416) cannot be reconciled with the later opinion of the learned circuit judge in the Boston suit, (*ante*, 195,) the complainant is entitled to nothing here on the ground of comity.

In its answer in the Boston suit, the defendant set up (1) that the Pullman patent was void for want of novelty; (2) that the Sessions patent and other patents anticipated it; and (3) that, if they did not anticipate it, the complainant was estopped, by its attitude in the Sessions suit and the decree of the court in that suit, from denying that the Sessions invention was prior to the Pullman invention.

"The object of my invention," says the Pullman specification, "is to provide suitable means whereby there may be made a continuous connection between contiguous ends of passenger railway cars, this connection being an entirely closed passage-way, preferably of the width of the car platforms, and serving at the same time as a vestibule for entrance and exit to the respective ends of the cars, the connection between the solid parts forming a vestibule being made of flexible or adjustable material, so as to constitute a loose or flexible joint that will permit of sufficient movement of each unit car in travel, but at all times preserving a complete vestibule connection between the respective cars. * * * The problem is to hold each bellows so firmly to its car that it will maintain its place when the car is uncoupled from others; *second*, to so support them that when cars are coupled the ends of adjoining bellows or connections take their relative proper positions, so as to form a continuous passage, without any necessity of manipulating the bellows or flexible connections; *third*, to provide a continuous flooring between the cars; *fourth*, so to combine the parts that both the flexible connections and the flooring shall be so supported that the cars may approach nearer and remove further from each other without disturbing either the continuity of the flooring or that of the bellows or inclosed flexible passage-way; *fifth*, that the cars may, as in traveling round curves they must, have the longitudinal line passing through the center of one car at an angle with that passing through the center of another car, without disturbing the continuity of the foot passage, or causing open spaces between the ends of adjoining flexible passage-ways."

The bellows, or accordion-like structure, composed of flexible material, is attached to the outer end of the vestibule and the face-plate, and is thus made capable of conforming to the movements of the cars, which do not always occupy the same relative position. The specification further says:

"The drawings show a buffer-rod and draw-bar of a well-known kind. The buffer-spring, *m*, incloses the buffer-rod, and this rod is moved outward by the spring, and inward by the impact of an adjoining car or buffers connected therewith. Upon this rod is mounted a cross-bar, or equalizing bar,

7, in such manner that it can move out and in with the buffer-rod, and at the same time oscillate upon its center as the evener of a wagon does upon the pole. Two rods, *s, s'*, are attached to the ends of this cross-bar, 7, not firmly, but by a sort of ball and socket joint, in such manner that the cross-bar may change its angle to horizontal lines drawn perpendicular to the length of the car, while the rods, *s, s'*, always remain substantially parallel with the sides of the car. These rods, *s, s'*, pass through mortices or guide-plates made in or supported by the transverse timbers of the car, and are thus confined in such manner that they can slide outward and inward in the direction of their length, but cannot practically move in any other direction. These rods, at their outer ends, project beyond the outer cross-beam of the car, and are there pivoted to the buffer-plate, *n*. This plate is a vertical plate as long as the width of the flexible connection, with its upper edge on a level, or thereabout, with the top of the ordinary platform. A study of the mode of supporting this buffer-plate, as above described, will show that it is pressed out by a spring, that it can be shoved towards the car by the application of sufficient force, and that it can change its angular position with reference to the end of the car when at its extreme outward and inward locations, or anywhere between them. This buffer-plate on one car could not have its acting face coincident with a similar buffer-plate on an adjoining car when the two cars are rounding a curve, unless it could change its angle with reference to a longitudinal line passing through the center of the car, so that it can be at times at right angles to such a line, and at times at various other angles. The support of the buffer-bar before described not only permits these changes of angular position and the in and out motions of the buffer-bar, but prevents its center from leaving a horizontal longitudinal line passing through the center of the car to which it is attached, so that the center of the buffer-bar is always, whether projected or shoved in, practically in line with the center or middle of the platform. The mode of supporting this buffer-bar must be such as to permit it to have these motions so long as the buffer-bar is permitted to move as described, and at the same time to have its center restrained, so that it can move only in a certain path."

The first claim reads:

"The combination, substantially as hereinbefore set forth, of a face-plate, forming the open end of a vestibule extension to a railway car when not coupled with another car in a train, and a buffer-plate, which is pivotally connected with a spring-extended buffer-rod, and arranged, as described, to be capable of oscillating on a fixed center, but restrained by guide-rods, as described, to compel the center of oscillation to move only in a line passing longitudinally and horizontally through the center of the car; the said buffer-plate, and the face-plate of the vestibule connected therewith, being free to move angularly with such fixed longitudinal line of their movement."

This claim is for a combination of the face-plate, buffer-plate, and spring buffer-rod with in and out motions and a rocking motion. The chief feature of the invention consists in the loose or pivotal connection of the supporting rods or links at one of their ends to the cross-bar or equalizer, and at their other ends to the buffer-plate; thus allowing the so-called motions and restraint of motion, while the cars oscillate on a fixed center. No other feature of the patent need now be considered.

The Sessions equalizing device is thus described:

"The spring pressure acting against the lower portion of the frame-plate is obtained, as exhibited in the drawings, from the coil-spring, *n*, which takes a bearing at one end against the solid frame-work of the car, and at the other

against a cross-head beneath the entrance platform car, which cross-head, by means of the rigid links, *s, s'*, is connected with the threshold of the frame-plate, *a*; the said links, *s, s'*, being knuckle-jointed to the threshold-plate, *c*."

It will be observed that the links are not described as pivoted to the cross head or equalizer, and the latter is not described as pivoted to the buffer-stem, but the drawings of the patent show such connections.

It is urged by the complainant that this language in the Sessions patent indicates that the equalizing bar is rigidly connected to the buffer-rod, and the supporting rods or links are rigidly connected to the equalizer, and that therefore the face-plate and buffer-plate cannot have the motions and be restrained in the manner described in the Pullman patent. Why were the links knuckle-jointed to the threshold-plate, if it was not intended that they should be pivoted to the equalizer? It is only by keeping the face-plates in constant frictional contact that the declared object of the Sessions invention is, or can be, accomplished. Without the equalizing mechanism shown in his drawings, his plates cannot be thus held together. The pivotal or loose end connection of the links to the threshold-plate suggests, if it does not plainly imply, such a connection of the other ends to the cross-bar or equalizer. Practical mechanics, familiar with the Janney and other buffing apparatus in use at the date of the Sessions patent, would readily have understood how to construct the mechanism with the necessary working play. If the Sessions frame-plates do not oscillate on a fixed center, as do the corresponding plates in the patent in suit, his invention is not capable of accomplishing the beneficial results which this court held it could and did accomplish. If he did not intend that his equalizing mechanism should have the motion, and restraint of motion, described in the later Pullman patent, why did he insert the following language in the descriptive part of his patent?

"It is common experience that, when a train of drawing-room or sleeping cars is traveling at high speed, there is induced in each car a tendency to sway or oscillate laterally. The force which induces this tendency may be relatively a slight matter, but its continued repetition results in an aggregation of impulses, which accelerate the oscillations, and cause unpleasant effects upon the passengers, especially when the road-bed has reverse curves, even of great radius. * * * The effect of my improvement is to provide a resistance to this tendency to oscillation by checking the same at the outset, before the impulses which produce it have accumulated."

This court sustained the Sessions patent on the ground that the equalizing mechanism was capable of keeping the frame-plates in frictional contact, not part of the time, but all the time, on sharp curves, like those of the Baltimore & Ohio road, as well as on tangents; and on the further ground that it was not anticipated by certain prior patents, because their buffing-plates were not kept in such contact, and could not, therefore, at all times oppose the tendency of the cars to sway laterally. The complainant in that suit (and the parties in this suit are the same) insisted that this was the correct construction of the Sessions patent. And yet, in the face of its former ruling, this court is now asked to hold that the Sessions equalizing mechanism will not keep the frame-plates in constant

contact; that in turning curves the plates on the inner side will touch only on their outer edges, while on the outer side of the curve they will not, or may not, touch at all. We do not understand the complainant to insist that the patent can be so construed if the drawings are treated as part of it. The same solicitors prepared both patents and drawings; and, although the latter are exactly alike, it is claimed that they were intended to represent two different equalizing devices. The construction which Sessions now places upon his patent cannot be reconciled with his testimony in the Sessions suit. Mr. Pullman made an affidavit, which was used in support of a motion for a preliminary injunction in the last-named suit, in which he spoke of the operation and effect of the Sessions apparatus as follows:

"These vertical spring-buffers project beyond the vertical planes of the cars, so that on the coupling of the two cars the adjacent frames of the cars compress the springs which back them, and therefore the faces of the plates are held against each other in frictional contact. The result of this construction is that the tendency of the cars of a train, when running at high speed, to have oscillations or vibrations set up, is almost entirely dissipated. * * * As an evidence of the steadiness with which trains run, and their freedom from that oscillatory movement which belongs to all other descriptions of trains when running at high speed, I will state that there is provided in one of the cars of the train a barber's room. The barber's chair in this room is daily occupied by persons who desire to be shaved upon the train; and I state that there is but little more danger or risk in undergoing shaving at the hands of the barber with a common razor on this train, when running at forty miles an hour, than there would be in an ordinary barber's shop in Chicago. I have found that the oscillation of the cars has become greatly diminished in consequence of the application of the spring-friction plates in contact, interposed between the superstructures of adjacent cars of the train, and that the upper berths of sleeping-cars are no longer objectionable on account of the swaying movement."

The Sessions patent, as we are now asked to construe it, would fall far short of accomplishing these beneficial results. In his original application Pullman claimed the vestibule and bellows. He did not there claim what was finally allowed as the distinguishing feature of his patent. In none of his numerous original claims did he embrace the oscillating motion of the arch-plate and the foot-plate. It may be fairly inferred that his first application was prepared with reference to the disclaimer of the vestibule and bellows in the Sessions application. His original application and claims were all canceled, and more than a year after the date of his first application he filed a new specification and claims, and it was in these that he first claimed the equalizing mechanism, with its motions and restraint of motion. This application was rejected February 9, 1889, the commissioner holding that the applicant had not invented a single element; the "particular equalizer" being shown in the Janney and Sessions patents, and the frame-plate in the latter patent. On April 1, 1889, Pullman made and forwarded his affidavit to the patent-office, in which he stated that he had reduced his invention to practice on a train of cars before Sessions filed his application. Some weeks later, the application, which had been rejected on the

ground that the Sessions patent showed the frame-plate and the "particular equalizer," was allowed, and the patent in suit issued. The affidavit did not say that Pullman was the first inventor, and it did not follow that, because he first reduced the invention to practice, he, and not Sessions, first perfected the invention. It did not deny that the Sessions patent showed the "particular equalizer;" on the contrary, its presentation amounted to an acquiescence in the correctness of the commissioner's ruling on that point, and a claim that Pullman was entitled to a patent because he was the first inventor.

We have referred to the fact that the parties to this suit were the litigants in the Sessions suit. In the latter suit the complainant obtained a decree, on the theory that Sessions was the first inventor of the equalizing mechanism for which a patent was finally granted to Pullman. That decree remains in force. It is chiefly on the testimony of Sessions in this suit and the Boston suit this court is now asked to hold that he was not the first inventor. That testimony cannot be reconciled with material portions of the testimony of the same witness in the Sessions suit. To what extent, if at all, the decree in the Sessions suit is conclusive upon the complainant in this suit is a question which we prefer to reserve until the final hearing. Injunction denied.

MCDONALD v. PRIOLEAU.

(District Court, D. South Carolina. January 14, 1891.)

ADMIRALTY—JURISDICTION—STATE STATUTE.

The district court has jurisdiction of a libel against the consignee of a vessel for pilotage, though the consignee is made liable therefor by a state statute of the port where the services were performed.

In Admiralty. Libel *in personam* for pilotage fees.

I. P. K. Bryan, for libellant.

E. H. Prioleau, *in pro. per.*

SIMONTON, J. McDonald was a licensed pilot on the bar of Charleston. He boarded and brought in the Spanish steam-ship Borinquin. After the steam-ship got into port another pilot claimed that, under the pilotage regulations of the port, he should properly have acted as her pilot, and he made a demand for the fees. Some discussion was had before the commissioners of pilotage, with what result does not appear. The matter was not adjusted before the steam-ship left the port. The respondent, being her consignee, retained in his hands a sum of money sufficient to pay the inward and outward pilotage. The libel seeks the recovery of this sum. The libellant, having brought the vessel in, had

the exclusive right to take her out, unless some reason to the contrary is shown. Gen. St. S. C. § 1274. The consignee is liable for pilotage fees, as well as the master and owners. Id. § 1280. The respondent admits that he has the money on hand, disclaims all interest in the question, and has paid the money into the registry of this court. Libellant proposes an order for the payment of the money to him. No one has intervened or objected.

The liability of the consignee is created by a state statute. Has this court jurisdiction as against the consignee? Claims for pilotage services without doubt are cases of admiralty jurisdiction. *The George S. Wright*, Deady, 591. Courts of admiralty enforce provisions of state statutes which fix the amount of pilotage fees, and recognize and enforce provisions giving fees for services offered and refused, and so not performed. *Steam-Ship Co. v. Joliffe*, 2 Wall. 456; *Wilson v. McNamee*, 102 U. S. 572. So, also, when district courts of the United States have jurisdiction of a contract as a maritime one, they may enforce a lien given for its security, created by a state statute, although such lien would not exist under the general maritime law. The jurisdiction in admiralty in matters of contract depends not on the character of the parties, but on the character of the contract, whether it be maritime or not. Hen. Adm. 319. The state law makes the consignee liable upon the contract for pilotage, as well as the master or owner. This is a wise regulation, as it secures against any unexpected departure of the vessel. It, however, would not affect the jurisdiction of this court. In *Ex parte McNiel*, 13 Wall. 243, the court say:

"A state law may give a substantial right of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in a federal tribunal, whether it be a court of equity, admiralty, or of common law. The statute in such case does not confer jurisdiction; that exists already. It is invoked to give effect to the right, by applying the appropriate remedy. * * * In no class of cases has the application of this principle been sustained more frequently than in those of admiralty and maritime jurisdiction."

Assuming jurisdiction, the court can see no reason for refusing the order asked for. No one else claims the money. Nothing has been disclosed depriving libellant of his right under the state statute. Let the proper order be entered.

BARKER v. THE SWALLOW.

(District Court, N. D. Illinois. October 20, 1890.)

SHIPPING—LOSS OF CARGO—PERILS OF THE SEA—OVERLOADING.

The propeller S. started on a voyage with a cargo of lumber, part of which was piled on deck to the height of 8 or 10 feet, which was fully equal to the depth of the hold. A wind sprung up on her quarter, raising a sea that caused her to roll so heavily that she careened to port and hung there until the deck-load on that side slid off, when she righted and rolled to starboard until the lumber on that side went overboard, leaving only that piled amidships. She then righted and rode easier, and came safely to port. It was shown that the wind in question was only a 12 or 15 mile breeze, and not a gale. *Held*, that the loss was not due to stress of weather, but to overloading, and the vessel is liable therefor.

In Admiralty.

Schuyler & Kremer, for libellant.

W. H. Condon, for respondents.

BLODGETT, J. The libellant in this case seeks to recover the value of part of a cargo of pine lumber shipped on board the propeller Swallow on or about the 31st day of July, 1888, at the port of Muskegon, to be transported to the port of Chicago, and which, it is averred, was not delivered to the libellant at the latter port of destination. The shipment of the lumber is admitted by the answer of respondents, but they allege as an excuse for the non-delivery that the portion of the cargo not delivered to the libellant at the port of destination was a part of the deck-load of the propeller, which was washed overboard and lost in midlake, by reason of the strong wind and heavy sea which prevailed, and that neither the vessel nor her owners are liable for such loss, the same having been lost by a peril of the sea, without fault of the crew of the Swallow or of her owners. It is admitted to be the usage of both sailing and steam vessels, engaged in the lumber trade on Lake Michigan, to carry part of their cargo on deck, and that the vessel and her owners are not liable for the loss of the cargo so carried, by a peril of the sea, if the same is properly stowed, and the vessel be seaworthy and properly loaded and navigated. It is admitted that the Swallow took on board for libellant at Muskegon for the port of Chicago a cargo of 283,393 feet of pine lumber, nearly one-half of which was stowed on deck, and that while on the passage she lost 86,227 feet from the deck-load, which was of the value of \$1,822. But respondents insist that they are not liable for this loss, because, as they say, a high wind arose which caused the vessel to roll to such an extent that the lumber in question was lost overboard by the rolling of the steamer, occasioned by the heavy wind and waves, and not by any fault of the steamer or those in charge of her. The proof on the part of the respondents shows that the Swallow sailed from Muskegon in the evening, her course being about south-west; that soon after 12 o'clock a strong wind arose from the north, which raised a heavy sea, which struck the Swallow on her starboard quarter, causing her to roll

very badly; that finally she careened over to port and hung there for some time until a part of the deck-load on the port side slid off, when she righted and rolled to starboard, where she hung until a part of the deck-load on the starboard side slid off, leaving the part of the load in the middle of the deck in place, after which she righted, and did not roll so badly afterwards, and brought the remainder of the cargo safely into port. It is conceded that it is not the usage to lash deck-loads of lumber vessels with ropes or chains, but it is expected that the frictional contact of the surfaces of the boards forming the deck-load will be sufficient to keep them in place, in the ordinary seas encountered in crossing the lake; but the contention on the part of the libellant is that too much lumber was loaded upon the deck, thereby making the vessel top-heavy, and causing her to roll more than she would have done had she not been overloaded on deck. The testimony from respondent's witnesses fails to show that the loss of the deck-load was caused by what is called a "gale of wind" or a "tempest." The statement by respondent's witnesses is that, while the Swallow rolled very heavily, the wind did not exceed a 12 to 15 miles per hour breeze, while it is conceded that the velocity of the wind must be at least at the rate of 40 miles per hour to make what is called by seamen a "gale." The fact that she rolled so badly from such a wind must, I think, be taken as conclusive proof that she had too much load on her deck, thus bringing her center of gravity too high above her keel, and this view is confirmed by the fact that all the crew who have testified agree that she rode easily after she had spilt off the deck-load from the sides. The proof also shows that the lumber was piled on deck to the height of eight or nine feet, which was fully equal to, if not greater than, the depth of the hold. Now, while a vessel is not liable for the loss of her deck-load when it is lost by stress of weather, or what can be properly called a "peril of the sea," yet, if she takes on so heavy a deck-load as to become top-heavy, and endangers loss of the deck-load, or puts it in peril in an ordinary wind, or anything less than a gale of wind, or such a stress of weather as is clearly unusual, it should, I think, be accounted bad stowage and negligence. Overloading the vessel so as to render her unmanageable, or susceptible of becoming unmanageable, by such a wind as is shown to have prevailed on the night in question, is, I think, a manifest negligence on the part of the carrier, and such as should not acquit him of liability if the cargo is lost. Respondents submit proof showing that the Swallow had carried from port to port cargoes considerably larger than the one she had on board on the night in question, but the fact that this was done occasionally, or even frequently, only shows that the parties were fortunate in not meeting with wind enough to set their vessel rolling, while overloaded, and does not prove that it was either prudent or good seamanship to have so loaded their steamer. While the law acquits a common carrier from loss of cargo by what can be properly termed a "peril of the sea," it at the same time holds it responsible for the safety of the cargo in ordinary weather, and as against ordinary risks, and I cannot dis-

miss from my mind the conclusion that the deck-load of this steamer was lost on this occasion, not from stress of weather, but because as I have already said the vessel was overloaded, and had too much of her load on deck. A decree will therefore be entered finding the steamer at fault, and awarding damages to the libelant in the sum of \$1,822.

THE FRED JANSEN.¹

LYNCH *et al.* v. THE FRED JANSEN.

(District Court, S. D. New York. December 31, 1890.)

COLLISION—OVERTAKING VESSEL—UNEXPECTED SHEER—TIDE-RIP—WIND.

As libelant's schooner T. was going west through the East river under sail, she was overtaken near Negro Point by a schooner in tow of a tug on a hawser some 350 feet long. About the place of collision the T. passed out of slack water into a strong flood-tide, and, the wind at the same time falling, she was swung around by the tide some four to six points, and out into the stream, when she struck the other schooner. When the tug passed the T., the two vessels were on parallel courses, and about 200 feet apart. *Held* that, under the circumstances, the pilot of the tug could not expect such a large swing on the part of the T., and, as there was no fault in his course, and no indication of danger when he passed the T., the tug could not be held in fault for the collision.

In Admiralty. Suit for damages caused by collision.

McCarthy & Berier, for libelants.

Goodrich, Deady & Goodrich, for claimant.

Brown, J. The libelants' small schooner Titus, loaded with sand, while going west near Negro Point in the forenoon of May 22, 1890, came into collision with the schooner W. O. Snow, on a hawser about 350 feet long, also going west, in tow of the tug Fred Jansen. The libel alleges that the Titus, being under sail, and the tide strong flood, was coming very close to the Ward's island shore, and that the Jansen and Snow overtook, and negligently ran upon and sunk, her. There is a great difference in the estimates of the distance of the collision from the shore. The whole testimony and the circumstances together leave no doubt in my mind that the collision was at least 250 feet from the shore of Ward's island. There were several other vessels and tows near by. The Snow, in order to avoid the Titus, sheered to port, and thereby hit, and somewhat injured, another vessel, passing to the west on her port side. Abreast of the latter, and just beyond her, a schooner was at the tail end of a tow, going east. There is no probability that all these vessels would be hugging the northerly shore. Certainly the tow going east would naturally take the mid-channel to get the full benefit of the flood-tide, and would thus be about 400 feet from the Ward's island shore, since the channel there is fully 800 feet wide. The collision was prob-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

ably nearer 300 than 200 feet from shore. As the Titus was previously, no doubt, going close along the shore, it follows that the defendant's account of the collision, through the swing of the Titus towards mid-stream, must be accepted as the true one. This swing would follow naturally, if not counteracted, upon her going out of the slack water near shore into the line of the strong flood-tide,—a line that runs angling close up to Negro Point. The Titus' own witnesses show that just before collision she became unmanageable, and that her fore peak was dropped, and her wheel put hard to port, in order to counteract the effect of running into the flood-tide. But, the wind dying away, she had not headway enough to be kept under control, and was consequently carried around some four to six points, and out into the stream, and upon the Snow. With the wind dying away, I do not see how the Titus could have avoided this result, except by casting anchor. I am not satisfied that all this should have been so reasonably foreseen by the Jansen as to charge her with fault. When the latter passed the Titus, as both sides testify, the two vessels were on about parallel courses; and the Jansen must have been 200 feet outside of the Titus, if the latter was within 50 feet of the shore. This was surely a reasonable distance to pass; and, considering the position of the other vessels in the river, the only thing the Jansen could do with her tow was either to go on, or to stop short, and drift with the tide till the Titus should drift to some place unknown,—a course less likely to avoid collision than going on. In truth, the pilot of the Jansen could not know the precise place where the Titus would strike the rip of the flood-tide, or what was her ability to counteract its effects by her sails, her speed, and her helm; and he was not chargeable with any such knowledge. When the tug passed her, there was no indication of trouble or danger. He might expect some swinging by the Titus when she struck the tide, if that were not counteracted; but not, I think, her running so far out into the stream. In the position of the vessels and tows in so peculiar a situation, I have no doubt it was the Jansen's duty to go on, relying on the ability of the Titus to take care of herself by sails, helm, or anchor when she should meet the tide. See *The C. H. Northam*, 37 Fed. Rep. 238. It was not until after the Jansen had passed that any danger was seen or suspected. When it was seen, the evidence of her witnesses shows that she slowed and stopped her engines. The breaking of the masts and upsetting of the Titus arose from the peculiar and accidental manner of their fouling when they came together. The Jansen, 350 feet away, had no knowledge of this, and could not see it. The headway and momentum of the Snow were sufficient to break the masts and upset the Titus, even though the hawser was slack, as the Jansen's witnesses say it was. The Jansen not being in fault for the collision itself, I do not see how she is chargeable with any such knowledge of the peculiar manner of fouling as to charge her with fault for her management afterwards. The libel is dismissed; but, under the circumstances, without costs.

BENHAM *et al.* v. THE NIAGARA.

(District Court, N. D. Ohio, E. D. January 17, 1891.)

1. COLLISION—TUGS WITH TOWS—BROKEN RAFT IN RIVER.

The steamer N. was proceeding down the St. Clair river, having in tow a raft of telegraph poles, some 800 feet long and 400 feet wide, properly constructed for navigation in such river, when two schooners collided with the raft and so broke it up that it spread out to the width of nearly 600 feet, and in some places occupied the whole of the channel. The N., however, went her way without attempting to repair the raft, and in the night-time she sighted the tug B. with a tow, just below South-East bend. The master of the N. looked back on his starboard side, and saw what he called "a hole" between the raft and the bank, and he thereupon gave two blasts of the whistle for the B. to pass to starboard, which she proceeded to do after answering. Before the B. could do anything to prevent collision, after discovering the character of the raft, it struck one of the schooners of the B.'s tow, and damaged her. *Held*, that the N. was in fault because her master did not acquaint himself with the dangerous character of the raft and give the danger signal to the B., or hold the raft for repairs at some place where other vessels might pass safely.

2. SAME—NOTICE TO PASSING VESSEL.

The fact that vessels going down the river had warned the B. that there was such a dangerous raft in the river before she met it was not sufficient notice to require her to disregard the N.'s invitation to pass, where such vessels had not described the raft in question so as to enable the B. to distinguish it from any other she might encounter.

In Admiralty.

Goulder & Lee, for libelants.

Henry H. Swan and *H. M. Gillett*, for respondents.

RICKS, J. The libel filed in this cause on the 20th day of November, 1889, charges that on the 26th day of August, 1888, the schooner H. C. Richards, properly equipped and skillfully handled, in tow of the steamer Britannic, was proceeding on a voyage from Lake Erie up through the St. Clair river. Said Britannic had in tow, in the order named, and attached by tow lines of the ordinary length, the schooners Woolson and Richards, and at the time of the collision, hereafter described, had proceeded as far as a point in the St. Clair river near and below South-East bend; and while so proceeding, in the night season, the Britannic exchanged with the tug Niagara, then approaching from above and descending the river, passing signals of two blasts, with the appropriate signal for passing to starboard, which signals were exchanged at a proper and appropriate distance, and the said tow and said tug approached each other with no notice to those on the tow that any circumstance existed to make the passage dangerous. The libel further avers that the Britannic and said tow duly starboarded their helms, and made over to and kept the port-hand side of the channel, and were in proper position to pass. It further alleges that when the Niagara was passing said tow it was discovered that she had in tow a raft of unusual shape and size, which was occupying substantially the whole channel, and was coming down the channel, towed by the Niagara, with good headway. The helms of the tow were thereupon starboarded, and they kept in just as close as they could on the port bank, and the Britannic checked down. It further alleges that there was a dock which made out a little from the shore ahead and on the port bow of the Britannic, and the

Richards ran into the bank below said dock with her helm starboarded, notwithstanding which the raft caught the Woolson, (which was the first vessel in the tow,) and brought her stern down upon the Richards as the latter lay against the bank, tearing out the rail, stringers, and stanchions, and carrying away some of her head-gear and her rigging on the starboard side, and otherwise damaging her. The libel avers that said raft so towed by the Niagara had, a short time previous to meeting the Britannic and tow, been in collision with some other vessel, and been badly broken and disarranged, so that instead of being in the usual and ordinary shape, and of the usual size and condition proper for being towed through said river, the same was unwieldy, and to a considerable extent unmanageable and innavigable, so that it occupied nearly the whole channel at the point of the collision, and was not in ready command of the Niagara and the tug Saugatuck, the other tug astern and attached to said raft, and was not in condition to be towed in that place. The libel avers that the Richards was wholly without fault, and that the Niagara was guilty of fault in the following respects and particulars: (1) That she was attempting to navigate said river, having in tow a raft not of proper size and condition to be towed through said river, and was not making a reasonable and ordinary use of said river. (2) That having said raft in tow, in its broken, unmanageable, and innavigable condition, she gave no notice of these facts to the approaching tow. (3) That, having such a tow, she exchanged the ordinary passing signals with the Britannic, and continued to approach without warning of the dangerous tow she had. (4) In not stopping the raft by means of the tug at the stern of the raft, and holding said raft over against the bank of the river, and warning approaching craft of the dangerous character and condition of the obstruction when said raft was above South-East bend, where it could have readily been done and said raft put in condition to proceed.

The testimony in this case very clearly establishes all that the libel charges in relation to the unwieldy, unmanageable, and innavigable condition of this raft at the time of the collision. In fact the respondents rather insist, in their presentation of their defense, that the raft was so unmanageable and unwieldy by reason of a previous collision and damage thereto that it could be neither stopped for repairs nor for a more favorable time for descending the river, nor controlled in such a bend as that where this accident took place. The defense seems to rely largely upon their utter helplessness to control the movements of this raft as sufficient reason for not being held liable for injuries caused thereby. This raft was in peculiar shape and form. It was what is known as a "sack raft," and before entering the mouth of the St. Clair river had been prepared for navigating that stream. This was done by forcing the booms of the raft as near together as possible, and then stretching from side to side heavy ropes to hold the booms and raft in position. Within the booms were several thousand telegraph poles of varying sizes, and of the value of \$30,000. By these guy-lines the raft was put into navigable form, and is described as being about 800 feet long and 400 wide. In this shape, and under the control of a sufficient number of

tugs, the raft might have been safely towed down through the river; but it appears from a libel filed by the Mackinaw Lumber Company against the Kitty M. Forbes and the schooner Mabel Wilson, in the district court of the United States, at Detroit, that on the 25th day of August, 1888, the said Kitty M. Forbes and schooner Mabel Wilson collided with said raft, first near Faun island and later near Harson's island, in the St. Clair river, and pulled said schooner through said raft, "breaking and widening out the same, and thereby breaking said booms, caused the loss of 4,000 of said poles, and rendered said raft helpless, innavigable, and unmanageable, in which condition it passed down the St. Clair river." This description of the raft, made by the owners themselves, is not exaggerated. This testimony shows that after the collisions referred to the guy-ropes were all broken, one of the booms on the port side of the raft was broken and the other driven under the poles so that they projected over the port quarter of said raft in a tangled and dangerous manner. The raft, at its widest point, is fixed by some of the witnesses at from four to six hundred feet. In this condition the raft proceeded upon its journey, and at some points in the river substantially occupied the whole channel; and in this condition it approached the South-East bend with the knowledge that vessels were liable to meet it at almost every point of the river. The mate, who was in charge of the tug Niagara at the time of the collision, admits that he had not examined the raft to ascertain its condition after the collision with the Kitty M. Forbes, neither had he been advised by the rear tug, or the man in charge of the raft, of the damages arising from said collision. Seeing the Britannic and her tow approaching, he says he went first to the port side of his tug, and looking back saw the port side of the raft dragging along the rushes on the Canada bank, and then, going to the starboard side of the tug, he says he remarked to the watchman: "That fellow [referring to the Britannic and tow] can get through there. There is a hole right through there." The master's characterizing the passage-way as a "hole" is significant in itself. Immediately he sounded two blasts of the whistle as an invitation to the Britannic and tow to approach. It was clearly the duty of the commanding officer of that tug, before the signal was given, to know that there was a sufficient space upon the starboard side of that raft to permit that tow to pass in safety. His signal was an invitation to the steamer to approach, and a notice to her that in the judgment of the master of said tug there was sufficient channel for the tow to pass in safety. Without undertaking to determine here the legal relations of the tug Niagara and the tug Saugatuck, assisting in navigating that raft at its rear end, or the agent in charge of that raft, I am clearly of the opinion that, primarily, it was the duty of the Niagara to know that a sufficient space in the channel was unobstructed and open to the tow to pass before the two-blast whistle was given. I am just as well satisfied from the evidence in this case that there was not a sufficient space to have justified the master of the tug in inviting the Britannic to pass. It was clearly his duty, under the circumstances, to have given a danger signal the moment the head-lights of the Britannic came in view. That would have been the safe and seaman-like course to pursue. With such a danger signal the Britannic and her tow could

have safely stopped below the bend at several places, where the raft could have passed without danger. But it is claimed by the proctors for the respondents that the Britannic had notice in fact of the unmanageable and innavigable condition of this raft, and that it was being towed down the river occupying substantially the whole channel. This notice it is not claimed was given by the Niagara or the agent of the raft, but that it was notice given voluntarily by masters of vessels who had passed the raft further up the river, and it does appear from the testimony in this case that the Whitney, in passing down, had notified the master of the Britannic to look out for a raft that was coming down the river; but it is not claimed that this notice was of such a definite and positive character as to give the Britannic and other approaching vessels such a description of the raft as to identify it from other rafts on the river. It was not notice of such character as to justify the respondents in claiming that the Britannic ought to have observed that notice, and disregarded the two-blast signal given by the Niagara, as the vessels approached, which the Britannic had a right to suppose was an invitation and notice that she could pass with safety. When the Niagara pursued her journey down the river with the raft in the condition described, she took upon herself all risks that might follow from such a dangerous course. There was nothing in the law to prevent her making the attempt, but she did it at her own risk and peril, and every injury and loss occasioned by the innavigable and unmanageable condition of the raft she ought in justice to pay. I think, under all the circumstances developed by the testimony in this case, that the master of the Niagara was censurable for proceeding with his journey. He is especially censurable for having failed in sounding the danger signal, or in not giving notice by sending a tug in advance of him, and at a sufficient distance to notify vessels of the character of the raft he had in tow so as to enable them to seek shelter at such places as the river bank afforded, or choose passing places at such points where the width of the river would make it safe for all concerned. If there had been a reasonable channel on the starboard side of the raft, through which the Britannic and her tow could have passed with safety if they had skillfully managed their tow, it might then be proper to consider the claim now made that this collision was caused by the want of care on the part of the Richards. But the master of the Niagara, having deliberately invited the Britannic to try her luck in getting through what he called a "hole," he cannot now claim a slight sheer or change in the course of any of the tow, which he should have known was probable, if not inevitable, because of the insufficient channel through which he induced the tow to pass, as having caused the collision complained of. As I have before stated, the primary and proximate cause of this collision was the innavigable and unmanageable character of that raft, spreading out and substantially occupying the whole channel of the river, and in the Niagara, under such circumstances, inviting the Britannic and her tow to pass under the misleading signals of two blasts, which was in fact a notice that in the judgment of the master of the Niagara the conditions for passing were favorable. This neglect is sufficient to entitle the libelant to recover in

this case, and I do not consider it necessary or proper to consider the other defenses relied upon. It may not be improper for the court here to remark that in view of the great value of the tonnage daily passing through these rivers and canals connecting our lakes, and in the absence of proper legislation, tugs and parties in charge of rafts must be held to a high degree of care,—in the first place as to the proper construction of the rafts, so as to make them manageable and navigable, and in the second place as to proper care and diligence in transporting them through the lakes and rivers, with reference not only to the time and character of the weather when they shall undertake to pass through, but also with reference to their proper handling when actually making the transit.

I have submitted to Capts. Kelly and Nelson, the nautical assessors, who kindly sat with me in this case, my conclusions from the testimony as to the space in the channel between the starboard side of the raft and the American shore through which the Britannic and her tow were invited to pass, and also the dimensions and unmanageable character of the raft, and upon these facts, as established, have asked their opinion as to whether the channel open to the Britannic and her tow was reasonable and sufficient, and whether, under all the circumstances of the case, the master of the Niagara managed his tug in a seaman-like manner. They have answered both questions in the negative, which advice fully meets with my concurrence. A decree may be prepared for the libelants in accordance with this opinion, and a reference to H. F. Carleton, as commissioner of the circuit court, to take testimony and assess the damages.

LARSEN *et al.* v. THE MYRTLE.

(District Court, N. D. Illinois. October 20, 1890.)

1. COLLISION—SAILING VESSELS APPROACHING END ON.

About 1 o'clock of a clear morning, on Lake Michigan, the schooner L., close-hauled on the starboard tack and headed S. $\frac{1}{2}$ W., sighted and was seen by the schooner M., headed N. by W., with the wind free. The M. put her helm hard-a-port, and let go her main sheet, and swung six or seven points to starboard. When the vessels were five or six lengths apart, the L. starboarded and swung to port, until she was across the bows of the M., which struck her forward of the fore rigging. Held that, whether the vessels were approaching end on or on converging lines, the L. should not have starboarded, and the collision is chargeable to her fault.

2. SAME—INSUFFICIENT LOOKOUT.

It was negligence to allow the wheelsman of the L. to go below after the M. was sighted, and to send her lookout to the wheel, leaving the captain, the only other man on deck, to perform the double duty of officer of the deck and lookout.

In Admiralty.

Schuyler & Kremer, for libelants.

W. H. Condon, for respondent.

BLODGETT, J. Libelants, as owners of the schooner Lookout, bring this suit to recover damages sustained by their schooner from a collision

with the schooner Myrtle, on the waters of Lake Michigan, on the 1st day of June, 1888, charging that the collision came about solely from the negligent management of the Myrtle, while, by the answer, the owners of the Myrtle charge that the collision occurred solely from the fault of those in charge of the Lookout, and they file a cross-libel to recover damages sustained by the Myrtle from the collision. The proof in the case is all from the decks of the two vessels, and is much less conflicting than usual in such cases. It is conceded that the collision occurred a few minutes after 1 o'clock in the morning of the day mentioned; that it was on the waters of Lake Michigan, six or eight miles from the west shore of the lake, in the vicinity of Sheboygan, Wis.; that the night was clear, with no fog or haze upon the water; that the Lookout was heading about S. $\frac{1}{2}$ W., with a six-mile breeze; that the course of the Myrtle was about N. by W.; and that each vessel sighted the other about 15 minutes before they struck; that soon after they sighted each other the wheel of the Myrtle was put hard a-port, and the main sheet let go, and she swung off to starboard; that when the vessels were five or six lengths apart the wheel of the Lookout was put to starboard, and she swung to port sufficiently so that when the vessels came together she was across the bows of the Myrtle, although the Myrtle had swung six or seven points to starboard; and that the Myrtle struck the Lookout just ahead of her fore rigging. There is some conflict as to the direction of the wind. The witnesses from the Lookout say it was W. S. W., while those from the Myrtle say it was W., or W. by N. The witnesses from both vessels say they were sailing by the wind, and I conclude that neither was paying very close attention to their compass course, but were simply keeping a good full with the wind probably from about due west, as the Lookout was bound for Chicago and the Myrtle was bound from Chicago for a port inside of Green Bay, so that they were not particular to a point or two as their compass course, so long as they made the best use of the wind, and held the general courses required to take them to their respective destinations. The effort on the part of the respondent at the hearing was to show that the vessels were approaching each other upon converging or cross-lines, and not end on, or nearly end on; but I do not deem the question whether they were sailing on converging lines, or approaching each other end on, or nearly end on, very material, as the only difference in the duty of the two vessels was that, if approaching each other end on, or nearly so, both vessels, under the sailing rules, should have put their wheels to port, and kept away to starboard; while, if approaching each other on converging lines, the vessel which had the wind free should have kept out of the way, and the vessel which was on the starboard tack should have kept her course. Now, there can be no doubt from the testimony of the Lookout's witnesses that she was on the starboard tack, close-hauled, while the Myrtle had the wind free; hence, if they were meeting end on, or nearly so, it was the duty of those in charge of the Lookout to have gone off to the starboard, and, if approaching on converging lines, then to have kept her course. But she did neither; but, on the contrary, after the Myrtle had put her wheel to port, and gone off to starboard, as it was her duty to do, the Look-

out's wheel was put to starboard, thereby throwing her to port, so that she was brought across the Myrtle's bows. I conclude from the proof that there was not to exceed a point's difference in the course of the vessels, and that they were approaching each other nearly end on; and that the plain duty of those in charge of the Lookout was to have ported their wheel, which they did not do, but, on the contrary, starboarded their wheel; and that the collision was brought about by their neglect of their duty and violation of the sailing rules in that regard. But I am also fully satisfied that, if the Lookout had held her course, instead of going to port, there would have been no collision, so that it seems to me of very little consequence whether the vessels were meeting on converging lines, or end on, as the Lookout was at fault in either dilemma.

It also appears from the proof that, after the light of the Myrtle had been seen on board the Lookout, her captain allowed his wheelsman to go below to get lunch, while the lookout was sent aft to take the wheel, and, as the full watch consisted of only the captain and two men, this left the captain to perform the double duty of officer of the deck and lookout, which, with another vessel approaching, and in close proximity, was in itself an act of negligence, as it left his vessel practically without a lookout. *The Ottawa*, 3 Wall. 268; *The Hypodame*, 6 Wall. 216. Had there been a vigilant and competent lookout on libellant's vessel, charged with no other duty, it is probable that the captain would have been kept constantly advised of the situation of the Myrtle as the vessels neared each other, and the collision averted. While embarrassed by the double duty he had assumed, the captain of the Lookout committed the fatal error of going to port when he should have gone to starboard. The original libel is dismissed, and a decree must be entered on the cross-libel, finding the Lookout at fault, and decreeing damages in favor of cross-libellants.

HARDY v. THE RALEIGH AND THE NIAGARA.

(Circuit Court, S. D. New York. December 8, 1890.)

1. COLLISION—FOG—TUGS WITH TOWS AT ANCHOR—SIGNALS.

The tug N., with a tow, anchored in mid-stream in the Hudson river on account of fog, about 2 o'clock in the morning. The tow of canal-boats stretched abaft the tug about 800 or 1,000 feet in the channel. The N. sounded the required fog-signals, but no others were sounded, though the E., another tug, which was the N.'s helper, was stationed about the middle of the tow. Shortly after coming to anchor, a steamer coming down the river ran into and sank one of the canal-boats. *Held* that the N., as principal, was in fault in not requiring fog-signals to be sounded on the E., her helper, which would have enabled passing vessels to locate the tow.

2. SAME—EXCESSIVE SPEED.

The steamer was likewise in fault, as she was steaming from four to five knots, which was an excessive speed in the fog in question, through which vessels could not be seen at a greater distance than 50 feet.

3. SAME—CANAL-BOAT AT ANCHOR—SIGNALS.

The canal-boat which was sunk, being the outside boat of the first tier of the flotilla, was likewise in fault for not sounding any signals, under the statute which prescribes that "canal-boats which shall be anchored or moored in * * * the channel of any * * * river * * * shall sound a fog-horn or equivalent signal."

In Admiralty.

Mr. Hyland, for libellant.

Edward L. Owen, for the Niagara.

E. P. Wheeler, for the Raleigh.

WALLACE, J. The libellant's canal-boat J. E. Heaton was sunk by a collision with the steam-boat Raleigh, which took place in the Hudson river, a little below Inglewood dock, after sunrise, and about half past 5 o'clock in the morning of May 8, 1889. The canal-boat was at the time the port vessel of the first tier of a flotilla of canal-boats which had been brought in tow of the steam-boat Niagara from Albany, bound for New York city. The flotilla was composed of six tiers of canal-boats. Owing to a dense fog, the Niagara brought her tows to anchor at about 2 o'clock A. M., near the mid-channel of the river, and kept them there until the collision took place. At the time of the collision the tide was running slightly flood in the middle of the river, and the Niagara was headed down the river southerly, and somewhat easterly, and her tows were behind her, stretching in a northerly or north-westerly line up the river. The first tier of tows was about 250 feet distant from the Niagara on a hawser, and the other tows were connected with the first by hawser. The tug Easton, which was under the control of the Niagara, and was her helper on the voyage, was stationed on the port side of the fourth tier of tows. The Raleigh had left Inglewood dock to proceed down the river to New York. As the tide in shore was running a little ebb, she had made her landing by going below and rounding up to the dock. Upon leaving the dock she started in a south-easterly direction, and gradually rounded towards the south as she crossed the river, until she headed down the river, when she took a south-westerly course, to reach the westerly side of the channel. While on this latter course, and when going at a speed of four or five knots an hour, she struck the libellant's canal-boat on the latter's port side. The fog was so dense at the time that vessels could not see one another further than about 50 feet away. The proper fog-signals were maintained on board the Niagara during the time she and her flotilla lay at anchor, but no fog-signals were given on board the tug Easton, or on the libellant's canal-boat, or on any of the canal-boats of the flotilla, nor were any ordered to be given on the tug or tows by the Niagara. The Raleigh maintained proper fog-signals on her part during all her movements. She also reversed her engines as soon as she discovered the canal-boat. The libellant went down with his boat, and was rescued in an unconscious state, and in consequence of the shock and exposure his health was permanently impaired. The district court decreed for the libellant \$2,175.13 for the loss of his boat, cargo, and personal effects, together with \$5,000 for his personal injuries, and condemned each of the steamers to pay half of the decree, and such part of the other's half as might not be collected. The owners of both steam-boats have appealed.

The district judge held the Niagara in fault because no fog-signals were given by her helper, the Easton. He held the Raleigh in fault for continuing her navigation from Inglewood dock in so dense a fog in a

river where other vessels were liable to be encountered, and also because her speed was excessive under the circumstances of the case.

It is not necessary to discuss the question whether the Raleigh was justified in leaving her dock, and attempting to proceed on her trip, in the dense fog that prevailed. In the present case, that question involves merely an abstract proposition. It is enough to establish her liability that she was proceeding at a speed under which she could not, by any degree of promptitude and skill, avoid a collision by reversing her engines within the distance at which she could discover approaching or stationery vessels. The rule is that such speed only is lawful or moderate speed in a fog as will permit a steamer seasonably and effectually to avoid a collision by slackening speed, or by stopping and reversing, within the distance at which another vessel can be seen. If this rule is a severe one, and practically requires a steam-ship to come to a stop, and remain stopped, when navigating a river having an extensive commerce, or in a crowded harbor, it is too well established to be disregarded.

Inasmuch as the Niagara was a principal, and the tug Easton was her servant, the former is chargeable with fault, as between the Raleigh and herself and the libellant and herself, if proper fog-signals were not given on board the Easton. In respect to the Raleigh, the Niagara is also chargeable with fault if such fog-signals were not maintained on board the tows, as reasonable care demanded, in view of the particular location and arrangement of the flotilla. The tows, being without motive power of their own, were under the control of the Niagara in respect to the place selected for anchorage, and the manner in which they should be deployed and arranged while lying at anchor in mid-river; and any failure of the Niagara to observe proper care on her own part in these particulars would be a breach of duty to other vessels navigating the river, as well as to the tows themselves. Having a flotilla stretching out 800 or 1,000 feet behind her in the navigable channel, common prudence required the Niagara to adopt needful measures to signify that state of things to approaching vessels, because such vessels, hearing fog-signals on board the Niagara, would look for danger at the location of the signals, and deem themselves safe in crossing the river to the eastward or the westward, on a course much nearer to her than 800 or 1,000 feet. If the Niagara was unable to supply the tows with the bells or fog-horns necessary to be used in order to properly warn other vessels of the situation of the flotilla, she could at least have required the Easton to station herself where the fog-signals from that vessel would be serviceable, and to maintain the signals. Stationed where the Easton was, from 600 to 800 feet behind the Niagara, her location would seem to have been a judicious one; but it cannot be affirmed that signals maintained on board her would not have assisted the Raleigh in discovering danger and avoiding it while on her course across the river. Irrespective of this consideration, the statute required the Easton, as a steam-vessel, not under way, and in a fog, to sound a bell at intervals of not more than five minutes. For her default in not obeying the rule, the Niagara is responsible as her principal and master.

James Kent is cited on this point in the *Northwestern Reporter*. James

The remaining question is whether the libelant was not in fault for the collision, as well as both the steam-boats. The statute prescribes that—

"Canal-boats * * * anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not in any port, shall sound a fog-horn, or equivalent signal, * * * at intervals of not more than two minutes."

The terms of this statute are not restricted to canal-boats when they are independent vessels, but are broad enough to apply to canal-boats under all circumstances when anchored in a fog, and to include a canal-boat when she is lying among a flotilla in a fog, under charge of a tow-boat. It may well be that an inside boat in a flotilla should not be considered as within the spirit of the statute, and should therefore be treated as not within its meaning, because no practical benefit would result from her signals. However this may be, there seems to be no reason why the statute should not be read as requiring the outside boats of such a flotilla to observe the signals. Surely a multiplication of danger signals to indicate the presence of a stationery object, or a collection of anchored boats, covering a large expanse of water in a fog, could do no harm. The present case illustrates how it might be useful. If one canal-boat in each of the six tiers here had kept sounding a fog-horn at intervals of two minutes while they were at anchor, who can doubt that the chorus of signals would have told the Raleigh, even before she left the dock, certainly before she took her westerly course across the river, of the presence of an anchored flotilla, and warned her of the necessity of extra caution. The language of the statute is explicit and unequivocal. There is no room for interpretation, and it covers the case of a canal-boat in the situation of the libelant's boat. It may impose a duty towards other vessels upon the towing vessel having control of a flotilla under circumstances like the present to maintain proper signals on her tows. However this may be, the statute is addressed directly to the tows themselves when they fall within the described class, and the duty of obeying it is therefore primarily upon the owner of the tow. Those who navigate canal-boats and the other craft described by the statute are as much bound as are any other class of vessel-owners to provide their vessels with all appliances which by law they are required to use when the contingencies of navigation arise. The libelant cannot escape the imputation of fault by ascribing to the Niagara the duty of providing a fog-horn for his boat. The contract of towage between the two vessels implied that each would perform her part in completing the towage service; that proper skill and diligence would be used on board each; that each would be provided with the necessary appliances by law required; and that neither vessel by her own neglect would increase any risk of the other which might be incidental to the voyage. This is not a case in which it is obvious that the fault committed by either the Raleigh, the Niagara, or the libelant was one so remote as to be inconsequential.

A decree is ordered for the libelant for one-half the recovery allowed by the district court, and in other respects as decreed by the district court. The decree will award to the appellants the costs of this court.

CARSON & RAND LUMBER CO. v. HOLTZCLAW.

(Circuit Court, N. D. Missouri, E. D. January 13, 1891.)

REMOVAL OF CAUSES—APPLICATION—AMENDMENT.

Where an application to remove a cause to a federal court, on the ground of local prejudice, has been denied, a motion, made several months later, to amend the petition so as to set up another ground for the removal, is too late, and will be refused.

At Law. On motion to remand.

This is a motion to remand the cause to the state court. Plaintiff brought suit in the circuit court of Macon county, Mo., on February 8, 1889, (the same being returnable to the April term, 1889,) for the sum of \$1,822.99. April 10, 1889, the defendant filed his answer, and interposed a counter-claim for something over \$3,000. April 12, 1889, plaintiff filed a motion to strike out part of defendant's answer, which motion was overruled April 20, 1889. Thereafter, on May 25, 1889, plaintiff filed a reply to the answer, and on the same day lodged in the clerk's office of the Macon county circuit court a petition for removal of the cause to the United States circuit court for the northern division of the eastern judicial district of Missouri, under the local prejudice and influence clause of the act of congress of March 3, 1887. *Vide* 24 St. U. S. 553. Subsequently the petition for removal was presented to this court, and an order of removal demanded. Such order was finally denied on September 30, 1889. For the action taken on such application in this court, see 39 Fed. Rep. 578, 885. On September 27, 1889, the cause was ordered to be continued to the next term by the Macon county circuit court, but on October 1, 1889, that order was set aside, and three days thereafter, October 4, 1889, the plaintiff filed what is termed an "amendment to the original petition for removal." Such amended petition alleged the existence of "a separable controversy between Holtzclaw and the Carson & Rand Lumber Co.," in which the lumber company was defendant. The amended petition was accompanied with a bond for removal in the ordinary form. The state court does not appear to have taken any action whatever on the amended application for removal. On the 13th of November, 1889, the lumber company lodged a transcript of the record of the state court in this court, and on December 2, 1889, defendant filed a motion to remand. For some reason unknown to the court the motion to remand has not heretofore been submitted.

Sears, Guthrie, and J. C. Davis, for plaintiff.

B. R. Dysart and Berry & Thompson, for defendant.

THAYER, J., (*after stating facts as above.*) In any view that may be taken of the facts as above stated, the motion to remand must be sustained. Having failed in the effort to remove the cause on the ground of prejudice and local influence, it seems that an attempt was made to
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remove on other grounds, by amending the original petition for removal some months after it had been filed. The application was made too late, and the motion to remand must be sustained. It is so ordered.

In re CHAMBERS et al.

(Circuit Court, D. Nebraska. January 15, 1891.)

RECORDS OF FEDERAL COURTS—RIGHT OF EXAMINATION.

Act Cong. Aug. 12, 1848, provides that all books in the offices of the clerks of the circuit and district courts of the United States containing the docket of the judgments or decrees of said courts shall, during office hours, be open to the inspection of any person desiring to examine the same without any fee or charge therefor. Act Feb. 26, 1853, allows the clerk a certain fee for searching the records for judgments or decrees. Act Aug. 1, 1888, provides that the indices and records of judgments that the clerk is by that act required to keep shall at all times be open to the inspection and examination of the public. *Held*, that these provisions secure to the citizens the right to examine these records free of charge, and the clerk is entitled to the fee only when he is required to make the search himself.

At Law. Petition for leave to examine court records.

The following motion was filed on the 6th day of December, 1890:

"In the Circuit Court of the United States in Nebraska. November Term, 1890.

"MOTION.

"Comes now the undersigned, and on behalf of the said J. M. Chambers, whose name is subscribed to the affidavit accompanying this motion, and moves the court that the clerk thereof be instructed as to the right of the public, and especially said J. M. Chambers, to make inspection and examination of the indices and records authorized and prepared by authority of the act of congress approved August, A. D. 1888, and accompanying this motion, and support the same, by the petition and affidavit hereto attached, and made a part of this motion.

J. H. MACOMBER, Atty. at Law."

The petition and affidavit filed with and made part of the motion are as follows:

"PETITION.

"To the Honorable Judges of the Federal Courts of Omaha, Nebraska: We, the undersigned, being interested in the right to examine the indices for judgments in the district and circuit courts of the United States for the district of Nebraska, would respectfully ask the judges of said courts to instruct the clerks of said courts as to the right of the public to inspect the same free of charge.

"J. M. CHAMBERS, Abstractor, 923 New York Life Bldg.

"JOHN PALMYUIT, Abstractor, 913 New York Life Bldg.

"JOHN P. BREEN, Atty.

"DEXTER L. THOMAS, Atty. I have been refused the right to examine judgment index and shown order from Atty. Genl. Garland.

"CHAS. A. GOSS, Atty. at Law.

"C. F. HARRISON.

"W. W. SLABAUGH.

"GEO. J. PANE.

"C. K. COLLIERS, Secy. Home Investment Co.

"J. W. WEST.

"FRANK HELLER.

"T. J. TOOLEY.

"OMAHA ABSTRACT COMPANY, by HERBERT H. NEALE, Secy.

"H. E. HAND.

"F. E. ALEXANDER.

"CHAS. C. KNEESLY, Secy. Provident Savings Loan and Building Assn.

"R. S. ERON, Atty.

"F. L. RICE.

"A. BRANTLY.

"L. S. SKINNER.

"R. W. RICHARDSON, Atty. at Law.

"H. B. IVEY, Loan and Real Estate Broker.

"JNO. W. ROBBINS, of Hartman and Robbins, (Real Estate.)

"SECURITY ABSTRACT COMPANY, by E. F. SEAVER, Secy.

"OMAHA TITLE INDEMNITY & TRUST Co., by J. W. HARRIS, Secy.

"S. SCHLESINGER.

"W. E. GRATTON.

"*Omaha, Nebraska, Dec. 4, 1890.*"

"AFFIDAVIT.

"*State of Nebraska, Douglass County.*

"I, J. M. Chambers, being duly sworn, depose and say that I am an abstractor of titles, having an office in Omaha, Neb. That I have constant occasion to inspect and examine the indices and records of the courts of the United States, prepared and authorized by the act of congress approved August 1, 1888, entitled 'An act to regulate the liens of judgments and decrees of the United States.' That I understand and believe that the provision of said act in section 2 thereof authorizes and allows that 'such indices and records shall at all times be open to the inspection and examination of the public.' That the clerks of the courts of the United States at Omaha require the payment of a fee from the public to allow said public to make such inspection and examination for themselves. I further state that such fee is required and demanded by said clerks as a matter of right, but, as your affiant believes, is without warrant of law, and contrary to said act approved August 1, 1888. That the names attached to the petition accompanying this affidavit are of persons, companies, and corporations situated and resident in Omaha. That this application is made in good faith, on my own behalf and others, for the purposes of the said petition. That I am forbidden, without fee, to make inspection and examination of the said indices and records by the said clerks. That I desire, in the utmost good faith, that the said clerks should be instructed as to the law and right of the matter.

J. M. CHAMBERS.

"Subscribed in my presence, and sworn to before me, this 5th day of December, A. D. 1890.

[Seal.]

"SILAS ROBBINS, Notary Public."

CALDWELL, J. It will be observed that the petitioners do not seek an order authorizing the inspection and examination, by the public or themselves, of all the records in the clerk's office, but only those specifically mentioned in the second section of the act of congress of August 1, 1888, (25 U. S. St. 357.) They are the indices and cross-indices to the judgment records of the court and the judgment records themselves. Taking them in their chronological order, the acts of congress which re-

quire consideration in the determination of the question raised by this petition are as follows:

Act of August 12, 1848, (9 U. S. St. c. 166, p. 292,) which provides—

"That all books in the offices of the clerks of the circuit and district courts of the United States containing the docket or minute of the judgments or decrees of said courts shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fee or charge therefor."

The act of February 26, 1853, (10 U. S. St. c. 80, p. 163,) fixed the clerk's fees. Among its provisions were the following:

"For every search for any particular mortgage, judgment, or other lien, fifteen cents. * * * For searching the records of the court for judgments, decrees, and other instruments constituting a general lien upon real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made."

All the foregoing provisions, with others, are embodied in section 828 of the Revised Statutes of the United States. The second section of the act "To regulate the liens of judgments and decrees of the courts of the United States" (25 U. S. St. c. 729, p. 357) declares—

"That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public."

The act of 1848, which now constitutes the last clause of section 828, Rev. St., declares the particular records in question "shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor;" and the later act of 1888 declares that the indices and cross-indices of the judgment records "shall at all times be open to the inspection and examination of the public." The language of these statutes is peremptory and authoritative. Their plain meaning and legal effect are in no manner limited, restricted, or affected by the provisions relating to the fees of the clerk for searches. If the citizen "requires" the clerk to make the search, instead of making it for himself, the clerk is then entitled for his services to the fees fixed by the statute. He is only entitled to fees when he earns them. He cannot charge the citizen fees for the privilege of doing for himself what the statute in terms says he may do "without any fee or charge therefor." The fee does not attach to a search by whomsoever made, but only to a search made by the clerk. The statute fixes "the clerk's fees for searching the records" at "fifteen cents for each person against whom such search is required to be made;" and it is only when he is "required" to make, and makes, the search that he is entitled to the fee. If the clerk was entitled to the fee of 15 cents for each name searched for by the citizen, then he would have the right to compel the citizen to disclose the number of names he looked for, if not the names themselves. The law has not invested the clerk with any such inquisitorial powers. To compel the citizen to disclose such facts might imperil important business interests, or injuriously affect the credit of the persons named.

Independently of the act of 1848, the act of 1888 confers on the petitioners the right they claim. That act deals with the liens of judgments in the United States courts. It takes cognizance of the great importance to the public of having complete and accurate indexes to the records of judgments in these courts, and of affording to the public free and ready access to the same. To that end it declares the clerk "shall prepare and keep" in his office these records, and that they "shall at all times be open to the inspection and examination of the public." The terms of this statute are such as to preclude discussion or debate. It puts it out of the power of either the clerk or the court to deny to a citizen the right, freely, and without charge, to inspect and examine the records mentioned. No toll can be levied on the citizen for that privilege. It must not be forgotten that these are public records, made by the authority and direction of the United States whose property they are, and that they are kept in a public office, by a public officer, for public purposes. The law creating them was not a revenue measure, nor are they made and kept as a source of revenue to the United States, nor for the private gain of the clerk. If the clerk is "required" by the citizen to search them, he is entitled to the prescribed fee for his services; but he cannot reap where he has bestowed no labor.

The question raised by this petition was decided in *Re McLean*, 9 Cent. Law J., 425. In that case a corporation publishing a newspaper petitioned the court to instruct the clerk to allow its reporter to inspect the fee-books and all other records of the court. The clerk demurred to the petition. In its ruling upon the demurrer the court expressed the opinion that the reporter was not entitled, as a matter of right, to inspect all the records of the court, but that he was legally entitled to inspect the records which the petitioners in this case claim the right to examine. The court said:

"The right to examine certain records and papers does exist. It exists as to the books containing the docket or minute entries of the judgments and decrees of the court, and these the petitioners allege that they have been refused by an officer of this court."

—And the demurrer to the petition was overruled on the ground that the petitioner had the right to examine these records. While it was said the right to inspect the other records of the court did not exist, the court was probably not very well satisfied on that point, for, on further consideration of the case, it decided to grant, *ex gratia*, the whole prayer of the petition, and gave the reporter leave to examine all the records.

The right claimed by the petitioners is secured to them by statute, and it is not, therefore, material in this case to inquire what the common law was on the subject of the right of the public to examine the court records. If it was material to inquire into the common law on the question, it would probably be found to shed very little light on the subject for several reasons. At common law the court records were written in the "ancient and immutable court-hand," in a dead language, which few besides the officers of the court could read; and this method of keeping the records, which practically made them sealed books to the public,

continued down to the reign of George II., and at common law judgments were not liens on lands, and the necessity that now exists for examining the records had no existence then. But it is said that, while natural persons may have this right corporations have not, because they are neither "persons" nor any part of the "public," within the meaning of these words in the acts of congress relating to court records. Business pursuits of all kinds are now largely conducted by corporations. They sell goods, lend money, furnish abstracts of title, and carry on many other pursuits, which make it necessary for them to be constantly advised of the contents of the judgment records in the courts. A corporation must act by its officers or agents, who are citizens, and no citizen loses any of his rights as a citizen because he is a member of, or an agent for, a corporation; and he has a right to search the record for his own information, or as agent for another, and with a view of imparting the information he acquires to his principal, be that principal a natural person or a corporation.

The wear and tear of the records incident to the legitimate public use of them is no concern of the clerk or the court. When worn out in a use to which they are dedicated by congress, that body will doubtless make provision for renewing them, as has often been done before. It is said the public use of the records may result in their alteration or mutilation, but this cannot be received as an argument against such use, because it is a use to which they are devoted by the act of congress. Besides, as they are mere indexes and abstracts of judgments, made up from the journal entries, no alteration or mutilation of them would affect the integrity of the original entries.

It is due to the clerk to say that he has no pecuniary interest in this question, because the receipts of his office exceed the maximum compensation allowed him by law by a sum greater than the fees derived from this source. His action in this matter conformed to the opinion and instructions of Attorney General Garland, who, in a letter addressed to the clerk of the district court of this district, bearing date November 10, 1888, says:

"For every judgment record examined, section 828 directs a charge of fifteen cents, whether the search is made by the clerk or a private individual. The fee attaches to the fact of a search. The act of August 1, 1888, only facilitates the method of search. You will continue to collect the charge as heretofore. * * *"

But the court holds the fee attaches, not to the fact of a search, but to the fact that such search is made by the clerk on the requisition of another. It is a compensation for his services in actually making the search.

The court has been furnished with the copy of a bill and the decree in a cause in the circuit court of the United States for the district of Indiana at Indianapolis. The bill was filed in the name of the United States against a firm alleged to be engaged in the abstract business, and averred that it was the duty of the clerk to make and certify all searches, and that the United States had an interest in having the clerk do the

work, and in preventing any one else from doing it, because from the fees for searches the United States was enabled to pay in part the expenses of the clerk's office and the compensation of the clerk, and that the fees were provided for that purpose; that the defendants had obtained copies of the records of the judgments and decrees, and the indexes to the same, and were using the same "in their business of abstracting and certifying to the titles to real estate," thereby enabling "persons to procure searches to be made of the records of said court without obtaining the same from the clerk thereof, as they otherwise would be compelled to do," and prayed that the defendants be enjoined from using their copies of the records in their business of investigating and certifying to titles, and there was a decree in accordance with the prayer of the bill. The case is said to have been fully argued, but no opinion was filed, and the decree recites that the cause was heard upon "the bill of complaint and the decree *pro confesso*." No opinion having been filed, the reasoning and authorities upon which the court grounded its decision can only be conjectured. In the absence of clear and controlling authorities, the court is unable to yield its assent to the conclusion reached in that case. A decree rendered by confession cannot be accepted as settling the law for any other case; but, conceding the decree to have been rightly rendered on the law as it then stood, it has no bearing on the case at bar, since it was rendered two years before the passage of the act of 1888.

The theory of the bill and the decree is that the government fixed the clerk's fee for searches at 15 cents for each name as a means of revenue to aid in the support of the government, and that it is therefore entitled to a monopoly of the business, and that persons who lawfully obtain copies of the judgment records, and the indexes to the same, cannot use them in their business of abstracting and certifying to titles, but that every citizen of the state who desires any information with reference to judgments in a United States court must apply directly to the clerk of that court, and pay him for searching for the same. All monopolies are odious, and English history does not furnish an example of one more odious in principle and vexatious in practice than that sought to be established by the bill in that case. Congress never contemplated the establishment of any such monopoly in this business, either for the benefit of the government or the clerk. The acts of 1848 and 1888 are anti-monopoly acts, and took away from the government and the clerk all possible claim to the exclusive privilege of searching these records, and selling the information they contain. The monopoly of authority in business affairs is in every instance, and in every degree, an evil which can only be established by clear and positive legislation. It will never be presumed nor inferred from a statute capable of any other construction. The decisions on the right of the citizen and abstract companies to inspect and copy the records of the state courts, under the varying statutes of the states, are somewhat conflicting, but it is believed that there would have been no division of opinion on the subject if the state statutes had been as comprehensive and mandatory in their terms as the

statutes of the United States. The statutes in Michigan, Wisconsin, New Jersey, Minnesota, and New York are held to confer the right. *Burton v. Tuite*, 78 Mich. 363, 44 N. W. Rep. 282, 29 Amer. Law Reg. (N. S.) 49, and note, (overruling *Webber v. Townley*, 43 Mich. 534, 5 N. W. Rep. 971;) *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. Rep. 30; *Lum v. McCarty*, 39 N. J. Law, 287, (overruling *Flemming v. Clerk of Hudson Co.*, 30 N. J. Law, 280;) *State v. Rachac*, 37 Minn. 372, 35 N. W. Rep. 7; *People v. Richards*, 99 N. Y. 620, 1 N. E. Rep. 258; *People v. Reilly*, 38 Hun. 429; *People v. Cornell*, 47 Barb. 329. Under the statutes in the states of Kansas, Alabama, Georgia, Colorado, and Maryland the right is denied or qualified. *Cormack v. Wolcott*, 37 Kan. 391, 15 Pac. Rep. 245; *Boylan v. Warren*, 39 Kan. 301, 18 Pac. Rep. 174; *Randolph v. State*, 82 Ala. 527, 2 South. Rep. 714; *Buck v. Collins*, 51 Ga. 391; *Bean v. People*, 7 Colo. 200, 2 Pac. Rep. 909; *Belt v. Abstract Co.*, (Ct. App. Md. 1890,) 20 Atl. Rep. 982, 30 Amer. Law Reg. 56, and note.

It is proper to say that the court has been at some pains to ascertain the views entertained and the practice that prevailed in this matter in other circuits and districts. Inquiries for this purpose extended to four circuits besides the eighth, and the replies showed a substantial consensus of opinion and practice in harmony with the views here expressed. The clerks of the several circuit courts in this circuit will conform, in the administration of their offices, to the views expressed in this opinion. For the proper practice and fees where the clerk is required to make the search, see *In Re Woodbury*, 7 Fed. Rep. 705, 17 Blatchf. 517.

This court has no jurisdiction over the clerk of the district court, and so much of the petition as prays for an order on that officer is dismissed. If the petitioners desire any relief against the practice that prevails in the office of the clerk of that court, they must apply to that court.

EILLERT *et al.* v. CRAPS *et al.*

(Circuit Court, D. South Carolina. January 22, 1891.)

TESTIMONY TAKEN BY COMMISSION—PUBLICATION.

Where complainant's testimony has all been taken by commission, the evidence will be published before defendant opens his case, with proper precautions that he does not deprive complainant of any advantage he may enjoy by reason of defendant's laches, so that defendant may know whether or not complainant has made out his whole case in chief.

Motion to Open Commissions Under Equity Rule 69.

E. W. Hughes, for defendants.

B. A. Hagood, for complainants.

SIMONTON, J. This case has heretofore been referred to a special examiner to take the testimony. He is engaged in doing this. It appears that all the testimony of complainant has been taken by commissions.

These are here. The complainant has refused to consent that they be opened by the clerk. The defendant, being about to open his case, now moves that they be opened and published. He bases his motion upon the ground that necessarily he does not know how complainant has sustained the allegations of his bill, and that he is unable to meet him. The purpose of taking testimony in a cause is to give the opportunity to each party to sustain his own position, and to meet the position of his adversary, if he can, by witnesses. Ordinarily the parties have the right to be present, and to hear the witnesses, and, if thought best, to cross-examine them upon the testimony they give. In exceptional cases, testimony, however, may be taken by commission or deposition. The defendant has the right to compel the complainant to make out his whole case in chief, and complainant in our courts is confined, in his reply, to such testimony only as will reply to that of defendant. Thus the practice conforms to the rule which fairness and justice would prescribe, and the defendant is entitled to know the case of complainant, as made by the evidence. When, however, all the testimony of complainant is taken by commission, the most secret mode of procuring testimony, whose contents cannot be disclosed without perjury, the defendant is not only put at a great disadvantage, but he is deprived of a right. While the court, governed by these considerations, will grant this motion, care will be taken not to permit the defendant to avail himself of it, and deprive the complainant of any advantage he may now enjoy by reason of laches of defendant. It has been suggested that after an order of publication no further testimony can be taken, and *Wood v. Mann*, 2 Sum. 317, is cited. It is not necessary to decide this point now. *Non constat* that defendant will produce witnesses, if he does let the testimony be taken subject to this exception, if the exception be made. Let the commissions taken in this cause be opened, and published in the clerk's office.

BLACK *et al.* v. EHRICH *et al.*

(*Circuit Court, S. D. New York. January 31, 1891.*)

INJUNCTION—LITERARY PROPERTY—NAMES OF BOOKS.

Injunction will not lie to restrain the publication and sale of a cyclopædia of the same name as one published by complainants, and of the same contents, except as to certain copyrighted articles, when defendants have not infringed any copyright, and use no means to persuade the public that their publication is that of complainants.

In Equity. On bill for injunction.

Rowland Cox, for complainants.

Augustus T. Gurhitz, (Newton A. Partridge, of counsel,) for defendants.

WALLACE, J. The complainants, a publishing firm of Edingburgh, Scotland, bring this suit to restrain the defendants, who are doing busi-

ness at New York city, from selling a work entitled "The Encyclopædia Britannica," which is published by Messrs. R. S. Peale & Co. at Chicago, and from issuing and distributing circulars and advertisements introductory of the book, which are alleged by the complainants to be misleading and injurious. The case is now here upon a motion for an injunction *pendente lite*.

It appears by the pleadings and depositions that prior to 1873 several editions of the Encyclopædia Britannica had been issued by various publishers, the last, and eighth, edition having been issued in 1861. In 1873 the complainants undertook to bring out a new edition. They named it "The Encyclopædia Britannica, Ninth Edition." They issued the first volume in 1875, and subsequent volumes from time to time until 1889, when the work, consisting of 24 volumes, was completed. In the preparation and publication of this work the complainants expended an enormous sum of money for editorial labor, for articles contributed by eminent specialists and authors, for maps, drawings, and illustrations, and for the printing, binding, and other mechanical features. They intrusted to Messrs. Little, Brown & Co., of Boston, and Messrs. Charles Scribner's Sons, of New York, the introduction and sale of their work in this country. With the exception, however, of a very limited number of their original edition, which was known to the trade as the "Black Edition," their volumes sold here have not purported to be published by them, but bear upon their title-page the imprint of different American publishers. The defendants are offering for sale a reprint of the work published by the complainants in a cheap form, except that in the place of certain articles of the original, copyrighted pursuant to the statutes of the United States, they have substituted other articles, to avoid infringement of the copyright. The case for the complainants rests upon the legal theory that the acts of the defendants amount to unlawful competition in trade. With the exception of the copyrighted articles, the entire literary matter of "The Encyclopædia Britannica, Ninth Edition," is public property in this country, at least, and a rival publisher has the legal right to make any use of it he sees fit. He may use any part of it, or all of it, and call it by what name he prefers. Neither the author nor proprietor of a literary work has any property in its name. It is a term of description, which serves to identify the work; but any other person can with impunity adopt it, and apply it to any other book, or to any trade commodity, provided he does not use it as a false token, to induce the public to believe that the thing to which it is applied is the identical thing which it originally designated. If literary property could be protected upon the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws. There is not a *scintilla* of evidence in the present case to indicate that the defendants have held out the title of the book as a false token, or made any statements in their circulars or advertisements, with a view or likely to lead any person to believe that their reprint is the book which the complainants publish. Their book denotes on its title-page that it is published by R. S. Peale

& Co. at Chicago. Their circulars announce that the Peale reprint is the "latest and best;" the "only American reprint having all marginal references;" contains "articles rewritten by eminent Americans, substituted for those in the 'English edition,'" is "incomparable," and, in short, is a reproduction of the original, except as it has been improved. Their laudations go for what they are worth, but they do not tend in the remotest degree to confuse the mercantile identity of their book with that of the complainants.

The motion for an injunction is denied.

BRENNAN v. MOLLY GIBSON CONSOLIDATED MINING & MILLING CO.

(Circuit Court, D. Colorado. January 22, 1891.)

1. ACTION FOR WRONGFUL DEATH—HEIRS—PLEADING.

In an action by a mother for the death of her sons caused by defendant's negligence, under the Colorado statute allowing such an action to the heirs of a deceased person, it is sufficient to allege that plaintiff is the sole heir of the decedents, without further averring that they were unmarried and childless.

2. SAME—DEPENDENCE OF PLAINTIFF.

It is not essential to the right to maintain such action that plaintiff should have been dependent on decedents for her support.

At Law. On demurrer to complaint.

C. W. Franklin, for plaintiff.

W. W. Cooley, for defendant.

HALLETT, J., (orally.) *Catherine Brennan against The Molly Gibson Consolidated Mining & Milling Company* is a suit brought in the district court of Pitkin county, and thence removed into this court. The action is to recover damages for the death of Martin W. Brennan and Hugh Brennan while in the service of the defendant. It is averred that defendant was engaged in carrying on a mine, and employed Martin and Hugh Brennan as miners to work upon the property, and set them to work in a place which was dangerous on account of the nature of the ground. The ground was "filled with large boulders, and surrounded by loose debris which made it unsafe and dangerous to work, which the defendant well knew from other developments previously made upon said property, and which said Martin and Hugh Brennan had no knowledge of whatever." That defendant set them to work there without giving them notice of the danger to which they were exposed. That the danger was increased by defendant going upon the surface of the ground and drilling and blasting there in a manner to loosen the rock and dirt above the place where Martin and Hugh Brennan were at work. That the place was not sufficiently timbered; and that the earth came down upon them and killed them. The action is founded upon the statute of this state which provides that, in case of the death of

any person from the negligence of another, the heirs of the deceased surviving may have an action for such death. There is a demurrer to the complaint, in which the first ground is that plaintiff, as mother of the men who were killed, does not show herself to be the person designated in the statute as authorized to sue; and this appears to be on the ground that it is not averred that Martin and Hugh Brennan were not married, and that they had no children. The plaintiff does aver that she is the sole heir, the only person authorized to bring suit; and this is regarded as a sufficient statement of the fact. It is also objected that it does not appear in the complaint that the men who were killed "contributed directly or indirectly to the support of the plaintiff, or that plaintiff was interested in any manner in deceased, or that deceased suffered in any manner [that must be a mistake in the use of words] from the negligent acts of defendant." In some states it has been held that it must appear that plaintiff was dependent upon the person killed in some manner for support, but that rule has never been adopted here, and it is held to be entirely inapplicable to the action under this statute. Counsel presented no briefs or arguments upon this demurrer. Defendant's counsel asked for time in which to present a brief, but the questions are so clear, and have been so often determined in this court, that it seems unnecessary to have briefs upon them or to hear any argument. The demurrer will be overruled, and the defendant will be allowed 20 days in which to answer.

UNITED STATES *v.* THE WALLA WALLA.

(District Court, D. Washington, N. D. January 12, 1891.)

CUSTOMS DUTIES—FRAUDULENT IMPORTATION—LIABILITY OF VESSEL.

Where a vessel employed as a common carrier was seized to enforce a lien for a penalty under section 3088, Rev. St., there being probable cause for the seizure, but no charge of wrong-doing against the owner, *held*, that, in the absence of rebutting evidence, proof that packages supposed to contain the contraband goods were received, transported, and delivered as freight in due course of business, and that the master had no knowledge with reference thereto, makes a sufficient case for the claimant, and the vessel must be released.

(Syllabus by the Court.)

At Law.

P. H. Winston, U. S. Atty., and P. C. Sullivan, Asst. U. S. Atty.

J. C. Haines, for claimant.

HANFORD, J. In this case the steam-ship Walla Walla, engaged as a common carrier of freight and passengers on the route between San Francisco and the Puget Sound ports, via Victoria, in British Columbia, was seized on the 19th day of March, 1889, to enforce a lien under section 3088, Rev. St., for a penalty alleged to have been incurred by her master by violations of sections 2806, 2807, 2809, 3126, Rev. St. The cir-

cumstances which led to the seizure are as follows: A short time prior to the arrest of the vessel, the custom-house officers discovered and seized at Tacoma two barrels containing 370 pounds of opium, prepared for smoking, and about the same time discovered and seized at Ellensburg three other barrels containing 530 pounds of prepared opium. The barrels seized at Tacoma were first discovered in a car *en route* from Ellensburg by rail, via Portland, to San Francisco. Those seized at Ellensburg were found in the railroad warehouse. There was nothing upon the outside of either of the barrels to indicate that they contained opium, but they appear to have been purposely disguised as to their contents. It was also discovered, and has been proven upon this trial, that in the month of February, 1889, the steam-ship Walla Walla discharged at Tacoma five barrels,—two on one trip, and three on a different trip,—which barrels were similar in all respects as to marks and general appearance to the barrels seized. Manifests or way-bills of railroad freight were also delivered at Tacoma at the time of unloading, showing that barrels of similar appearance and marks were brought in the vessel from San Francisco; one of the shipments being destined to Ellensburg, consigned to J. Light, and the other destined to the same place, consigned to J. Dark. In the memoranda of railroad freight so delivered at Tacoma two of the barrels are referred to as containing "sauerkraut," the other three as containing "skid grease;" and it is also proven that neither of the five barrels were entered in the ship's manifest delivered at the custom-house at Port Townsend, as required by law, upon entering. From these circumstances a very strong inference arises that the barrels containing this opium are the identical barrels which were unladen from the Walla Walla at Tacoma, and must have been transported in the vessel either from San Francisco or from some other place at which she touched before arrival at Tacoma, and failure to enter such freight in the ship's manifest, as required by law, is a circumstance to justify suspicion of complicity on the part of the master in the unlawful importation of this opium; and I consider, and will certify, that there was probable cause for the accusation against the master in this case, sufficient to justify the seizure of the ship, and to throw the burden of proof upon the claimant, as provided in section 909, Rev. St.

On the part of the claimant, it is shown by the testimony of the purser and freight clerk, and by the ship's freight book and shipping receipts, that barrels corresponding in appearance and marks to those delivered at Tacoma were received as freight in due course of business at San Francisco, being delivered on the dock for shipment by a regular transfer company, and receipted for in the usual way, and without any circumstance to justify suspicion on the part of the ship's officers that the barrels contained contraband merchandise; and it is also shown that the master had no particular knowledge in regard to the cargo or the barrels in question. The master himself has testified that he had no knowledge whatever in regard to these barrels, or in regard to any freight transported upon either of the trips in question, and not appearing in the ship's manifest. This testimony is reasonable, and probably true; at

least, it is uncontradicted by the testimony of any witness, or by any circumstance proven in the case. Just when the opium was put into the barrels—whether before they were shipped from San Francisco, or whether it was clandestinely introduced into the vessel, and packed into the barrels at Victoria, or whether the contents of the barrels were changed after their arrival at Ellensburgh—cannot be determined by the testimony upon this trial; and in either case no penalty has been incurred for which the ship, being a common carrier, can be held liable, or in any way responsible, unless there was complicity in the smuggling of the opium on the part of her master or owner. 21 St. U. S. 322; *The Saratoga*, 9 Fed. Rep. 322.

As to the owner, the libel of information does not charge such complicity, and there is nothing in either the pleadings or proofs to raise an issue or justify inquiry.

The question as to guilty knowledge of the master is the one of chief importance, upon the answer to which the decision of the case must be predicated; and to this I find that it is shown, by a clear preponderance of the evidence, that Capt. Blackburn did not at any time have any knowledge whatever as to the barrels mentioned or their contents.

Let there be findings accordingly, and a decree in favor of the claimant.

UNITED STATES v. SEVEN HUNDRED AND FORTY TINS OF OPIUM.

(District Court, D. Washington, N. D. January 19, 1891.)

CUSTOMS DUTIES—FRAUDULENT IMPORTATIONS—EVIDENCE—FORFEITURE.

In a suit to condemn merchandise as forfeited under section 3032, Rev. St., for having been fraudulently imported, where the proofs on the trial show probable cause for the seizure, and the claimant makes no offer to explain damaging circumstances, and show when, where, how, or from whom he acquired the ownership he claims, such withholding of evidence is a circumstance sufficient to complete the case for the government, under section 909, Rev. St.

(*Syllabus by the Court.*)

At Law.

P. H. Winston, U. S. Atty., and P. C. Sullivan, Asst. U. S. Atty.

A. R. Coleman, for claimant.

HANFORD, J. This is a case of seizure under section 3082, Rev. St., the merchandise alleged to be contraband being the 370 pounds of prepared opium referred to in my opinion in the preceding case, (*United States v. The Walla Walla*, ante, 796,) the circumstances connected with the discovery and seizure of which are stated in that opinion. After this suit was commenced, and notice of the seizure published, the claimant appeared, filed his claim as owner of the property, and answered the information, denying that the merchandise was of foreign growth and manufacture, and that it was unlawfully imported into the United

States. Upon these issues a trial has been had, the testimony in this case being the same as that taken in the case referred to against the steam-ship Walla Walla, no additional proofs being offered on either side. The claimant has not, to the knowledge of the court, appeared in person before the court at any time. He has not testified as to any facts within his knowledge as to when or how he acquired the ownership of the opium. For aught that appears, he may have bought the right of a smuggler to this property, since its discovery and seizure by the United States officers. It may be fairly assumed, however, that if he is the *bona fide* owner, and if the merchandise is not in fact contraband, that he could easily have shown, by competent proof, where and by whom it was manufactured, when it was imported into the United States, if it ever was imported, and when, from whom, and in what manner he acquired ownership of it; and he should at least offer some explanation of the peculiar circumstances as to the opium being packed in casks, and shipped under the false designation of "sauerkraut" and "skid grease." Having failed to do this, or to make any attempt to do so, I think he has failed to establish, by a preponderance of the testimony, his right to recover the property, which he is bound to do to make good his claim under the provisions of section 909, Rev. St., which casts the burden of proof upon him; there being an abundance of testimony to show probable cause for the seizure. A decree will therefore be awarded, condemning the opium as forfeited to the United States, according to the prayer of the information.

UNITED STATES v. TEN HUNDRED AND SIXTY TINS OF OPIUM.

(District Court, D. Washington, N. D. January 19, 1891.)

At Law.

P. H. Winston, U. S. Atty., and P. C. Sullivan, Asst. U. S. Atty.

A. R. Coleman, for claimant.

HANFORD, J. What has been said in the preceding case is equally applicable in this case, and determinative of it. For the same reasons there stated, a decree will be awarded in this case condemning the opium as forfeited to the United States, in accordance with the prayer of the information.

UNITED STATES *v.* MANION.

(District Court, D. Washington, N. D. December 10, 1890.)

1. PERJURY—RULES AND REGULATIONS OF LAND-OFFICE.

Rules and regulations issued by the commissioner of the general land-office, pursuant to section 2351, Rev. St., do not have force as laws of the United States, within the meaning of section 5392, Rev. St., relating to perjury.

2. SAME—OATH BEFORE NOTARY PUBLIC.

Notaries public are not authorized by any law of the United States to administer oaths to affidavits required by the rules and regulations prescribed by the commissioner of the general land-office.

3. SAME.

Perjury cannot be assigned upon an affidavit made before a notary public by a person in support of his claim to a preference right to purchase coal land under sections 2348, 2349, Rev. St.

(Syllabus by the Court.)

Indictment for Perjury.

P. C. Sullivan, Asst. U. S. Atty.

James Hamilton Lewis, for defendant.

HANFORD, J. This indictment is founded upon section 5392, Rev. St. U. S., which reads as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punishable by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The perjury alleged to have been committed by the defendant is assigned upon an affidavit made by him before Paul D'Heirry, a notary public, in support of his claim as a pre-emptor of coal land, under sections 2348 and 2349, Rev. St. U. S. A demurrer has been interposed, raising the question whether such an affidavit is authorized or required by any law of the United States, and whether a notary public is competent to administer an oath to such affidavit. Section 2347 *et seq.*, Rev. St., relating to sale of coal lands, does not in terms prescribe or authorize such an affidavit as the one now under consideration, nor confer any authority upon notaries public; and no act of congress has been called to my attention which does authorize the oath, or vest in such officer the power to administer it, and according to my understanding of the decisions of the supreme court of the United States in the cases of *U. S. v. Curtis*, 107 U. S. 671, 2 Sup. Ct. Rep. 507; *U. S. v. Hall*, 131 U. S. 50, 9 Sup. Ct. Rep. 663; *U. S. v. Perrin*, 131 U. S. 55, 9 Sup. Ct. Rep. 681; and *U. S. v. Reilly*, 131 U. S. 58, 9 Sup. Ct. Rep. 664, for want of statutory provisions covering these points, the case is not within section 5392. Section 2335 only provides, in effect, that any affidavit required

by any provision of the chapter of the Revised Statutes relating to the sale and disposal of mineral lands, into which the coal-land act has been incorporated, may be sworn to before any officer authorized to administer oaths. By its terms it expressly limits the general authority so given to the particular affidavits required or authorized by the chapter, and it can have no bearing upon this case, for the reason that the affidavit in question is not one that is so required or authorized.

The United States attorney has contended that, pursuant to section 2351, Rev. St., the commissioner of the general land-office has issued rules and regulations which have the force of law, supplying omissions in the acts of congress in the particulars stated; and in support of the indictment he cites *U. S. v. Bailey*, 9 Pet. 238. I have found, upon examination, that the regulations and instructions first promulgated by Commissioner Drummond, under authority of this section, seem to require the party claiming a preference right under the coal-land law to appear in person, and swear to an affidavit in a prescribed form before the register or receiver of the land-office, and do not confer any authority upon notaries public. If any different rules or regulations upon the subject have been subsequently issued, they have not been brought to my attention, although time was given the United States attorney for the purpose of obtaining copies of all rules and regulations bearing upon the question. I think, however, that the decision in *U. S. v. Bailey*, as it has been explained in the opinion of the supreme court by Mr. Justice HARLAN in *U. S. v. Curtis*, does not support the district attorney in the position which he has taken. Perjury can only be assigned upon an oath authorized by a law of the United States. "Law," according to the most familiar definition of that term, is a rule prescribed by the supreme power in the nation. Now the commissioner of the general land-office is not the supreme power in the United States. He does not create the laws of the United States, and he cannot be endowed with power to do so while the present constitution is upheld. He may exact from all who transact business in his bureau and in the district land-offices compliance with the rules and regulations which he is authorized to make, but he cannot prescribe a rule which can have the force of a law of the United States, and the violation of which can be punished as a felony.

I conclude, therefore, that the demurrer to this indictment must be sustained.

UNITED STATES *v.* BETHEA.

(District Court, D. South Carolina. January 8, 1891.)

POST-OFFICE—ROBBERY FROM MAILS—DECOY PACKAGES.

A postal-car employe who takes from the mail under his charge a package containing things of value, although placed in the mail as decoy, and addressed to a person having no existence, is punishable under Rev. St. U. S. §§ 3891, 5467, denouncing a penalty against any postal employe who takes any letter or packet "intrusted to him, * * * and which was intended to be conveyed by mail. * * *". Following *U. S. v. Wright*, 38 Fed. Rep. 106; *U. S. v. Dorsey*, 40 Fed. Rep. 752; and *U. S. v. Whittier*, 5 Dill. 85. Refusing to follow *U. S. v. Demicke*, 35 Fed. Rep. 407, and *U. S. v. Matthews*, 35 Fed. Rep. 890.

At Law. Indictment for robbing the mails.

Rev. St. U. S. § 3891, provides that—

"Any person employed in any department of the postal service, who shall unlawfully detain, delay, or open any letter, packet, bag, or mail letters intrusted to him, or which has come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the postmaster-general, or who shall secrete, embezzle, or destroy any such letter, packet, bag, or mail of letters, although it does not contain any security for, or assurance relating to, money or other thing of value, shall be punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both."

Section 5467 declares, among other things, the punishment of any postal employe who shall secrete, embezzle, or destroy any letter, packet, etc., "intrusted to him," etc., for the purposes described in section 3891.

Abial Lathrop, Dist. Atty.

J. M. Johnson and *Charles A. Woods*, for defendant.

SMONTON, J. The defendant is indicted, under sections 3891 and 5467 of the Revised Statutes, for taking from the mail in his possession a package, and stealing its contents, which had value. He was a postal-car employe between Wilmington, N. C., and Jacksonville, Fla. The evidence on the part of the government was that among the contents of a mail-bag distributed by defendant on the train was a box containing a stud and a dollar bill; that defendant opened the box, and appropriated its contents, throwing the box away; that the box was really a decoy package, addressed to W. H. Tatum, Orange Park, Fla. There is no such person as Tatum. The inspector who caused the decoy package to be put in the mail intended to intercept it before or when it reached Orange Park post-office. At the close of the evidence by the prosecution, the defendant moved the court to instruct the jury to find him not guilty, upon the ground that a decoy package addressed to a person not existing, and not intended to be delivered to the addressee, is not within sections 3891 and 5467, Rev. St. He quotes and relies upon *U. S. v. Demicke*, 35 Fed. Rep. 407; *U. S. v. Matthews*, 35 Fed. Rep. 890. The

same question was made in *U. S. v. Wight*, 38 Fed. Rep. 106; *U. S. v. Dorsey*, 40 Fed. Rep. 752; and *U. S. v. Whittier*, 5 Dill. 35,—and an opposite conclusion reached. A careful consideration of the sections in question satisfies me that those two sections cover every package which has come into the hands of a postal employe, "intended to be conveyed by mail;" and, if he deals unlawfully with it, he cannot be excused because it cannot be delivered to the person to whom it is addressed. I concur with the cases in Dillon, 38 and 40 Fed. Rep., and dismiss the motion. See, also, *U. S. v. Foye*, 1 Curt. 364.

THE CHRISTOBAL COLON.

CAVALIER *v.* THE CHRISTOBAL COLON.

(District Court, E. D. Louisiana. December 26, 1890.)

MARITIME LIENS—DAMAGE FOR TORTS.

A person injured by the negligence of the master and owners, while employed in loading coal upon a foreign vessel as a supply, has a lien upon the vessel for his damages.

In Admiralty.

Percy Roberts and *Alfred Goldthwaite*, for libellant.

Bayne, Denegre & Bayne, for claimant.

BILLINGS, J. This cause is submitted on the exception that no cause of action is shown in the libel against the vessel. It is not denied that there would be admiralty jurisdiction in an action *in personam*. The question presented is whether the libellant, upon the alleged facts, has a lien upon the vessel. The facts alleged in the libel are that the Christobal Colon was a vessel engaged in foreign commerce, (the claim filed by the respondent shows that she is a foreign vessel, her owners residing in Barcelona, Spain;) that she was taking on coal for a voyage; that the libellant was employed to aid in loading the coal; that while so employed, through the negligence of the master and owners in not closing certain sections of the hatchway, he fell through the same and was injured, and thereby has suffered damage in the amount of \$10,000. The question then is whether a person injured by the negligence of the master and owners, while employed in loading coal supplied for a voyage upon a foreign steam vessel, for the damage which he has suffered has a lien upon the vessel.

Those who supplied the coal have a lien. It is difficult to see why those who were employed in loading the coal should not also have a lien. In several cases in this court judgments have been given against the vessel for injuries suffered by employes through the negligence of the owners. On appeal to the circuit court the libellants also recovered. It is true that no question was made in these cases as to the lien. See *The*

Explorer, 20 Fed. Rep. 135, and *The Mandalay*.¹ In *Cope v. Vallette Dry-Dock*, 10 Fed. Rep. 144, this court gives a brief summary of the doctrine of maritime liens and their origin, and the measure or test as to their existence, as follows:

"The reason of this precise discrimination is that, with the exception of derelict and things found, and the ship, her cargo, and freight, there could be no basis in reason for a lien which must exist in order to support a libel *in rem*. The ship and all things which pertain to it, are, in the law of admiralty, clothed with personality, so far as responsibility goes. Those who repair or loan upon her, or equip or man her, and those who deal with her, and those who are injured by her, and those who save her, look to her. The reason of this is that she was often far distant from her home and owners, and commerce was vastly facilitated by the law thus endowing her with the attributes of a person. This is the origin of the doctrine of liens in the maritime law, and by this it is to be measured."

Applying this test, it is clear that it is in the interests of vessels as essential that they should, when in foreign ports, have the capacity to become indebted as things, for damage suffered by those who load a necessary supply as for the supply itself, and that it is essential in both cases, the reason being that without such a capacity it might be impossible for ships to get supplies or procure their being loaded where, as here, the owners lived in remote foreign lands. In *Ex parte Easton*, 95 U. S. 68, after a most elaborate discussion of all the law upon the question whether wharfage carries a lien, the court held that it does, on the ground that (page 68) "such a contract being one made exclusively for the benefit of the ship or vessel, a maritime lien arises." In *The Max Morris*, 11 Sup. Ct. Rep. 29, (*Morris v. Curry*), a case in which Mr. Justice BLATCHFORD rendered the opinion of the supreme court at the present term, November 7, 1890, the case as stated by him is precisely this case,—"that of a libellant employed to load coal by a stevedore having a contract for loading coal, and who fell from a bridge to the deck while on the vessel, in consequence of the negligence of those in charge of her." This case was tried in the district court, and an able opinion given by Judge Brown in rendering judgment for libellant. 24 Fed. Rep. 860. On appeal to the circuit court a difference of opinion was certified to by the circuit judges as to the propriety of dividing the damages in such a case of tort, (other than collision,) and the case was very fully considered, and the decree against the vessel for damages affirmed. 28 Fed. Rep. 881. Neither in the district nor circuit nor supreme court was any question made as to the lien, and the propriety of the consequent proceeding *in rem*. I think that the authorities, so far as they bear upon the question, as well as the reason of the lien for supplies, viz., that the ship may, in the absence of foreign owners, upon its own credit, obtain supplies, and thus be able to continue her navigation without interruption or delay, lead to the conclusion that the libellant upon the case stated in the libel, and as is shown in the claim, has a lien upon the vessel, and that the suit *in rem* is properly brought.

The exception is therefore overruled.

¹Not reported.

RANSTEAD v. FAHEY.

(District Court, D. Maryland. February 7, 1891.)

1. WHARVES—OVERLAPPING VESSEL—AMOUNT OF WHARFAGE.

Held, as was decided in *The Wm. H. Brinsfield*, 39 Fed. Rep. 215, that where a vessel lying on a private dock overlapped on to the adjoining wharf, the owner of such adjoining wharf could recover a *pro rata* proportion of the customary charge for wharfage on the vessel, but that, when no part of the cargo was loaded or unloaded over the adjoining wharf, the owner could not recover any part of the customary wharfage charged in respect of the cargo.

2. SAME.

Held that, where the purchaser of the cargo was bound to furnish a wharf free of expense to the vessel, and ordered the vessel to discharge at his own wharf, where she necessarily overlapped on to the adjoining wharf, and notice was given him that wharfage would be charged, there was an implied contract to pay such amount of wharfage as was legally collectible, and that the adjoining owner could sue him *in personam* in admiralty.

(Syllabus by the Court.)

In Admiralty.

Robert H. Smith, for libellant.

Wm. H. Cowan, for respondent.

MORRIS, J. This libel for wharfage arises out of disputes between the same adjoining wharf-owners and with reference to the same adjoining wharves which were involved in the case of *Ranstead v. The Wm. H. Brinsfield*, decided in this court, and reported in 39 Fed. Rep. 215. The defendant, Fahey, is the proprietor of a wharf fronting 85 feet on a private dock opening into the Patapsco river, and the libellant, Ranstead, is the owner of the next adjoining wharf. Fahey is a dealer in coal, wood, and sand, and the vessels which discharge the cargoes purchased by him at his wharf are of such length that they overlap on to Ranstead's wharf. The libellant claims to recover in this case not only a *pro rata* proportion of the customary wharfage charge for a large number of vessels loaded with wood, which by overlapping made use of a berth along-side a portion of his wharf, but also to recover a *pro rata* of the customary wharfage charge for the cargoes which were discharged from the vessels, although all the discharging was onto Fahey's wharf, and none onto the libellant's. It was held in the case of *The Wm. H. Brinsfield* that vessels at Fahey's wharf, so overlapping, were liable to pay to Ranstead his *pro rata* proportion of the customary charge for the whole berth furnished the vessel, and that, the Wm. H. Brinsfield being a foreign vessel, it was held that there was a maritime lien. This case presents two other questions: *First*, whether in addition to the proportion of the customary charge for the vessel, which is rated by her tonnage, the adjoining wharf-owner is also entitled to a proportion of the customary rate of wharfage charged for discharging the cargo, which is rated by the quantity of cargo discharged, and which with respect to wood is reckoned as so much per cord. The *second* question is whether the defendant in this case, as the purchasers of the cargoes, by whose direction they were sent to this wharf, is personally liable for either the

wharfage on the vessels or their cargoes. As was stated as the result of the investigation in the case of *The Wm. H. Brinsfield*, there is no law or ordinance regulating wharfage in the port of Baltimore at private wharves, such as Ranstead's wharf. In the cases involved in this controversy there was no contract or specific agreement. The libellant repeatedly notified the defendant that wharfage would be charged him on all vessels bringing cargoes to him which overlapped. This permissive use rendered the defendant liable, if liable at all, for such wharfage as was reasonable and customary. It is not denied that in the port of Baltimore there are two separate wharfage charges,—one for the vessel, rated by her tonnage, and the other for the cargo, rated by the quantity of cargo loaded or unloaded over the wharf used. None of the vessels in respect to which compensation is claimed in this case landed any cargo at all over the libellant's wharf; for although they all overlapped on to the libellant, the cargoes were all put ashore over defendant's own wharf. With regard to the existence of custom to prorate the charge for the wharfage on the cargo thus discharged the testimony is nearly all one way, and is overwhelmingly against such usage. The only witness to the contrary is the wharfinger at Smith's dock, and his practice there is far from showing a custom generally acquiesced in. The numerous witnesses for the defendant embraced persons familiar with the usages at nearly all the other public and private wharves of the port, and all testified against the existence of such a custom. In *The Wm. H. Brinsfield* it was held that, while overlapping was not the ordinary use which gives rise to a claim for wharfage, yet the occupancy of a berth in the dock extending close along-side the adjoining wharf was such a beneficial use of the adjoining owner's property, which it cost him outlay to construct and maintain, that he ought to be paid for such use. But the charge for wharfage on the cargo landed or loaded seems to stand upon an entirely different footing, and, in the absence of statute or established custom or special contract, it does not seem to me that item of charge can be maintained.

It must be conceded that there is no actual use made upon which to base a claim for compensation. The wharf-owner, no matter how his wharf may be occupied, is at the same expense to keep the dock dredged out to enable overlapping vessels to lay along-side, and the vessel lying there has the benefit of it; but his wharf may be built upon to the water's edge, or it may be completely covered by merchandise, so that nothing more can be landed upon it, in which case it would seem unreasonable that he should receive compensation for a constructive use which could not possibly be actually made at his wharf. It is obvious also that for many cargoes a specially constructed wharf is necessary, so that the adjoining wharf might be unsuitable to receive the cargo, while the wharf actually used might have been fitted by special expenditure to receive it. So long as the customary charge is made up of two distinct items,—one for the use of berth in the dock occupied by the vessel, and the other a charge for the cargo, only exacted when there is actually cargo loaded or unloaded, and only for just so much cargo as is put on

or over the wharf,—there is no reason, as it seems to me, in the absence of custom or legislation, why the adjoining owner should be entitled to charge for what he has not furnished, upon the theory of a merely constructive use. In my judgment, the libellant is entitled to his proportion of the charge for the berth occupied by the vessel, but not to anything for the wharfage on the cargoes.

The other question is whether the defendant, Fahey, is liable *in personam* for the wharfage on the vessels. The proof shows definitely with respect to some of the cargoes that by the terms of his purchase they were to be delivered to him at his wharf, free of any charge to the vessels for wharfage; and with regard to all of them the custom of the trade is proven to be that the purchaser of the cargo directs where it shall be delivered, and assumes to pay all wharfage charges at the place provided by him. It is shown that the libellant demanded wharfage of the masters of some of these vessels, and that defendant's agent in charge of his wharf and of the business of discharging cargoes there stated that the defendant would be responsible for whatever charges might be lawfully recovered, the masters having refused to deliver the wood without such an understanding. The defendant and his agents thus received the cargoes with the distinct notice of the claim, and that the defendant would be held for it, and his agents were called upon to see that the measurements of overlapping were correctly made. There can be no doubt, I think, that the whole matter was thoroughly understood, and that the defendant received the cargoes protesting that no wharfage was chargeable, but with the understanding that if any wharfage was properly chargeable he was to pay it, and that there was an implied, if not an express, contract that he would pay it. There is no question but that such an implied contract to pay wharfage is a maritime contract cognizable in admiralty. It is similar to the implied contract of the consignee of a cargo who receives it with notice of a claim for freight, and such implied contracts to pay freight are very frequently enforced in admiralty. *Hen. Adm.* 166. A decree will be signed in accordance with this opinion.

BAILEY *et al.* v. SUNDBERG.¹

(District Court, S. D. New York. January 14, 1891.)

1. ADMIRALTY—STIPULATION FOR VALUE—BOND TO MARSHAL—NOTICE.

A bond to the marshal, under the act of 1847, unlike a stipulation for the value of the vessel, does not necessarily afford security to other creditors than the libellant in the particular suit. When such bond is given, and no legal notice to creditors is published, *quære* whether the doctrine of *quasi* parties or privies, as to a suit *in rem*, could be applied to persons other than the actual parties to the record.

2. SAME—LACHES—SUIT BARRED.

Where insurers had full notice of a suit to determine the liability of a vessel for a collision, and were virtually represented in it, and abstained from formally join-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

ing in the litigation for nearly six years, and until a decision had been reached on appeal, held, that such abstention from joining in the litigation should debar the insurers from any right to revive the same litigation *de novo*.

In Admiralty. On exceptions to the amended libel. For former report, see 43 Fed. Rep. 81.

George A. Black, for libellant.

Goodrich, Deady & Goodrich, for respondent.

BROWN, J. After the decision of the court sustaining the plea of *res judicata* interposed by the defendant to the second amended libel in the above case, (43 Fed. Rep. 81,) the libellant again amended his libel upon leave granted pursuant to rule 51 of the supreme court in admiralty, "so as to confess and avoid or add to the new matter set forth in the answer." The new matter thus pleaded in the third amended libel alleges, in brief, (1) that the defendant, Sundberg, was not master when the Newport was libeled in the original action; (2) that the original libel was for damages to the schooner John K. Shaw only; (3) that, on the day following the issuing of process in the original action, a bond to the marshal was given under the act of March 3, 1847, (Rev. St. § 941,) and that the vessel on the same day was discharged from custody; (4) that no publication of the process or citation was ever made in the original action, nor proclamation, nor default taken on the return-day thereof; (5) that, by amendment, additional claims for personal effects were subsequently included in the original action, and an additional bond to the marshal for \$3,000, by consent, ordered and given. The present defendant excepts to these new allegations as immaterial and insufficient.

The libellant's exceptions to the former plea admitted, for the purpose of the hearing, the truth of the matter pleaded. Among the matters so pleaded was the statement that in the former action the steam-ship had been attached by the marshal under process, and a stipulation for value given therein. Such a stipulation is in accordance with the ancient practice of courts of admiralty, and represents the vessel by placing within the power of the court her whole value for the benefit of any who may intervene in the original suit. The previous decision was made upon the assumption that such were the proceedings in the former suit; so that any other person damaged by the same collision could, upon intervention, have the benefit of the stipulation up to the value of the vessel. By the exceptions to the new matter, it is now admitted that no such stipulation was given, but only a bond to the marshal, under the act of 1847, which provided only for double the amount of the particular claim in suit. As the amount of such a bond is not fixed with any reference to the amount of other claims or the value of the vessel, it cannot be deemed given for the benefit of all up to the full value of the vessel, like the ancient stipulation for value, or fully to represent the vessel; nor is there any means of compelling further security in favor of additional libellants, except upon a further arrest of the vessel, which would be impracticable when the vessel is beyond the jurisdiction. As

the bond to the marshal does not necessarily and in effect afford any security to other creditors, and the vessel is thereupon discharged, and as no legal notice was published affecting anybody, I doubt whether the doctrine of *quasi* parties or privies, as to a cause *in rem*, could be properly applied to the insurers in this case, who were not actual parties to the former record. In *Gelston v. Hoyt*, 3 Wheat. 246, 271, a stipulation for value was given. It is not denied, however, that the insurers had full, actual notice of the former suit. There can be little doubt that they were virtually represented in it, so far as they desired to be represented. An additional bond was voluntarily given by the vessel for \$3,000 when additional claims for personal effects and new parties were brought in; and there is no reason to suppose a like additional bond would not have been given for the insurers, had they desired to have their claim secured in the same suit. Their abstention from joining in the cause, in a formal manner, for nearly six years, ought therefore to be regarded as a voluntary one, as stated in the former decision. This, without reference to the other points, ought, I think, for the reasons in that respect stated in the former decision, to debar the insurers in admiralty, after so long a period, and after the close of the former litigation, from any revival of the same litigation *de novo*.

The other points raised seem to me immaterial, or to have been previously considered. The new matter is therefore held insufficient to sustain the libel.

THE MONMOUTH.¹

SMITH v. THE MONMOUTH and THE RARITAN.

HOWARD v. SAME.

(District Court, S. D. New York. January 9, 1891.)

1. COLLISION—NEGLIGENCE—DAMAGE FROM STEAMER'S SWELLS—LIABILITY.

A steamer which passes other boats at high speed, so near as to damage them by her displacement waves, is liable for such damage.

2. SAME—FAST STEAMER—DUTY IN PASSING OTHER CRAFT.

The steamer M., a passenger-boat plying in the harbor of New York, whose usual speed was 20 miles an hour, passed within 1,000 feet of a fleet of about 30 canal-boats in tow of tugs. The displacement waves of the M. caused the boats of the tow to strike against each other, whereby one was sunk and another damaged. The steamer on this occasion did not notice the tow, and did not slacken her speed. The evidence indicated that the M. was accustomed, in passing near small boats or tows, to slacken speed or sheer away. It also appeared that the present accident was probably due to inattention on the part of the officers of the steamer to the tow, or to an erroneous estimate of its distance. The tugs were unable to turn the tow so as to take the waves stern on in the short time that elapsed after the M. was seen coming. No regulation required the tugs to signal, and so large a tow in broad day was a conspicuous object. *Held*, that the steamer was solely liable for the damage.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Suits for damages occasioned to libelants' vessels by displacement swells of the steamer Monmouth.

Butler, Stillman & Hubbard, (Mr. Cromwell, of counsel,) for the Doran.

Hyland & Zabriskie, for the Sarah.

Weeks & De Forest and Mr. Ledyard, for the Monmouth.

Robinson, Bright, Biddle & Ward, for the tugs.

BROWN, J. The above libels were filed to recover for damages sustained by the canal-boat William Doran and the canal-boat Sarah, caused by the displacement waves from the steam-boat Monmouth in the forenoon of July 14, 1890, while she was making her trip from Sandy Hook to pier No. 8, North river. The canal-boats were part of a fleet of about 30 boats, in tiers of 4 each, lashed together in the usual way, and coming up the bay from South Amboy to New York in tow of the steam-tug Raritan and three other helpers, upon hawsers about 500 feet long. The libelants' boats were the inside boats of the third tier. The tow was making its way slowly against the first of the ebb-tide, at the rate of not over a mile or a mile and a half an hour; and at the time of the accident it was a little way to the westward of the Bell or black buoy, and about three-fourths of a mile to the southward of Fort William, heading for the North river. The Monmouth is one of three large and swift passenger steamers built for speed, to make close connections with the railroad trains at Sandy Hook in the transportation of passengers to and from New York. Each steamer makes three round trips daily. The passengers in 1890 were about 400,000; an increase of 110,000 above the number for 1889, due to the better service and quicker time. The displacement waves of these steamers, which make their trips of about 20 miles in a few minutes over an hour, is well known to be dangerous to small boats, if the steamers pass near them and at full speed. Their usual practice has been to slow when coming near small craft or tows of this character, or to sheer away from them, if they lie too near their course. On this trip, the tow was not observed by any of the officers or seamen of the Monmouth, and they testified that any tow near enough to be likely to suffer damage would have been noticed. The other witnesses, while they differ considerably in the estimates or the data they give as to the distance at which the Monmouth passed them to the westward, mostly estimate her as not more than 600 or 700 feet distant; the extremes varying from one-half to twice that distance. There is no doubt that the Monmouth, when passing the tow, was going at least at her usual speed of about 20 miles an hour, and that her displacement waves, which ran quartering astern at an angle of about four points, were such as to cause the forward tier of the tow, attached by four hawsers to the tugs, to break loose from the rest of the tow to which they were lashed. The boats were described by the witnesses as jumping up on each other, and pounding each other, while the forward tier was submerged by the first wave. The Doran was broken in her bow, and received some injuries astern, causing her to sink in a few minutes. The Sarah was also damaged. Another tow, a short distance ahead of this, also received some

injury. According to the defendants' evidence, the swells of various steamers at the dock at the Narrows were found upon measurement to be of the following height: Of the Monmouth, passing three-eighths of a mile distant, 17 inches; of the Sandy Hook, three-eighths mile distant, 18 inches; of a German steamer, one-half mile distant, 24 inches; of an English steamer, the same. This, however, was in very deep water. For the steamer, it is contended that she was pursuing her usual course, heading for pier 1, North river, and going a little nearer to the Statue of Liberty than to the Bell buoy. This would make her to have passed more than 2,000 feet distant from the tow, if the latter was within 500 feet of the Bell buoy, as the witnesses allege.

It has been urged with great ability and force by the counsel in this case, as well as in the case of *The Majestic*, post, 813, that such a distance from tows or other small craft is sufficient, and more than sufficient, to answer all the legal obligations of steamers in passing other boats; that though the rivers and harbors are a common highway for all, in which all have an equal right, yet this very equality of privilege excludes such methods of making up and navigating tows as impose unreasonable restrictions or obstacles in the way of passenger transportation; that in the increase of commerce, the growth of population, and the needs of passenger service, quick dispatch, such as the Sandy Hook boats offer, is an indispensable necessity; that the waves of those steamers, 1,000 feet from the steamers, are no greater than those made by ordinary gales; that tows like the present could not bear such ordinary waves from storms, and would be deemed unseaworthy to encounter them; that sometimes two of such tows in succession, as in this case, stretch over nearly half a mile, and proceed at so slow a pace as to become unreasonable obstructions; and that it is unreasonable that such a raft of boats, unseaworthy in their character and in their make-up as a mass, should be held entitled to such privileges as to preclude a fast passenger service, and thus virtually to monopolize the use of a common highway of commerce, and to prevent its beneficial enjoyment by the public in a rapid passenger traffic; that, if such tows also serve the public good in the form of cheaper transportation of some of the necessities of daily life, they may be, and should be, modified in their make-up, in the character of the boats used, and in the power and speed of the tugs that haul them, so as to become reasonably compatible with the other general needs of the public.

Whatever force there may be in these views, I do not think, upon the facts as they appear in this case, that there has yet arisen any such actual conflict of rights or incompatibility in the mutual claims of these opposing interests as calls for any new application of familiar rules. The evidence shows that though at least eight of these fleets of tows usually pass daily up and down the bay, and though eighteen trips are performed daily by these fast Sandy Hook steamers, meeting or passing such tows under every variety of circumstances, only two accidents like this have been previously reported during the three years that these fast steamers have been running; and that accidents have been avoided

by slowing when passing tows too near for full speed, sometimes without previous danger signals from the tugs, and sometimes upon danger signals received from them. Under this usage, there have been no material delays upon the steamers' trips, no connections missed, no complaint of tardy arrivals, and no evidence of inconvenience to the public. On the contrary, so regular and efficient has been the rapid transit service that a very large and rapid increase has resulted in the public patronage. While these facts bear the highest testimony to the general skill, care, and prudence of the officers in command of these steamers, they are equally conclusive that such care and skill are ordinarily sufficient to avoid injury to tows like these, which for at least 15 years past have been accustomed to navigate the harbor upon the same routes and by the same methods pursued in the present case, and that, with such care, both may enjoy their common privileges without material injury or inconvenience to each other. The same facts make it probable, also, that the present accident was due to inattention to the tow, through some special causes, or to an erroneous estimate of its distance. The steamer's witnesses are at a great disadvantage in testifying as to the distance, since they did not notice the tow at all that day, and can only testify as to their usual course and practice. I do not find, however, that the usual course from buoy 18, off Bay Ridge, as stated by the quartermaster, viz., to head for pier 1, would, according to the chart, carry the steamer nearer to Liberty island than to the Bell buoy, but, on the contrary, about three-fourths of the way over towards the Bell buoy, or about 450 yards from it; so that, if the tow was from 300 to 600 feet west of the buoy, the steamer would have passed within 750 or 1,000 feet of the tow. This approaches the libelants' estimates quite as nearly as is to be expected in estimates of distances on the water. There had also been some fog in the lower bay that morning, hindering the steamer in reaching the starting point; and, although the quartermaster says that that caused him no delay at the start, no memorandum was kept of the time of departure, and the steamer arrived at pier 8 on time.

The weight of testimony and of probability, upon all the evidence, is that the steamer, through some preoccupation of her men, or false estimate of distance, went nearer than usual to the tow, and nearer than was safe at full speed, and that the accident arose from the failure to use the customary and requisite caution when going so near. She must therefore respond for the damage. *The Morrisania*, 13 Blatchf. 512; *The Drew*, 22 Fed. Rep. 852, (affirmed, on appeal;) *The Atalanta*, 34 Fed. Rep. 918. If but a single boat among so many had been injured by the pitching, there would have been room for the contention that her injury was due to her specially weak or rotten condition; but the violence of the shock is attested by the breaking of all the lines that attached the hawser tier to those behind, and this precludes that defense.

I do not think the *Raritan* and the helper tugs in this case can be charged with any legal fault. They could not turn the tow in the short time after the Monmouth was seen coming, so that they might take the wave astern, as would have been their duty if that were practicable.

The Majestic, infra. A half hour, it is said, would be needed to turn such a tow. She might, indeed, have signaled; but no regulation required signals, and in broad day so large a raft of boats in tow was a very conspicuous object. Its character was perfectly well known to the steamer, and the pilot of the tug had no reason to suppose any signal needed to the Sandy Hook boats for such a tow.

Decrees for the libelants against the Monmouth, with costs, and for dismissal as to the Raritan, with costs, with an order of reference to compute the damages.

THE MAJESTIC.¹

THE NANNIE LAMBERTON.

NELSON v. THE MAJESTIC and THE NANNIE LAMBERTON.

(District Court, S. D. New York. January 9, 1891.)

1. COLLISION—NEGLIGENCE—DAMAGE FROM STEAMER'S SWELLS.

A steamer which passes other boats at high speed, so near as to damage them by her displacement waves, is liable for such damage. See *The Monmouth, ante*, 809.

2. SAME—TOWAGE—DUTY OF TOW ON APPROACH OF STEAMER.

Where the pilot of a tug in charge of a tow sees a large vessel rapidly approaching, and knows her displacement waves are dangerous, it is his duty to turn the tow so as to take the waves end on, and, failing to do so, the tug will also be held in fault.

In Admiralty. Suit for damage to libellant's boat, occasioned by displacement swells of the steam-ship *Majestic*.

Hyland & Zabriskie, for libellant.

Lord, Day & Lord, for the *Majestic*.

McCarthy & Berrier, for the *Nannie Lamberton*.

BROWN, J. On June 4, 1890, as the steam-ship *Majestic* was coming in from sea, her displacement waves struck the tug *Nannie Lamberton*, which was towing two canal-boats from the Erie basin to Hoboken; one boat being lashed on each side of her. In the high swell, and in the surging of the boats, the tug fell so heavily upon the side of the plaintiff's boat, which was on her starboard side, as to break several of her streaks of pine and oak, for which damage the above libel was filed.

This case, in its general aspects, is quite similar to that of *The Monmouth*, tried shortly after this; and I need not repeat here what has been said in the decision of that cause. *Ante*, 809. In some particulars this case differs from that of *The Monmouth*. The *Majestic* was go-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

ing, as her officers say, certainly not over 12 knots an hour, and probably not over 7. The pilot of the Lamberton estimates her speed at 13 knots, and her distance in passing at from 700 to 800 feet. The accident occurred a little to the northward of the bell buoy, below Governor's island; the tug and tow having been previously headed for Hoboken. But the Majestic is a much larger ship than the Monmouth, being one of the largest and swiftest of the ocean steamers, 582 feet long by 57 beam and 22 feet draft. Her waves at the same speed would naturally be larger. The Majestic's witnesses, however, are under the same disadvantage as the Monmouth's, in not having noticed the tug and tow. This was not a fleet of canal-boats, as in the other case; and possibly it did not attract attention, because not supposed to be probably in danger. I am obliged to accept in the main the testimony of the tow's witnesses as to the approximate distance of the Majestic in passing, rather than the mere inference of the steamer's witnesses, based upon the fact that the tow was not noticed, or that her usual course would take her further away. The claim that the steamer went within a length of the Statue of Liberty I regard as entirely mistaken. According to the chart, the line of 23½ feet of water is 1,250 feet to the eastward of Liberty island. The great height of the Statue of Liberty makes more deceptive than usual any mere estimate of distance on water reckoned from that object. The course stated, viz., "a straight course for pier 5 or 6" after getting up to Robbins reef, would carry the steamer a half mile from the Statue of Liberty; and if, as is probable, she rounded towards the eastward soon after passing buoy 18, and went not far to the westward of it, thence steering straight for pier 6, that course would carry her three-fourths of a mile east of the Statue of Liberty, and about where the libellant's witnesses say she was, and nearly on the same course as the Monmouth. The same observations as to the general care and skill of the officers, or of the pilot in charge, in avoiding similar accidents, are pertinent here as in the case of *The Monmouth*; and, on examination of the whole testimony, I am obliged to come to a similar conclusion as in that case, viz., that for some reason their usual vigilance and care were in this instance relaxed, or that the usual slowing of the vessel was from some cause delayed. I cannot doubt the testimony of the boatmen as to the strong surging that the waves caused to the tow, or that the accident occurred in the way detailed by them; and as the weight of evidence shows that the steamer passed probably faster than customary, and at all events much nearer than was usual, or was in any way necessary for the steamer, I must hold the Majestic liable. *The Morrisania*, 13 Blatchf. 512; *The Drew*, 22 Fed. Rep. 852, (affirmed on appeal;) *The Atlanta*, 34 Fed. Rep. 918.

But no good reason appears why the tug should not have turned the tow's stern directly to the wave. The Majestic was seen some time before she reached the tow. She was apparently coming quite near to the tug and tow, and, as the pilot said, would "likely give them a good shaking up." The coming wave was also seen some little time before it struck. The pilot knew its threatening character, and had time to

turn stern to it. He slowed his engines, and, as he says, did turn some to starboard. Other witnesses contradict him in this regard. But it is clear from the testimony that the tug was not much turned to starboard; that the wave was not taken astern, as it might have been, though the danger was seen; and for this reason I must hold the tug to blame also.

Decree against both defendants, with costs.

THE STRANGER.

FITZPATRICK *et al.* v. THE STRANGER.

RECTOR v. FITZPATRICK *et al.*

(District Court, S. D. New York. January 23, 1891.)

COLLISION—STEAM AND SAIL—CROSSING BOWS—FLASH LIGHT—MUTUAL FAULT.

The steam-tug Stranger, shoving one canal-boat ahead of her, and having others lashed along-side, in going up the North river, when little above Stony Point, came into collision in the night-time with the schooner E. coming straight down. At the time of collision, she had swung so as to head nearly straight across the river, to the eastward. Held, upon conflicting evidence, (1) that the tug was previously to the westward of the line of the schooner's course, and improperly attempted to cross her bows; (2) that if, as alleged, the E.'s green light was obscured, the night was not so dark as to prevent seeing the schooner, at least a quarter of a mile distant; (3) that the E. was in fault for not exhibiting a flash or torch light, and that this was material. The damages and costs were divided.

In Admiralty.

Goodrich, Deady & Goodrich and Mr. Foley, for Fitzpatrick et al.

Hyland & Zabriskie, for the Stranger.

BROWN, J. The schooner Evoline in coming down the North river, at about half-past 12 in the morning of September 24, 1889, when a few hundred yards above Stony Point, came into collision with the canal-boat Sweet, which was in tow on the port side of the steam canal-boat Stranger; both sustained damages, for which the above cross-libels were filed. The Stranger was shoving another canal-boat placed immediately ahead of her, the Hathaway, and the Sweet on her port side lapped each boat about half-way. The schooner had a light breeze aft, and was coming very slowly at about the first of the ebb-tide. The canal-boat, with her tow, was also going at moderate speed, estimated at from two to four knots. Both were proceeding, according to the testimony, very near mid-river. There is no charge that the schooner changed her course, but it is alleged that she did not show any colored lights, nor any flash light, and that she could not be seen until the time when she was first observed by the pilot of the Stranger, estimated at from 200 to 300 feet distant, when he observed her apparently coming head on, and, after blowing several blasts of the whistle, he ported his wheel and steered

strongly to starboard. The schooner struck the Sweet about midships, which would be about the middle line of the fleet, and all the witnesses agree that, at the moment of collision, the steamer and tow were heading almost straight across the river. The witnesses for the schooner, including Gager, the engineer of the Stranger, testified that their colored lights were properly set and burning, and had been from the time the vessel weighed anchor; and that the green light was not raised a few moments only before collision, as the Stranger's witnesses assert. No flash light was shown. All the witnesses for the schooner state that the Stranger, until she sheered across the schooner's course, bore considerably off their starboard bow, and would have gone well clear to the westward had she not sheered to the eastward.

1. Assuming that the schooner did not change her course, (that being neither charged nor testified to by any one,) the fact that the Stranger with her tow had sheered nearly 8 points to starboard before collision, and that the Sweet was struck about 100 feet aft of the head of her tow, is conclusive evidence to my mind in support of the schooner's contention, that the Stranger and her tow, previous to collision, were coming up well to the westward of the schooner's course, and that the collision was really brought about through the unjustifiable attempt of the steamer to cross the schooner's bow to starboard. So great a change of heading, and by a long tow made up in that manner, could not have been effected without a very considerable change of position in the river to the eastward, and this is strongly confirmed by the testimony of Gager. Some of the defendant's witnesses speak of seeing the schooner on their port bow; but this is evidence only that they did not see her at all, until the steamer, by her own swing to starboard, had brought the schooner on her port hand. No justification appears for crossing the schooner's bow. The night was not dark; and even if her green light, which I am satisfied was hung up, was during a part of the time obscured, which is possible from its position on the rigging 15 feet above deck, the schooner should have been seen at least a quarter of a mile distant, as all agree that both shores were visible. If the westerly shore was high, the easterly shore was low and did not darken the river.

2. The schooner, however, is in fault for not complying with the statute that required the exhibition of a flash or torch light on the approach of the steamer. Although one of the steamer's vertical lights was out, yet the other lights showed her to be a steamer, and the schooner so understood. She was bound, therefore, to comply with the statute. *The Wyanoke*, 40 Fed. Rep. 702. I cannot find that the absence of a flash light was immaterial, or that it would not have given additional information to the steamer, by lighting up the hull and sails of the schooner, and more or less of the river between the two vessels. Such a light might have given just such additional information as regards the heading, or the distance, or the course of the schooner, as to have prevented crossing her bows, which was the immediate cause of the collision. The damages and costs are therefore divided.

SAGE v. ST. PAUL, S. & T. F. RY. CO.

(Circuit Court, D. Minnesota. January 13, 1891.)

1. RAILROAD GRANTS—CONSTRUCTIVE FRAUD—LIMITATION OF ACTIONS.

Where a railroad company has complied with an act of congress granting land to the state of Minnesota for railroad purposes, and with the state law transferring the grant to it, a transfer by the state to another company is a constructive fraud, as the lands are held by the state in trust for the former company; and an action to recover such lands is not governed by Gen. St. Minn. c. 66, tit. 2, § 6, subd. 7, which specifies the period of limitation for "actions to enforce a trust or compel an accounting," but by subd. 6, which relates to actions "for relief on the ground of fraud," and specifies that the cause of action shall not be deemed to have accrued until a discovery of the fraud.

2. SAME—PRIORITY OF LOCATION.

As between two land-grant railroads, the definite location of the line of road under a later grant, if the road is finished, will carry all lands within the place limits which have not then been selected as indemnity lands under an earlier grant.

Affirming 32 Fed. Rep. 821.

On Rehearing in Equity.

Bill by the Hastings & Dakota Railway Company to recover possession of lands held adversely by defendant, the St. Paul, Stillwater & Taylor's Falls Railway Company. For former report, see 32 Fed. Rep. 821.

Cole & Bramhall, for complainant.

Wilson & Bowers, for defendant.

NELSON, J. This cause was before Judge BREWER in 1887, and decided, with reference to a master to take an account (see 32 Fed. Rep. 821) on the application for the entry of a final decree. A rehearing was allowed, and the merits of the controversy presented by the evidence, and all briefs of counsel have been examined. I agree with Judge BREWER in the opinion announced when the cause was before him, that the complainant is entitled to a decree. He decided that, as between two land-grant railroads, the definite location of the line of road under a later grant, if the road is finished, will carry all lands within the place limits which have not been selected as indemnity lands under an earlier grant at the time of the location. The lands in controversy are within the place limits of the Hastings & Dakota Railway and the indemnity limits of the road of the defendant, and the definite location of the Hastings & Dakota road was made by the defendant. No opinion is expressed by him of the effect of a withdrawal of lands within the indemnity limits of the defendant's road, by competent authority, before the definite location of the Hastings & Dakota Railway in determining the rights of the parties, I presume for the reason that there is no plenary or satisfactory proof of a withdrawal of the lands within the indemnity limits earlier than August, 1868, more than a year after the route of the Hastings & Dakota road was located. The defendant was allowed on the rehearing to amend its answer and plead the statute of limitation, and in the briefs submitted it is urged by the defendant's counsel that the action is barred by subdivision 7, § 6, c. 66, tit. 2, Gen. St. Minn. If

there is a statutory bar, it must be by reason of one or the other of the following subdivisions of section 6, which fixes the limit of six years within which to commence actions, viz.:

"Subd. 6. An action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Subd. 7. Actions to enforce a trust or compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same."

While I am of the opinion that in this case no lapse of time short of the period which is the statutory limitation prescribed for actions at law for the recovery of real property, which is 20 years, should be applied, yet, as I may be in error in so holding, I shall consider the statute presented, and the point urged by counsel that this action is one to enforce a trust or compel an accounting, and is barred by subdivision 7, § 6, c. 66, tit. 2, Gen. St. Minn., and that more than six years have elapsed since the cause of action accrued. The state of Minnesota acquired title to the lands in controversy upon the definite location of the line of road of the Hastings & Dakota Railway, and before the conveyance of the same to the defendant. This railroad, having complied with the act of congress and the law of the state transferring the grant to it, was justly entitled to the lands which were conveyed to the defendant. The state held the lands in trust for the road under an act of congress, of which the defendant was bound to take notice. In equity, the transfer by the state to the defendant was an act in fraud of law and the rights of complainant, and is within the strict definition of legal or constructive fraud.

Upon the facts it appears that the defendant, with notice of the trust in the state, acquired the legal title to the lands which equitably belonged to the complainant, and is therefore charged with the same trust, and a trustee for it. The fraud derives its character from the consequences of the act in relation to others, and this is what the law construes to be a fraud. The seventh subdivision, § 6, c. 66, *supra*, does not apply, but rather the sixth subdivision, for the relief sought is based upon the legal or constructive fraud, and there is no evidence that the Hastings & Dakota Railway Company had knowledge of the conveyance to the defendant by the state six years before the commencement of the cause of action, so as to set in motion the statute.

It follows, therefore, that the complainant is entitled to a decree.

WOOSTER v. HILL *et al.*

(Circuit Court, D. Vermont. January 17, 1891.)

WITNESS FEES—ATTENDANCE IN ANOTHER DISTRICT.

Witness fees in civil cases are not to be taxed for travel over any greater distance than a subpoena would run, and hence, where a witness resident in one district attends to have his deposition taken in another, he is not entitled to fees for travel before he reached the latter district.

In Equity. Appeal from taxation of costs.

Stephen C. Shurtleff, for plaintiff.

Kittredge Haskins, for defendants.

WHEELER, J. The question arises upon the taxation of fees for travel of witnesses residing in Hardwick, Vt., from their residence there to Hartford, Conn., where their testimony was taken. These witnesses could be compelled to attend to give their depositions at Hartford, only by a subpoena issued by the clerk of one of the courts of the United States in that district. Rev. St. U. S. § 868. And perhaps they could not be compelled to give their depositions there at all, as they did not at the time reside in that county, and no witness under a *dedimus potestatem* is required to attend at any place out of the county of his residence. Id. §§ 866, 870. But, if found there, their depositions might be taken there, if done without objection on the part of themselves or others. But a subpoena for them would not run out of that district, and perhaps not out of that county. In the direction of their travel, however, the lines of the county and district are the same. In civil cases, fees are not to be taxed for travel of witnesses over any greater distance than a subpoena would run. *Anon.*, 5 Blatchf 134; *Dennis v. Eddy*, 12 Blatchf. 198. Let travel be taxed from the line of the county, which is the line of the district of Connecticut, towards Vermont to Hartford.

LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON CO. v. CUNNINGHAM.

(Circuit Court, W. D. Michigan, N. D. February, 1890.)

1. PUBLIC LANDS—GRANTS IN AID OF RAILROADS—RELEASE AND SURRENDER—CONSTRUCTION OF ACTS.

Act Cong. June 8, 1856, granted to the state of Michigan a certain quantity of public lands to aid in the construction of certain railroads, among which were specified one from Marquette to the Wisconsin state line and another from Ontonagon to the state line. It was provided that the lands thus granted for the benefit of each of said roads should be "exclusively applied in the construction of that road, * * * and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever." By Act Mich. Feb. 14, 1857, this grant was accepted by the state, subject to all conditions therein contained, and the lands granted for the benefit of the roads from Marquette and Ontonagon to the Wisconsin line were conferred respectively on two distinct companies. By successive consolidations of each of these companies with a third, and by sale under foreclosure of the latter, all the property, rights, and franchises of the Mar-

quette and Ontonagon Companies were vested in the Chicago & North-Western Company. This latter requested the Michigan board of control to confer on the Peninsula Company all the benefits of the grant vested in the Marquette Company. This was done by act of the legislature. The proposed route of the Peninsula Company necessitated a change and relocation of the line previously surveyed and approved for the Marquette Company. Congress authorized this change by joint resolution, July 5, 1862, which made a similar grant of lands along the new route, conditioned on a release of the lands previously selected and certified under the act of 1856 along the original route, with the governor's certificate of non-incumbrance. This condition was complied with, and the grant duly conferred on the Peninsula Company, the governor being authorized, by joint resolution of the legislature in February, 1867, to "execute the certificate of surrender and non-incumbrance of the lands on the original line of the Marquette Company." The commissioner of the general land-office, on July 13, 1868, requested the Chicago & North-Western Company to execute a similar release of the lands previously selected and certified for the line of the Ontonagon Company. This release was accordingly executed, and the governor attempted to surrender the lands in the same manner as had been done in the case of the Marquette Company. *Held*, that the joint resolution of 1862 gave the commissioner no authority to demand a release of the Ontonagon Company's lands, and the governor's attempted surrender of them was void and of no effect to divest the title of the state thereto as trustee for such company.

2. SAME—INTEREST OF BENEFICIARIES—LEGAL TITLE.

As Act Cong. June 3, 1856, prescribed the manner in which the granted lands should be disposed of by the state for the benefit of the designated railroads, and so vested the title in the state for the purposes of the act, Act Mich. Feb. 14, 1857, which conferred the benefit of that grant on the Ontonagon Company *inter alia*, did not convey the legal title to that company so that it should vest in the Chicago & North-Western Company by virtue of the consolidation mentioned, and then pass by its surrender.

3. SAME—JURISDICTION OF LAND DEPARTMENT—GRANTED LANDS—SUBSEQUENT SELECTION AND APPROVAL.

Act Cong. July 3, 1866, granted to the state of Michigan a certain quantity of "the lands of the United States," to be selected by an agent of the state for the benefit of a ship canal. The president of the canal company was appointed such agent, and among other lands he selected 15,000 acres within the limits of the grant of 1856 to the Ontonagon Company. The land department approved the land so selected to the state for the benefit of the canal. *Held* that, though this certificate of approval has the force of a patent, it is absolutely void as to the Ontonagon lands, for by the prior grant and appropriation they were withdrawn from the jurisdiction of the land department, and had never been released, or declared forfeited to the United States.

4. SAME—TITLE TO SUPPORT EJECTMENT—DEFENSE BY TRESPASSER.

Such certificate being absolutely void, defendant in ejectment can attack the title of the canal company claiming under it, without in any way connecting himself with the title to the land, or showing that he is other than a mere trespasser.

5. SAME—ESTOPPEL OF STATE BY ACT OF AGENT—NOTICE TO BENEFICIARY.

The state is not estopped to claim title to these Ontonagon lands by the act of its agent in selecting them for the canal company, for such agent was also an officer of the company, and the company, through him, is chargeable with notice of all the above-mentioned public acts in relation to such land, and hence of the fact that it was not subject to appropriation under the grant to the canal company.

6. ESTOPPEL IN PARS—UNAUTHORIZED ACTS—DIVERSION OF RAILROAD LAND GRANTS.

As Act Cong. June 3, 1856, vested such lands in the state for the purpose of an express trust, which the state accepted subject to all the limitations contained in the grant, the state had no power to divert such lands to any other purpose, and hence it cannot be estopped to claim title thereto by any act of its agent attempting to appropriate them to any other use than that of the *cestui que trust* named in the grant.

SEVERENS, J., dissenting.

On Motion for New Trial.

This was an action of ejectment, in which the trial court directed a verdict for plaintiff. For opinion on second trial of the case, see *ante*, 587.

Alfred Russel and Ball & Hanscom, for plaintiff.

Don M. Dickenson and Marston, Cowles & Jerome, for defendant.

JACKSON, J. From a careful examination of the record in this case, in the light of the able briefs submitted by counsel on both sides, the circuit judge has reached the following conclusions, viz.:

The act of congress approved June 3, 1856, by its express terms, contemplated and provided for the construction of several distinct and independent lines of railway. The grant was made to the state of Michigan, "to aid in the construction of railroads." The lines of said railroads were designated, and among them was that from Ontonagon to the Wisconsin state line. The grant embraced "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads." It was further provided "that the lands so to be located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads," and the lands thus granted for the benefit of each of said roads were to "be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." It is further provided by the third section of the act that the lands thus granted to said state should be subject to the disposal of the legislature thereof, for the purpose aforesaid, and no other. The manner of such disposition for each of said roads is prescribed by the fourth section of the act, and "if any of said roads is not completed within 10 years no further sales shall be made, and the lands unsold shall revert to the United States." The legislature of Michigan, in accepting said grant, by the act approved February 14, 1857, clearly recognized the purpose and intent of congress to aid in the construction of separate and distinct lines of railroad. The benefits of the grant intended to aid in the construction of the railroad from Ontonagon to the Wisconsin state line were vested in or conferred upon the "Ontonagon & State Line Railroad Co.," organized under laws of the state, in 1856. In like manner the lands to be located along the other lines of road designated in the granting act were conferred upon other companies having a separate corporate existence from that of the "Ontonagon & State Line Railroad Co.," and by the third section of the act "the lands, franchises, rights," etc., thus conferred upon and vested in said railroad companies, or either of them, were to be exclusively applied in the construction of their respective lines of railroad as designated, and were not to be applied to any other purpose whatsoever. Both by the granting act and the act of acceptance, each of said railroads were to be public highways. For each of said lines separate surveys and locations were made, separate maps therefor were filed in the interior department, separate selections of lands within the limits of the grant were made for each of the lines, separate approvals of such selections were made by the secretary of the interior, for each of said railroads, and were separately certified by the department to the state for the benefit of each, respectively. The trusts thus created by the United States as grantor, and accepted by the state as trustee, for specific and defined purposes, and for designated objects, were subject to the single condition subsequent, that if any or either of

said roads was not completed within 10 years from June 3, 1856, the lands granted and appropriated to such line, and remaining unsold, should revert to the United States. Until the expiration of said period of 10 years and the non-completion of the Ontonagon & State Line road, no action of either state or United States officials, or of both combined, could change, modify, or alter the trust created and accepted for the construction of that particular line; nor could the lands assigned to that line, and certified to the state for its construction, be lawfully appropriated by such officials to the construction or benefit of any other line whatsoever. The trust declared and accepted required that they should be exclusively applied in the building and completion of that road, and no other. To effect any other application or disposition of these lands would require the consent of the United States, expressed through congress, and of the state, expressed through its legislature, and of the railroad company on which said lands had been conferred, or its successors or assigns in right. It is equally well settled that the United States alone could take advantage of the non-performance of said condition subsequent, and that so long as they failed or neglected to assert their right of forfeiture, even after condition broken, the trust created for the construction of the Ontonagon & Wisconsin State Line road would stand unimpaired, and the title to the lands granted and certified to the state for the benefit of that line would remain out of the United States, and from no part of the public domain. It is also settled that, the grant being a public one, the reserved right of the United States to reclaim these lands, or to declare them forfeited for breach of the condition subsequent, would have to be asserted either by judicial proceedings, authorized by law, or by some legislative assertion of ownership of the property for condition broken, such as an act of congress, directing the possession and appropriation of the land, or that it be offered for sale and settlement. *Schulenberg v. Harriman*, 21 Wall. 44. In order that an act of congress should work a reversion to the United States for condition broken of lands granted by them to a state to aid in internal improvements, the legislation must directly, positively, and with freedom from all doubt and ambiguity, manifest the intention of congress to reassert title and resume possession. *Railway Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. Rep. 123. The United States, prior to March 2, 1889, never by judicial proceedings authorized by law, nor by legislative action, asserted ownership of the lands in question, or exercised its reserved right of forfeiture for condition broken in failing to complete the road. By the act of March 2, 1889, congress declared certain lands granted to the state of Michigan, for railroad purposes, by the act of 1856, forfeited. This act confirmed certain rights, titles, and entries, but need not be specially noticed, as it is a matter of construction and grave debate whether its confirmatory provisions are most in favor of plaintiff or defendant. Both sides claim the benefit of its provisions. The act was not, however, passed upon by the trial judge, who directed a verdict for the plaintiff upon other grounds.

It is claimed for plaintiff that by the joint resolution of congress,

adopted July 5, 1862, the several trusts, as above indicated, were changed, with the acquiescence of the state and the companies interested, and that under the operation of that resolution the several railroads contemplated and provided for by the act of June 3, 1856, were abandoned, and one consolidated system was established upon a new line from Marquette to a point on the Wisconsin state line, near the mouth of the Menomonee river. The joint resolution of congress does not, upon its face, admit of this construction, nor do the facts and circumstances which led to its adoption warrant the court in giving it any such strained interpretation. The language of the resolution relates to, and only mentions, the line of railroad from Marquette to the Wisconsin state line, whose relocation alone was sought and applied for. The Peninsula Railroad Company, which sought the relocation of the line from Marquette to the Wisconsin state line, so as to carry the road to a point near the mouth of the Menomonee river, had no interest in or connection with the line of road from Ontonagon to the Wisconsin state line, nor in the lands selected and certified to the state for the benefit of that line, when said joint resolution of congress was applied for and procured. Said Peninsula Railroad Company had only succeeded to the rights, privileges, and franchises of the Marquette & State Line Railroad Company. A brief reference to the facts will make this clear.

The Marquette & State Line Railroad Company first consolidated with the Chicago, St. Paul & Fond du Lac Railroad Company. This consolidated company subsequently, on March 27, 1857, consolidated with the Ontonagon & State Line Railroad, under the name of the Chicago, St. Paul & Fond du Lac Railroad Company, and, so far as such rights could be transferred or assigned, succeeded to all property, franchises, rights, and privileges which the Ontonagon & State Line Railroad Company had acquired, or could acquire, under all or any acts of congress. The Chicago, St. Paul & Fond du Lac Company was sold under mortgage, in 1859, and its property, rights, franchises, etc., were purchased by the Chicago & North-Western Railway Company. Having, by this purchase, succeeded to all the rights and interests of both the Marquette & State Line Railroad and of the Ontonagon & State Line Railroad, in and to the granted trust lands, (assuming that they were the subject of transfer and assignment by said two companies,) the Chicago & North-Western Railway Company, in February, 1862, requested the Michigan board of control of railroad grants to confer upon the Peninsula Railroad Company all the benefits of the grant of 1856, which had been vested in the Marquette & State Line Railroad. Said board of control, in compliance with said request, and upon the application of said Peninsula Railroad Company, under the authority of an act of the Michigan legislature approved March 4, 1861, ordered that all the lands, franchises, rights, powers, and privileges, which were or might be granted in pursuance of said act of congress approved June 3, 1856, to aid in the construction of a railroad from Marquette to the Wisconsin state line, "be, and the same are hereby, conferred upon the said Peninsula Railroad Company, under the regulations and restrictions of an act approved Feb-

ruary 14, 1857." The Peninsula Railroad Company was organized for the purpose of constructing a railroad from Marquette to the Wisconsin state line, at or near the mouth of the Menomonee river, which route necessitated a change in and relocation of the line of the Marquette & State Line Railroad, as surveyed and located under the granting and accepting acts of 1856 and 1857. This change and relocation of said line was recommended to congress by said board of control of railroad grants at the time of conferring upon said Peninsula Railroad Company the benefits of the grant previously vested in the Marquette & State Line Railroad Company. This proposed change and relocation of the Peninsula Railroad Company's line, after lands had been selected and certified in December, 1861, for the original line of the Marquette & State Line Railroad, required the assent of both congress and the state, because it involved a clear departure from the exclusive trust granted by the United States and accepted by the state under the acts of 1856 and 1857; hence the application to congress for the joint resolution of July 5, 1862, which related alone to the proposed change of the original line from Marquette to the Wisconsin state line, so as to permit a relocation thereof on the line of the Peninsula Railroad Company's charter route. The joint resolution of congress authorized this relocation of said line, and as an incident thereto operated as a new grant of lands to the state for the benefit of such new line, upon releasing the lands previously selected and certified for the original line of road, with a certificate from the governor of Michigan that all claim thereto by the state and said Peninsula Railroad Company was surrendered, and that the same had never been pledged, sold, or in any wise incumbered. There had been selected for this original line from Marquette to the Wisconsin state line, and duly certified to the state by the interior department, in December, 1861, about 161,104 acres. This land the Peninsula Railroad Company, in May, 1863, released and surrendered to the United States under and in pursuance of said joint resolution of congress of July 5, 1862, and in consideration of the relocation of said land grants so as to conform to its new line. The state, by an act supplemental to the act of February 14, 1857, acceded to said joint resolution of congress, and confirmed unto said Peninsula Railroad Company the new grant of lands thereby provided for. Thus by the concurrent action of congress, of the state, and of the Peninsula Railroad Company, as the successor of the Marquette & State Line Railroad, the trust created by the act of 1856, in respect to the line of railroad from Marquette to the Wisconsin state line, was changed and made applicable to the relocated line of the Peninsula Railroad Company. This was the sole object of the resolution of 1862, and the sole change effected or alteration made in the trusts created and defined by the act of June 3, 1856. When said resolution was procured for and accepted by the Peninsula Railroad Company that company had no interest in and connection with the Ontonagon & State Line Railroad, for the benefit of which there had been previously selected and certified to the state of clear lands 142,430 23-100 acres. The joint resolution of congress did not expressly, or by any fair implication, call for or require

the surrender of those lands with which the Peninsula Railroad Company had no connection, and over which it could exercise no control. The joint resolution of congress is fully satisfied by confining its operation and effect to a change in the original grant and trust merely to the extent of allowing the old line from Marquette to the Wisconsin state line to be abandoned upon the surrender of the lands already certified to that line and permitting a relocation of the same on the route of the Peninsula Railroad Company's line to be run from Marquette to the Wisconsin state line at or near the mouth of the Menomonee river. That this was the construction which the state of Michigan placed upon said resolution of 1862 is clearly shown by the joint resolution of the legislature of said state, passed in February, 1867, which is entitled "Joint resolution authorizing the governor to execute the certificate of non-incumbrance and surrender of the lands on the original line of the Marquette & Wisconsin State Line Railroad." Said resolution of the state legislature, after reciting that by the act of congress approved June 3, 1856, there was made, among other grants to this state, a grant of lands to aid in the construction of a railroad from Marquette to the Wisconsin state line; that by joint resolution of congress a change in the route of said road was authorized and had been made; and that the company had executed a release of the lands on the original line,—provided "that the governor be, and he is hereby, authorized to execute and file the certificate of non-incumbrance and surrender to the United States of the land on the original line of said railroad, [from Marquette to the Wisconsin state line,] required by said joint resolution, [of 1862.]"

After the Peninsula Railroad Company consolidated with the Chicago & North-Western Railway Company, in 1864, under the name of the latter, said Chicago & North-Western Railway Company, under date of January 31, 1868, released to the state of Michigan the clear lands on the Marquette & Wisconsin State Line, and the governor of said state, on the 1st of May, 1868, under and in pursuance of the state resolution of 1867, and in compliance with the congressional resolution of 1862, released and surrendered the said lands to the United States. This release by the governor was a full compliance with the requirements of both of said resolutions, and exhausted the governor's authority to deal with the subject of the granted lands. The commissioner of the general land-office subsequently, on July 13, 1868, requested the Chicago & North-Western Railway Company to execute a similar release as to the 142,430 23-100 acres of clear lands previously selected and certified to the state in December, 1861, for and on account of the line from Ontonagon to the Wisconsin state line. This request was unauthorized by any fair construction of the congressional resolution of 1862, and the governor of the state, in attempting to make the surrender of said lands in August, 1870, exceeded his authority, and his act was a nullity, and did not divest the state of its title thereto as trustee, nor in any way defeat or annul the trust created by the act of 1856 in respect to said lands, which were exclusively appropriated by congress to aid in the construction of the line of railroad from Ontonagon to the Michigan state line.

The commissioner of the land-office certainly had no authority, by virtue of his office or official duties, to deal with the subject of that trust created by congress. He derived no authority from the resolution of 1862 to either disturb or terminate the trust created and declared for that line, or to recall the lands granted by the United States, and certified in 1861 to the state for its construction. The congressional resolution of 1862 did not, in terms or by implication, confer upon the land department any jurisdiction whatever over the lands granted to the state to aid in the construction of this Ontonagon & Wisconsin State Line Railroad. Nor did the state resolution of 1867 confer upon the governor any authority, even by the most strained implication, to release and surrender the same. The governor of the state had no more authority under said resolutions of congress and of the state, either or both, to surrender said 142,430 23-100 acres of land than he, as governor, would have had to convey them in defiance of the trust on which they were held by the state to a private individual without consideration. The opinion of the attorney general, on which the governor acted, does not assert the existence of his authority to surrender these lands. The attorney general was manifestly considering the lands relating to the old line from Marquette to the Wisconsin state line. He expressly disclaims any knowledge of the correctness of description of said lands, and states that "if any of them should prove incorrect, I do not see how it could affect the state. In such case your certificate would be a simple nullity, as being unauthorized by law,"—and at the close of his opinion he states that the release to be executed would "only release the interests of the state to such lands as are contemplated by the acts of congress approved June 3, 1856, July 5, 1862, and March 3, 1865." It is perfectly clear that the attorney general did not intend to advise the governor that he had authority to release the lands on the Ontonagon & State Line road; nor did the release submitted for his consideration and opinion on its face purport to surrender the lands on that line of railroad. It appears that, after the Peninsula Railroad Company consolidated with the Chicago & North-Western Railway Company, congress, by an act approved March 3, 1865, granted to the state of Michigan, for the purpose of aiding in the construction of a railroad from Marquette to the Wisconsin state line, at or near the mouth of the Menominee river, for the use and benefit of said Chicago & North-Western Railway Company, four additional alternate sections per mile to that already granted by said act of 1856, and the supplementary joint resolution of 1862. But this in no way affected the grants made for other lines by the act of 1856. Such grants and the trusts raised and declared to aid in the construction of the other railroads or lines designated in the granting act of congress and the accepting act of the state, remained wholly undisturbed and unaffected by either state or congressional action, when the governor of Michigan, without authority of law, executed the certificate and surrender of said 142,430 23-100 acres of land. The land-office had no authority of law either to call for or to accept said release for and on behalf of the United States. Congress, having made the grant and created the trust con-

nected therewith, could alone determine when the land should revert and the trust terminate. The state, and not the governor thereof, was the trustee, and the granting act defined how and in what manner the state, as trustee, by and through its legislature, should dispose of said land. Looking to the purpose and object sought to be effected, and to the language of the joint resolution of 1862, it is perfectly clear that it was wholly insufficient, under the rule laid down in *Railway Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. Rep. 123, to work a reversion to the United States, even *in futuro*, of the lands granted by the act of 1856 to aid in the construction of the Ontonagon line of railroad. That resolution neither directly, positively, nor beyond all doubt or ambiguity, manifests the intention of congress to reassert title and resume possession of said lands, either at the time of its passage or at any future day. Neither did said resolution in any way authorize the land department to assert such title for the United States, or to assume any control over said lands. I am, therefore, clearly of the opinion that, in the absence of any law, state or federal, calling for or requiring the execution of the certificate and surrender made by the governor on August 14, 1870, his release of said 142,430 23-100 acres of land was void for want of authority, and that said release did not operate to revest the title to said lands in the United States, or make them again a part of the public domain of the general government. The United States did not consider that said release had any such operation or effect, for with all facts before congress the act of March 2, 1889, was passed, declaring a formal forfeiture of said lands for breach of the condition subsequent. If said release had been either valid or only voidable, congress could and would have recognized or ratified it, and thus readily have confirmed all subsequent acts of the land-office in connection therewith. This was not attempted, but a formal forfeiture was declared, and the United States then, and at that date, reasserted ownership of the land. This was clear legislative recognition of the fact that the title of the United States had not previously thereto reattached so as to make said lands the property of the government.

Again, it is disclosed in the record that, notwithstanding said release by the governor in 1870, the state, through its executive, in 1872 or 1873, disputed the validity of said release, and still asserted title to said lands, not as the beneficial owner thereof, but as trustee under the act of 1856. This claim was not only made by the state, but her board of control of railroad grants acted upon the assumption of its validity in conferring said lands upon another railroad company, which action the legislature of Michigan confirmed. Until congress passed the act of March 2, 1889, reasserting the United States' ownership of these lands, the claim asserted thereto by the state as trustee remained unsettled or undetermined by any competent authority. The United States did not by any authoritative act or declaration dispute the state's claim to the lands made after said release had been executed by its governor, nor did congress pass any "act directing the possession and appropriation of the property, or that it be offered for sale or settlement." Under such cir-

cumstances and conditions it is doubtful, upon the authority of *Newhall v. Sanger*, 92 U. S. 761, whether said lands were open to appropriation or selection under other grants subsequent to the act of 1856, even assuming that the validity of said release by the governor would be ultimately sustained by the courts. But, said release being invalid and void for the want of authority to execute the same, the lands were not thereby restored to the United States, and, with no title in the United States till forfeiture declared in March, 1889, it is clear that said lands were not open to selection or appropriation under grants subsequent to the act of June 8, 1856.

It is not deemed necessary to notice all the consolidations that were, from time to time, effected between the several railroad companies, or the mortgage executed by the Chicago, St. Paul & Fond du Lac Railroad Company, or the sale thereunder, and the purchase by the Chicago & North-Western Railway Company. These matters are not material, because it is manifest that the dealings and transactions *inter sese* of companies designated as the beneficiaries of said grant of 1856 could in no way change or impair the trust created by the United States, and accepted by the state, nor authorize any diversion of the lands appropriated to construction of the several lines of railroad to any other purpose or use. It is claimed on behalf of plaintiff, and was so ruled by the trial judge, that the effect of the state's act of February 14, 1857, was to vest the legal title to the lands granted to aid in the construction of the line of road from Ontonagon to the Wisconsin state line in the Ontonagon & State Line Railroad Company; that such legal title by consolidation passed to the Chicago, St. Paul & Fond du Lac Railroad Company; thence to the Chicago & North-Western Railway Company, by whom it was surrendered to the state under the release of June 17, 1870, and from the state to the United States by the governor's certificate and surrender, executed August 14, 1870. We have already seen that said release of the governor did not operate to revest the title to the lands in question in the United States; nor is the position correct that under the operation of the act of February 14, 1857, the legal title to the lands granted for the benefit of the Ontonagon line of railroad was vested in said Ontonagon & State Line Railroad Company. The legal title was essential to the trust which the state accepted, and the granting act never authorized the legislature of the state to convey or pass the legal title to said lands to said company. The scheme of the trust created by congress clearly contemplated that the state, as trustee, should hold and retain the legal title to the lands, and the fourth section of the granting-act prescribed the time and manner in which said lands should be disposed of by the state as trustee. The object and purpose of the state act of February 14, 1857, was to accept the trust and to designate the companies which might, by completing the several railroads, become the beneficiaries of the trust-estate. Said act only conferred upon the respective companies therein named the right to earn the lands, or the proceeds thereof, appropriated to them, respectively. When the lands were selected for the respective lines, the secretary of the interior, after having approved

such selection, certified the same to the state, and not to the several railroad companies. The act of June 3, 1856, was a grant *in præsenti* to the state, and passed the title to the said sections of land along the designated lines of road. Upon the location of said roads, and the selection of the sections, and their certification by the department to the state, the legal title thereto was completely vested in the state as trustee. The disposal thereof, for the purposes specified as the trusts indicated, was left with the legislature, but the manner, and only manner, of such disposition, was prescribed. That manner did not contemplate or authorize the trustee to grant or convey the legal title direct to the several railroads whose construction was intended to be aided. While the act of February 14, 1857, employs some language which might purport to grant the lands to the several companies, the clear object and purpose of that act was, after accepting the grant, to confer upon the several companies designated the rights, powers, privileges, and benefits which were intended for their respective lines by the act of congress. They were the designated beneficiaries of the trust, with the legal title retained in the state as the trustee. This is made clear by reference to the act of the legislature, approved March 8, 1865, (page 98, H. R. Grant,) which provided for the issuance of patents for railroad lands whenever the company or companies should become legally entitled to such lands. The patents to be issued were to be *prima facie* evidence of title; but such patents, conveying the title, were only to be issued as the companies, respectively, finished and put in running order any section or sections of 20 continuous miles of their line of road. If the title had already passed by the act of 1857, this act of 1865 was idle and inoperative; but, aside from this, it is settled by the decision of the supreme court in the case of *Schulenberg v. Harriman*, 21 Wall. 50, 59, that the state, under the terms of the grant from congress, had no authority to dispose of land beyond 120 sections, except as the road, in aid of which the grant was made, was constructed. In the present case no portion of the road was built. The legal title to the lands in question did not, therefore, pass to the Ontonagon & Wisconsin State Line Railroad Company by the act of February 14, 1857, but remained in the state.

Was that legal title ever acquired by the plaintiff, or those under or through whom it claims? I am clearly of the opinion that it was not. The acts of March 3, 1865, and July 3, 1866, under which plaintiff derives its rights, whether considered and construed *in pari materia* or not, did not and could not confer upon it a legal title to the land in controversy. The act of 1866, treated as an independent grant, not controlled by the act of 1865, as to the location of the lands granted to aid in the construction of the Harbor & Ship Canal at Portage Lake, was the one under which plaintiff asserts its claim to the land in litigation, the same being a part of the 142,430 23-100 acres granted the state in 1856, for the benefit of the Ontonagon & Wisconsin State Line Railroad, and certified to the state by the land department, in December, 1861. The act of July 3, 1866, was a grant *in præsenti* to the state. It covered and embraced 150,000 acres of land to be selected from alternate odd-num-

bered sections, and 50,000 acres from even-numbered sections, of the lands of the United States. Upon its acceptance of the grant, on March 27, 1867, there passed to the state at that time, if not at the date of the grant, the title to 200,000 acres of the designated sections of public lands, to be afterwards selected and located, which selection and location would simply operate to perfect the grant, to identify the lands covered by it and give precision to the title, and by relation have the same effect upon the selected sections as if the grant had specifically described them. It admits of no question that this grant of 1866 was not intended to cover or convey to the state lands which had been previously granted by the act of June 3, 1856. It did not, either in express terms or by any implication, attempt to make any new appropriation of the lands granted by the act of 1856. The purpose of the act of July 3, 1866, as well as its legal effect and operation, was to grant to the state, for the benefit of the canal company, 200,000 acres of public lands, remaining at the disposal of the United States. That the lands granted to the state by the act of June 3, 1856, to aid in the construction of the Ontonagon & State Line road, and which were identified by selection and certification in 1861, did not and could not again pass to the state by the act of July, 1866, for a different purpose, the United States not having declared any forfeiture, or reasserted ownership thereof for breach of condition subsequent, is too clear for argument, as it is settled by an unbroken line of authorities. See *Wilcox v. Jackson*, 13 Pet. 498; *Eldred v. Sexton*, 19 Wall. 189; *Railroad Co. v. U. S.*, 92 U. S. 733; *Newhall v. Sanger*, Id. 761; *Glasgow v. Baker*, 128 U. S. 560, 9 Sup. Ct. Rep. 154; and *Johnson v. Ballou*, 28 Mich. 379. If the United States had forfeited the grant of 1856, and reasserted their title to these Ontonagon lands before the canal company made its selection of odd sections under the grant of 1866 from or out of said lands, it is probable that such location and appropriation would have been valid under the authority of *Ryan v. Railroad Co.*, 99 U. S. 382. But, the title to the 142,430 23-100 acres of clear lands on the Ontonagon line not having been restored to the United States, but remaining in the state, the attempt to select about 15,000 acres from said lands, and appropriate the same to the grant of 1866, was without any authority of law, and wholly invalid. When the grant of 1866 was accepted, the state occupied the position of trustee under two separate, distinct, and clearly defined trusts. It held the title to 142,430 23-100 acres under the grant of 1856 for one exclusive purpose. It also held the title to 200,000 acres of other and different lands for another beneficiary. Both trusts were created by a common grantor. Without the consent of the United States, expressed in some authoritative way, and the consent of the *cestui que trust*, how or upon what principle of law could the state divert the lands applicable to one trust or object and appropriate them to another and different object or trust? The mere statement of the question is sufficient to show that such a proceeding would violate every principle of the law of trusts. The state could not possibly, by any action of its officials, or even of its legislature, have conferred the Ontonagon lands, or any portion thereof, upon the

canal company. This is well settled by the authorities. *Schulenberg v. Harriman*, 21 Wall. 44; *Johnson v. Ballou*, 28 Mich. 397. But the state never in fact directed or attempted any such breach of trust. Gov. Crapo, in appointing T. J. Avery (then the president of the canal company) the agent of the state to select the 200,000 acres granted by the act of July, 1866, directed said Avery to make said selection from any lands in the Upper Peninsula that were subject to private entry. Under date of May 3, 1876, the commissioner of the land department instructed the register and receiver at Marquette that—

"In satisfying the claim under said act of 1866, we are restricted to the region of country contemplated by the act of 1865 and embraced by the withdrawal above mentioned. Consequently the selections from odd sections to make up the 150,000 acres, and from even sections to cover the 50,000 acres, are necessarily restricted to that portion of your district."

Withdrawals of public lands in the Upper Peninsula were made to satisfy said grant of 1866. The president of the canal company, acting also as the agent of the state in selecting the lands under said grant, in May, 1871, selected about 15,000 acres out of said grant of 1856 for the Ontonagon & Wisconsin State Line road, and the same were by the land department or commissioner approved to the state of Michigan on May 22, 1871, for the benefit of said canal company. Conceding to this certification the force and effect of a patent, it was void, because the lands had been previously granted and appropriated, and were thereby removed or withdrawn from the jurisdiction of the land department, and not subject to its authority or control. No right or title was thereby conferred upon or vested in the canal company to said lands. This is settled by numerous authorities. *Stoddard v. Chambers*, 2 How. 285; *Bissell v. Penrose*, 8 How. 317; *Minter v. Crommelin*, 18 How. 87-89; *Easton v. Salisbury*, 21 How. 426-432; *Reichart v. Phelps*, 6 Wall. 160; *Morton v. Nebraska*, 21 Wall. 660; *Shepley v. Cowan*, 91 U. S. 330; *Sherman v. Buick*, 93 U. S. 209; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389. These cases, with others that might be cited, establish the general principle that a patent issued by the executive department of the government for lands previously granted or disposed of, or otherwise appropriated, or reserved from sale by congress, is inoperative to pass any title for want of jurisdiction over the subject and authority of law to execute the conveyance. The rule is especially applicable where the United States have by previous act of congress granted the lands which thereafter, and while such grant is in force, cease to be public lands of the government, subject to the control or disposing power of the land department. The lands selected and appropriated to the Ontonagon line in 1861, under the grant of 1856, not having been restored to the public domain, as already shown, were not subject to selection and certification for the canal company in 1871, and the act of the department in permitting such selection, and in approving the same, was wholly without authority of law, and void, and communicated no title, legal or equitable, to the canal company. But it is urged on behalf of plaintiff that said certification by the department, to-

gether with the action of the governor in certifying to the completion of the canal under the state act of March 8, 1865, conferred upon the canal company a *prima facie* title to said 15,000 acres of land, which cannot be collaterally questioned, disputed, or attacked, by the defendant, because he does not connect himself with the title, or show any interest in the land, but is a mere intruder or trespasser. Cases are cited which, at first sight, apparently support this position; but, when carefully examined, they are not applicable to this case. The decisions relied on establish the general rule that where the land granted or approved for selection or entry is part of the public domain of the United States, over which the executive or land department has jurisdiction, or may lawfully exercise a discretion, or in respect to which the law invests it with "quasi judicial" functions, a patent or certificate issued for such lands, although irregularly and erroneously issued, cannot be collaterally attacked in an action of ejectment by a defendant, who is a mere trespasser or intruder. In such cases the power or authority of law to issue the patent exists, and irregularities or mistakes in its exercise cannot be taken advantage of by a defendant at law who does not connect himself in any way with the title, or show any right to the land. But the present case does not come within that rule. Here the lands attempted to be conveyed or patented were not a part of the public domain of the government, and the land department had no power or authority of law to dispose of them; nor was it vested with any discretion or jurisdiction over them. Its action in certifying the land to or for the canal company was therefore not merely irregular or voidable, but was absolutely void, and wholly inoperative to confer any right or pass any title. In cases of the latter character the defendant in ejectment may always attack the plaintiff's title, or show an outstanding title in another. This is settled by the following cases: *Polk's Lessee v. Wendal*, 9 Cranch, 87; *Patterson v. Winn*, 11 Wheat. 381; *Minter v. Crommelin*, 18 How. 87-89; *Reichart v. Phelps*, 6 Wall. 160; *Smelting Co. v. Kemp*, 104 U. S. 641, 646; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228. In the two last cases the chief justice dissented from the opinion and judgment of the court, on the express ground that the defendant, being a mere intruder, could not collaterally question or attack the *prima facie* title which the patent conferred upon the plaintiff. But the court held otherwise upon the distinction above indicated, which is founded upon the well-established rule that in the United States courts a recovery in ejectment can be had only upon the strength of the plaintiff's own title, which must be the strict legal title. *Proprietary v. Ralston*, 1 Dall. 18; *Watts v. Lindsey*, 7 Wheat. 158; *Foster v. Mora*, 98 U. S. 425; *Reynolds v. Mining Co.*, 116 U. S. 687, 688, 6 Sup. Ct. Rep. 601; *Johnson v. Christian*, 128 U. S. 374-382, 9 Sup. Ct. Rep. 87. The governor's certificate as to the completion of the canal, in pursuance of the state act of March 8, 1865, did not and could not operate either to confirm or give any validity whatever to the void act of the land department in approving or certifying to the

state, for the benefit of the canal company, said 15,000 acres of land previously granted and appropriated to the construction of the Ontonagon & Wisconsin State Line Railroad. But it is insisted by counsel for the plaintiff, and the trial judge so ruled, that, as the agent appointed by the state selected said lands for the canal company, which selection was approved by the land department and certified to the state for the benefit of said company, and the governor thereafter, under the authority of said act of 1865, certified to the completion of the canal, the state of Michigan is or would be estopped from disputing or denying the title of plaintiff thus acquired, and that this estoppel against the state will preclude the defendant from setting up any such outstanding title to said lands in the state.

It is not deemed necessary to enter upon any review of the authorities upon the question of when or under what circumstances the doctrine of estoppel may be invoked against the sovereign. The government is not ordinarily bound by an estoppel. *Johnson v. U. S.*, 5 Mason, 425; *Carr v. U. S.*, 98 U. S. 433. Individuals may be estopped by unauthorized acts of their agents apparently within the scope of their agency, but the government is rarely, if ever, estopped by the unauthorized acts or declarations of its agents. But if the state can ever be estopped by the unauthorized acts or declarations of its agents or officers, the facts of the present case do not call for or warrant the application of the doctrine. The canal company was not misled to its injury by any act of the state or its officials. Its own officer acted in violation of his instructions from the governor in selecting said lands. The company knew the lands had been previously granted, was affected with full notice of the public acts of congress, of the land department, and of the state in relation thereto, and assumed to act for itself in selecting what it could not legally appropriate. The state was guilty of no deception or fraud in leading the company to select said lands. To make the doctrine of estoppel apply to title to real estate the party invoking its aid must not only be misled to his hurt, but he must also be destitute of knowledge of the true state of title, and also of the means of acquiring such knowledge. *Brant v. Coal, etc., Co.*, 93 U. S. 326. The canal company does not bring itself within this rule. It was not misled, and it knew the state of the title. But for another and still stronger reason the doctrine of estoppel can have no application to this case. An estoppel can never exist where the party, whether an individual, a corporation, or a government, against whom it is invoked, has no power or legal capacity to lawfully and directly do the act, which is sought to be confirmed by precluding its denial. It is an essential element in the legal principle on which the doctrine of estoppel rests that the party against whom it is asserted should have possessed the authority or power or legal capacity to have directly done the act in some lawful way. It was not within the power or legal capacity of the state, as trustee, to have appropriated the lands in question to the canal company, or to have vested it with the title thereto; and no act or declaration of the state officials can estop the state from denying what it had no authority to do, directly. Upon the whole case, the conclusions

of this court are (1) that the title to said lands was not restored to the United States, nor were said lands made public domain until the passage of the forfeiture act of March 2, 1889; (2) that no title thereto was ever acquired by the canal company by the acts and transactions which preceded said forfeiture act of congress; (3) that the defendant, even as a mere intruder, and aside from any right acquired under said act of March 2, 1889, may and has successfully disputed plaintiff's *prima facie* title arising from the certification thereof for its benefit; and (4) that there is no estoppel either upon the state or the defendant against disputing or denying the validity of such *prima facie* title. It results in the judgment of this court that there should be a new trial in this case, at which the plaintiff will have to claim a confirmation of its title, to the exclusion of defendant's right, from the act of March 2, 1889, the construction and legal effect of which is not now passed upon.

BROWN, J., (*concurring*.) Having sat with my brother judges during the argument of this case, I am requested by them to express my views upon the questions involved. The limited time at my disposal, and the urgency of business in my own district, forbid my entering into a lengthy discussion of the various points, or doing much more than to announce my general conclusion. Having had recent occasion in the case of *Shepard v. Insurance Co.*, 40 Fed. Rep. 341, to examine the original railroad land grant act of June 3, 1856, I was of the opinion:

1. That the act was a present grant of lands, included in its terms, to the state, and that no further conveyance by the government was contemplated. *Schulenberg v. Harriman*, 21 Wall. 44; *Johnson v. Ballou*, 28 Mich. 379.

2. That, while the act passed the title to these lands to the state, such divestiture of title did not operate as to any particular lands until they had been selected and certified to the state.

3. That the state took the title to such lands as trustee for the railroads named in the first section of the act, and for no other purpose whatsoever.

4. That the provision in the act that all lands remaining unsold for 10 years should revert to the United States, if the roads were not then completed, was a condition subsequent, and that upon breach of such condition such lands would not revert to the United States without judicial proceedings authorized by law, or a forfeiture asserted by legislative act.

5. If the question, how many railroads were contemplated by this act? depended for its solution solely upon the language of the act itself, there would be strong reason for holding that they were limited to three, viz., one in the Upper Peninsula, one from Amboy and Grand Rapids to Traverse bay, and one from Grand Haven and Pere Marquette to Port Huron, by the way of Flint. But in view of the act of acceptance by the legislature of February, 1857, whereby the lands in the Upper Peninsula were conferred upon four separate roads, and in view of the subsequent action of the federal government in connection therewith, I think

the act should be construed as authorizing the formation of corporations for the construction of separate roads from Marquette and Ontonagon to the state line. It is true, the two roads from Marquette and Ontonagon, upon which a portion of the lands was conferred by the legislature, were consolidated with the Chicago, St. Paul & Fond du Lac Railroad, and thus became one corporation, and that this road filed two maps with the commissioner of the general land-office, one of which was from Fond du Lac through Wisconsin to the Michigan line, and the other of which was from Marquette and Ontonagon to the state line, and in his acceptance of these maps the commissioner of the land-office speaks of these as one road with separate branches from Ontonagon to Marquette; yet the subsequent dealings, for several years thereafter, were wholly with the Marquette line, which was treated as a separate and distinct road. After the acceptance of these maps nothing further appears to have been done until the foreclosure of the mortgage given by the Chicago, St. Paul & Fond du Lac Railroad, including its right to these lands, and the purchase of its rights and franchises by the Chicago & North-Western. From this time forward the line from Marquette to the state line appears to have been treated as a separate road. The Michigan legislature, by the act of 1861, after reciting the insolvency of the Fond du Lac Railroad, enacted that the lands appropriated to the construction of such road be placed in charge of the board of control, with power to confer them upon some other competent company for the construction of such road. The commissioner of the general land-office, in December of that year, certified to the state 112,145 acres "to aid in the construction of a railroad from Marquette to the Wisconsin state line, and known as the 'Chicago, St. Paul & Fond du Lac Railroad,'" and at the same time certified to the state 142,430 acres "to aid in the construction of a railroad from Ontonagon to the Wisconsin state line, and known as the 'Chicago, St. Paul & Fond du Lac Railroad.'" In April of the following year the board of control, acting under the authority of the legislative act of the preceding year, (1861,) and with the consent of the Chicago & North-Western Railroad, which had succeeded to the rights of the Fond du Lac road, recommended and requested that congress authorize the relocation of the lands granted for the purpose of the road from Marquette to the state line, so as to conform to the new line adopted by the Peninsula Railroad Company, and ordered that all the lands, etc., granted by congress to aid in the construction of the railroad from Marquette to the Wisconsin state line should be conferred upon the said Peninsula Railroad Company. In compliance with such request, congress, by joint resolution of July 5, 1862, authorized the relocation of the line of railroad from Marquette to the state line, with the provision that the governor should certify that the state had surrendered all its claim to the lands originally certified. In such case the state was entitled to receive a "like quantity of land selected in like manner upon the new line." If any doubt had previously existed as to the proper construction to be given to the act of 1856, I regard it as settled by this joint resolution, which, in my view, contemplated a distinct line of road from Marquette

to the state line. Thereupon the Peninsula Railroad released to the United States the original land granted to the Marquette & State Line Railroad, and became consolidated with the Chicago & North-Western. A joint resolution of the legislature also authorized the governor to execute a certificate of non-incumbrance and surrender of the lands on the original line of the Marquette & State Line Railroad, but made no mention of the Ontonagon line. This surrender was executed by Gov. Crapo in 1866. During all this time the grant to the Ontonagon line had remained in abeyance, nothing having been done since 1857, when the maps were filed and the land certified to the state. On July 13, 1868, the commissioner of the general land-office, in a letter to the solicitor of the Chicago & North-Western Railroad, called his attention to the lands "for the branch line to Ontonagon," and requested the State Line Railroad Company to execute a release of such lands. And thereupon the governor, on August 14, 1870, acting upon the opinion of the attorney general, executed a similar surrender and release of the lands certified to the state for the benefit of the Ontonagon line.

6. I think this release, not having been authorized by any act of congress or the state legislature, was a nullity, and the trust created by the original act of 1856 remained unimpaired until the right of the state to these lands was forfeited by judicial or legislative act. I do not understand that the governor of the state has any general power, by virtue of his office, to convey lands held by the state, either in fee-simple or in trust for another. His only authority to release lands vested in the state by the original act of 1856 was limited to the lands originally selected for the construction of the line from Marquette to the Wisconsin state line. The letter of July 13, 1868, from the commissioner of the land-office, would seem to indicate that he considered the Ontonagan line as a mere branch of the line to Marquette, when in fact these lands had been allotted to a distinct corporation. Three years thereafter Gov. Bagley, who had succeeded Gov. Baldwin, in a communication to the secretary of the interior, called his attention to the action of his predecessor, and claimed that the surrender of these lands was without authority of congress or the legislature, and requested that they be withheld from sale. Upon receipt of such letter, the restoration of these lands to sale was suspended, an investigation was had, and the secretary of the interior came to the conclusion that his predecessor had erred in demanding a release of the lands granted for the Ontonagon line, and was of the opinion that the title was still in the state of Michigan. Thereupon, and in 1880, the Ontonagon & Brulé River Railroad Company was organized for the purpose of constructing a road from Ontonagon to the state line, and the board of control declared the lands forfeited to the state, and vested the same in the newly organized company.

7. In March, 1889, no steps having been taken to build the road, congress passed an act forfeiting to the United States and resuming title to all lands granted by the act of 1856 "opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted," and all such lands were declared to

be a part of the public domain. Then, for the first time, these lands became subject to private entry. Long prior to this act, and in 1871, the canal company, through P. J. Avery, its agent, acting under authority of a certain act of congress passed in 1866, making grant of "lands of the United States" for the construction of the Portage lake ship canal, selected 15,000 acres of these lands originally reserved for the building of the Ontonagon & State Line road. This, like the act of 1856, was a grant *in præsenti*, and in the uniform construction given such grants by the supreme court did not operate to convey lands which had been previously appropriated for other purposes, or the title to which was not at the time of the selection then in the United States. I see no escape from the conclusion that the selection of these 15,000 acres, the title to which was then in the state, was void, and the canal company took no title to the lands. I see no evidence of fraud on the part of the company or its agent in making the selection, as they seem to have relied upon the legality of the release executed in 1870; and, if the governor had had authority to make the surrender and release of the lands appropriated to the Ontonagon line, I see no reason why the canal company would not have taken a perfect title to them. Nor do I see any reason for imputing fraud to the state. The act of the governor, on releasing these lands, was undoubtedly *bona fide*, and was done after consultation with his official adviser, the attorney general. I have given my reasons for believing that he was mistaken; but his act was simply in excess of his authority, and is not imputable to the state. The state itself, acting through its authorized voice, the legislature, was simply silent, doing nothing to affirm or disaffirm his conduct. When the land grant was made in aid of the ship canal company, the lands were conferred by the legislature upon the Portage Lake & Lake Superior Ship Canal Company, subject to all the conditions of the original grant. But there was no attempt by the legislature to interfere with lands already granted in aid of the railroad, or to dispossess it of the title it might acquire by building the road. Mr. Avery, in selecting such lands, was apprised of the state of the title, and took the risk of the legality of the governor's action. Had the state, in 1871, held the title to these lands in fee-simple, there could be no doubt of its power to confer them upon the canal company; but holding them a trustee for a special purpose, it had no right to divert them from that purpose, and grant them to another for a different purpose. The governor, the board of control, and the commissioners of the general land-office, are simply the agents for certain purposes of their respective sovereignties, and possess no powers not conferred by general statutes or special enactments; and I know of no legal principle by which the state or general government can be estopped by the acts of their officers in excess of their authority.

8. I do not think that the act of forfeiture of 1889 inured to the benefit of the canal company; that the act was a complete forfeiture of the right of the state to hold the lands for any purpose. It cut off all right which the state then had to these lands, but it conferred no title upon the canal company, and left this company standing in the position of a

naked trespasser. The act of 1866 did not confer these lands upon the state, because the grant was limited to lands then belonging to the United States, and the state never received a subsequent title to these lands which would inure, by way of estoppel, in favor of the canal company. In the case of *Railroad Co. v. U. S.*, 92 U. S. 733; it is said of a land grant act similar in its terms to the act of 1866 that the state takes an immediate interest in the lands whereto the complete title is in the United States at the date of the act; but if they are at that time reserved for any purpose whatever, they are excluded from the operation of the act, and it is immaterial whether they subsequently become a part of the public lands of the country. A subsequent sale and grant of the same lands to another person is absolutely null and void so long as the first appropriation continues in force. *Simmons v. Wagner*, 101 U. S. 260.

9. Can the defendant, who shows no title to these lands in himself, and who, for aught that appears, is a mere trespasser, set up this title in the state, when the state itself has conferred title upon the plaintiff? This is the most difficult question in the case, and one which caused considerable embarrassment in the *Shepard Case*, although I finally held, in that case, that, as both parties claimed title under the act of 1856, the doctrine of common source applied, and neither could set up against the other a title antedating that act. The general rule in actions of ejectment is that the defendant may show an outstanding title in a third person. Does this rule apply in this case? The decisions of the supreme court upon this point are, to a certain extent, misleading, and while there may be no direct conflict between them, there are certain expressions in some of the opinions which indicate that the point had not received attentive consideration from the justice who delivered the opinion. In discussing this question we are bound to assume that the grant to the canal company was void, for the reason that the state had no title to the thing granted, as stated in *Polk's Lessee v. Wendal*, 9 Cranch, 87. It was said of this case, in *Patterson v. Winn*, 11 Wheat. 384, that it had settled the doctrine of this court "that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law in an action of ejectment." It would be mere waste of time, however, to examine and distinguish all the cases upon this point, since all of them were subjected to a searching criticism in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and the conclusion reached that if officers of the government act without authority —

"If the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void for want of power in them to act upon the subject-matter of the patent, not merely voidable."

In *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601, the rule is stated somewhat differently,—that in all actions, to recover possession of real estate, the plaintiff can only recover on the strength of his own title, and not on the weakness of the defendant's title. On the other hand, if the patent has been obtained by fraud, it can only be

set aside by a bill in equity at the suit of the United States; and private persons, particularly in a suit at law, are in no position to attack its legality. So, if an executive officer of the government is vested with *quasi* judicial function to determine what lands shall pass in respect to their character, his determination is the only criterion of ascertainment, and cannot be impeached. *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Doll v. Meador*, 16 Cal. 295. In *Doolan v. Carr* the land was patented to a railroad company, February 28, 1874, and the railroad company conveyed to Carr, the plaintiff, June 10, 1874. No attempt was made by the United States to annul the patent. On the 10th of November, 1882, the defendant Doolan and one McCue each entered on 160 acres, under a claim of pre-emption settlement. Each of them then made and subscribed a declaratory statement of his intention to claim and pre-empt the land on which he had settled, under the laws of the United States, and presented it to the register of the proper land-office; but he refused to receive it, on the ground of the existence of a patent to the railroad company. The position assumed by the chief justice, in his dissenting opinion, is practically the same as that occupied by the plaintiff in the case under consideration. The principal cases upon which he seemed to rely were *Hoofnagle v. Anderson*, 7 Wheat. 212, in which an attempt was made by a private individual to attack the patent upon the ground of fraud and mistake, and it was held, following out the distinction above noted, that, as the patent appropriated the land, any defects in the preliminary steps required by law were cured by the patent. Says the chief justice:

"If a patent has been issued irregularly, the government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself."

In other words, the patent in that case was not void, but voidable, and it could only be avoided by a suit brought by the government for that purpose. In *Cooper v. Roberts*, 18 How. 173, the plaintiff claimed that his land had been allotted to the state of Michigan for the use of schools, while the defendant relied upon a license given by a mineral agent, and objected that the officers of the state violated the statutes of Michigan in selling these lands after they were known, or might have been known, to contain minerals. It was held that the defendant was not in condition to raise this issue, and the patent was held conclusive of the fact of a valid and regular sale. This is not the case of a patent located upon lands previously reserved for another purpose. In *Field v. Seabury*, 19 How. 323, it was held that a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant. A similar ruling was made in *Spencer v. Lapsley*, 20 How. 264. In line with these cases is that of *Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 Sup. Ct. Rep. 1157, in which it was held that oral evidence was inadmissible on the part of defendant to show that certain lands were not open to settlement under pre-emption laws, but were swamp and overflowed lands, which passed to the state under another act; the court holding it to be the duty of the land de-

partment to determine whether land patented to a settler is of the class subject to settlement under pre-emption laws, and that its judgment upon this fact was not open to contestation, in an action at law, by a mere intruder without title. In *Frisbie v. Whitney*, 9 Wall. 187, a certain Mexican grant having been declared to be invalid, a rush was made to pre-empt the lands covered by the grant, and it was held that such pre-emption, accompanied by force, was not valid to oust the title of one already in possession of the land. The case evidently turned upon the fact of the actual occupation of the land by the one party and his forcible dispossession by another party. The defendant, in the case under consideration, stands practically in the same position as the defendant in *Doolan v. Carr*. He took possession under a claim of right to the benefit of the pre-emption or homestead laws of the United States, and his claim was rejected upon the ground that the lands had been previously patented to the canal company. It seems to me this case cannot be distinguished from *Doolan v. Carr*, and that the principles announced by the majority of the court in that case apply with equal force here.

SEVERENS, J., (*dissenting*.) A verdict and judgment having passed for the plaintiff upon the trial of this cause at the last May term of this court at Marquette, a motion for a new trial was entered, and was heard in the autumn by the circuit and district judges sitting together. Very full and elaborate arguments were made on both sides, and much assistance has been thereby afforded. I have given careful attention to these arguments and to the authorities referred to by counsel in their support, and after much reflection upon the case am of the opinion that the verdict and judgment are right. The court was in error in the proposition stated at the trial, that the act of the legislature of Michigan of February 14, 1857, conferring the lands granted by the act of congress of 1856 upon the several corporations therein mentioned, operated to transfer the legal title. But I am of opinion that the precise nature of the rights conferred is not material to the proper determination of the present controversy, in the view which I think should be taken of the principal facts and their consequences. It is a question of grave doubt whether congress intended by the act of 1856 to provide for two distinct railroads from Marquette and Ontonagon to the Wisconsin state line, rather than one having branches to each of the former termini. The words descriptive of that proposed railroad are grouped together. In the contemporary act, granting lands to the state of Wisconsin, upon which the case of *Schulenberg v. Harriman*, 21 Wall. 44, arose, the grant was declared to be for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, and from thence to the west end of Lake Superior and to Bayfield. The latter place is upon Lake Superior, and some 60 miles east of Superior City, at the west end of Lake Superior. Marquette and Ontonagon, also on Lake Superior, are about 90 miles apart. A diagram of the line of this Wisconsin railroad is shown on page 46 of 21 Wallace. Obviously the line contemplated by that act was a unit, although branches would

be necessary to reach the two northern termini. The act of the state legislature, in apportioning the grant to different companies, does not appear to me to be of consequence in the construction of the granting act. Congress did not concern itself with that, and the state was at liberty to constitute one, two, or more companies to build railroads on any parts of the lines of roads as it might think expedient. And while the lands were originally conferred on two corporations, yet when they were actually located and certified, there was but one company, the originals having been absorbed by consolidation under the laws of the state. As a matter of fact, however, two distinct lines were never located southward to the Wisconsin state line, but part of the way only, and then in common. It is true that as located the single part of the line was shorter than either branch. But there was nothing in the act of 1856 to prevent the point of junction being located much further to the north with branches starting off more nearly at right angles. It seems to me, therefore, that there was strong reason for holding, as the department of the interior appears to have done, that the line of railroad contemplated by the act of 1856 was regarded as an entirety, and that for these reasons, and inasmuch as the change of the location of that part of the line running from Marquette to the Wisconsin state line to the new line contemplated by the act of 1862 would swing the southern part of the railroad entirely out of all relation to the rest of the line, and leave the remnant without connection with it, it was probably the expectation of congress that all the lands selected for the one object of the grant of 1856 would be surrendered. Nor do I think that the doctrine stated and applied in *Railway Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. Rep. 123, that a forfeiture must be indicated by express or unequivocal language of congress in order to work a resumption, has application here. The act of 1862 was not an act for forfeiture, but was in the nature of contract dealing, and in my opinion should be construed by the rules applicable to such. It can hardly be doubted that congress understood, when the act of 1862 was passed, that the granted lands for this road had been selected by and certified to the one railroad company, which had become possessed of all the franchises of the entire road. The interior department, in consideration of the reasons before it, held that the act contemplated a surrender of all the lands which had been certified to it for the entire road, and required such surrender before it would certify the lands selected in exchange. If that decision was correct, it would seem to end the question. But if this holding of the land department is now adjudged to have been erroneous, it remains to consider what has been done upon the footing of it and the consequences resulting therefrom. At a date subsequent to the time when these lands became subject to forfeiture they were surrendered by the beneficiary to the state, and by the executive of the state, and under the seal thereof, they were surrendered to the United States in accordance with the requirement of the executive department of the latter and the request of the railroad company. The state thereafter selected a part of the lands thus surrendered, under the canal grant, and bargained them to the canal company as the con-

sideration for the construction of that work. That selection was made by the officer designated by the act of congress to represent the state. It is not material that the lands were not a part of the grantable lands of the government at the date of the act. *Ryan v. Railroad Co.*, 99 U. S. 382. The canal grant was not a grant of any particular lands. It was floating, until it attached upon these lands by the selection of the state and the approval of the interior department. In the language of the court in *Cooper v. Roberts*, 18 How. 173, 179, "the *jus ad rem*, by the performance of that executive act, became a *jus in re*, judicial in its nature." By the method prescribed by congress, and the only means by which the state could acquire a fixed interest in any land, these lands were selected by the state, and by the method prescribed by the state itself they were bargained and certified to the canal company for a valuable consideration, and that consideration fully paid. This was before any complaint or criticism about the surrender had been made in any quarter. Subsequent to the surrender by the state to the United States, and prior to 1889, a very large proportion of the whole body of lands thus surrendered on the Ontonagon branch has been sold and patented by the United States to private individuals, and during that period of 18 years the legislative department of the government did nothing to indicate any disapproval of what had been done in its behalf. If the legislative department was content with what had been done by the executive in resuming control of these lands, there was no occasion to take action. Neither a legislative declaration nor a judicial forfeiture is necessary when the grantor has acquired actual dominion and control of the land granted upon condition. *Fitchet v. Adams*, 2 Strange, 1128; *Hamilton v. Elliott*, 5 Serg. & R. 375; *Andrews v. Senter*, 32 Me. 394; *Willard v. Henry*, 2 N. H. 120; *Rollins v. Riley*, 44 N. H. 9, 13.

I do not think there is anything inconsistent with this in what the supreme court has held upon the subject of forfeiture. There was no fraud on the part of the canal company in selecting these lands. All was done publicly, and with the concurrence of the executive of the state and the secretary of the interior, and there is nothing to impeach the *bona fides* of all concerned in that selection. There was nothing unusual or wrong in the canal company being active in selecting the lands. That was reasonable and proper. The lands which might otherwise have been selected, and were valuable, are now in great measure sold or appropriated. The defendant, who is a mere intruder, entirely without right or any possible way of obtaining any upon his own theory, asks the court to hold that all that has been done is utterly void, and gives the plaintiff no title whatever. This he asks not to protect any interests of his own, but when the consequences of such holding is to overturn the foundations on which the titles of a large number of purchasers in good faith are supported. The theory of his defense is that the title of the land sued for remained in the state of Michigan, and at the date of the commencement of suit was still lodged there. But he could not set up a title in the state, if the state itself could not in case it were litigating; and in my opinion, the state could not have asserted a title to these

lands. The inclination of my judgment is to hold that the proceedings were intrinsically sufficient to revest the legal title to those lands in the United States. But, be that as it may, the state should be held concluded by its concurrence in the proceedings intended to vest the title in the canal company. It would be permitting the state to commit a gross fraud if it be not concluded. The obligations of legal morality rest certainly with as much weight upon the state as upon private individuals. This principle was applied to a municipality in the case of *Carondelet v. St. Louis*, 1 Black, 179, 191; to a county in *Calhoun v. Emigrant Co.*, 93 U. S. 124; to a state in *Com. v. Andre*, 3 Pick. 224. It was justly said in *Woodruff v. Trapnall*, 10 How. 190, 207, by the court, in delivering judgment, that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals. And there are other cases where the supreme court has laid stress upon such circumstance when considering public action in regard to titles and property rights. In dealing with these, it does not seem to me that a state can be regarded as a merely mechanical organization, and its action in such matters be treated as unaffected by obligations which elsewhere bind the conscience. The principle has been asserted and applied in several cases in the circuit courts of the United States. *Cahn v. Barnes*, 5 Fed. Rep. 327; *Hough v. Buchanan*, 27 Fed. Rep. 328; *Pengra v. Munz*, 29 Fed. Rep. 830. Reference is not made here to that species of estoppel which is put upon one who by untrue assertion misleads another to his prejudice, but to that which precludes one from taking inconsistent positions where, having taken one by which he has benefited at the expense of another, he is not permitted to repudiate that and take another inconsistent position, to the prejudice of that other. In this kind of estoppel it is not necessary that there should have been either false representations or misleading. The fraud is committed by the party being permitted to retrace his course and stand on the other ground. *Daniels v. Tearney*, 102 U. S. 415, and cases cited. And this defense would be a good one if the state were a plaintiff in ejectment suing for this land which had thus been appropriated by her own act. *Dickerson v. Colegrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 U. S. 494; *Kirk v. Hamilton*, 102 U. S. 68.

In regard to the letter of Gov. Bagley, repudiating the official action of Gov. Baldwin, it seems to me, little need be said. In the writing of that letter he was not in the exercise of any duty conferred upon him by the constitution or laws of the state, or of the United States. His predecessor, in selecting these lands for the canal company, was. Gov. Bagley himself, at a later date, executed the certificate of completion to the canal company in the exercise of his proper official function. I think it can hardly be said that this was intended by the law and by the official to operate merely as denoting that the work was done. The language of the fourth section of the act of the legislature of March 18, 1865, as well as the language of the certificate itself, seem to imply that it was intended to operate as the conveyance of the title of the state in the se-

lected lands to the canal company. This seems to have been the view taken by the supreme court of Michigan in *Sutherland v. Governor*, 29 Mich. 320, 322, and, I think, correctly. No other mode of transferring the legal title to the canal company was provided by the law. Again, it seems to me that the courts should not measure the action of great organizations, like the state and the general government, by the square and compass of technical law, which, though well fitted to the measure and determination of private conduct and controversies, might work confusion if applied to great public transactions occurring in the past, and in reliance upon the validity of which many private rights have been founded. And legal doctrines, which might have unquestioned applicability to a simple state of facts, must often yield to impinging rules of paramount importance where, other circumstances concurring, the latter ought in the soundest reason to be applied. In the case of *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, which is much relied upon by counsel for the defendant, the circumstances were materially different from those here presented. The defendants in that case were in possession under a claim of right, which they were asserting to obtain the title to the land by the means which the law gave them. It mattered not that this right had been for the time wrongfully denied to them. If, as they offered to prove, the land was subject to entry, the denial would not finally decide their right. They, therefore, had a standing which enabled them to raise the question of the validity of the plaintiff's title. In view of other decisions of the supreme court, it seems likely that this fact must have influenced the ruling in that case. Here the defendant had no right to enter in any view of the situation. If the title was in the United States, it was by virtue of proceedings which rendered it exposed to the selection of the canal company; if it was in the state, the latter was not authorized to grant it to him. But, besides this, and, as it seems to me, of still greater importance, there was in that case no such reciprocal public action as took place here, and no such extensive private rights had been acquired upon its assumed validity. The case presented the simple grounds for the application of the doctrine there stated. Instances abound in the law where a matter of doubtful coherence becomes solid under the pressure of supervening events, and cases often arise where the maxim *quod fieri non debet factum valet* applies; and I think this is such a one, even if it be conceded that the action of the governor and the land department were based upon a mistaken construction of the acts of congress. For these reasons, I think, the defendant was not entitled to prevail with this defense, and that the result of the trial was the proper one.

The order granting the motion for a new trial was therefore entered.

EICHEL *et al.* v. SAWYER *et al.*

(Circuit Court, D. Kentucky. November, 1890.)

1. ACTIONS AGAINST PARTNERSHIP—BURDEN OF PROOF.

Where suit is brought against defendants as members of a partnership, and one of them denies his connection with the firm, the burden is on plaintiff to show that he is a partner.

2. CONVERSION BY BROKERS—POOLING.

The act of factors in putting into a pool tobacco which has been consigned to them for sale on commission is not a conversion of the property where the consignors are at liberty to withdraw the tobacco from the pool, but acquiesce in the factors' action when it is brought to their knowledge.

3. SAME—CONSTRUCTIVE CONVERSION—WAIVER.

A constructive conversion by factors of property consigned to them for sale on commission is waived by the action of the consignors in treating the property as still their own, as by letters expressing their gratification at certain sales made by the factors.

4. FACTORS AND BROKERS—AUTHORITY—ADVANCES.

Where factors have made advances on property consigned to them for sale on commission, such property is thereby removed from the absolute control of the consignor, and the factors are invested with a discretion to deal with it so as to indemnify themselves first, provided that such dealing is in good faith as respects the interest of the consignor.

5. SAME—NEGLIGENCE—EVIDENCE.

Where the market for such goods is composed of a single buyer, in order to charge the factors with negligence in not selling it must be shown that this buyer made them a reasonable offer for the goods, sufficient to cover their advances thereon, and that they refused it.

6. ACCOUNT STATED—ADVANCES—FACTORS.

Where factors transmit to their consignors accounts current showing the amount of advances made on goods received, and the consignors fail to point out errors therein within a reasonable time, their silence is an assent to the correctness of such accounts.

At Law.

This action was heard before the Hon. HOWELL E. JACKSON and a jury. The plaintiffs, Eichel & Lowenthal, who were dealers in tobacco at Evansville, Ind., sued Sawyer, Wallace & Co., who were commission merchants in the city of New York, alleging that they had shipped to the defendants divers hogsheads of tobacco upon consignment, for sale for their account; that, in violation of their duty as commission merchants, the defendants had agreed with divers other commission merchants in the city of New York, and put this tobacco with the tobacco of the other commission merchants into a pool, under an agreement that none of it should be sold except under the direction of the pool; and that, in this way, the defendants had converted the tobacco of the plaintiffs to their own use, and were responsible for its value. The plaintiffs further claimed that the defendants had negligently failed to sell their tobacco at times when it could have been sold for a reasonable price, and asked damages upon their whole claim in the sum of \$220,000. The defendants answered, denying the conversion, and denying negligence, and alleging, by way of counter-claim, that they had advanced to the plaintiffs certain sums, and that there were due to them from the plaintiffs other sums on account of storage, insurance, and commission, making an indebtedness from the plaintiffs to them of \$186,541. At the conclusion of the plaintiffs' evidence the defendants declined to put

in any evidence, and rested their case upon the testimony introduced by the plaintiffs.

Hargis & Eastin, for plaintiffs.

M. H. Cardozo, Charles S. Grubbs, and Humphrey & Davie, for defendants.

JACKSON, J., (*charging jury.*) The plaintiffs in this case purchased tobacco at Evansville, Ind., which they shipped from time to time during the years 1884 and 1885 to the defendants, Sawyer, Wallace & Co., commission merchants or factors in the city of New York. The course of dealing between the parties, as explained by the plaintiff Eichel, was for Sawyer, Wallace & Co. to make advances to the plaintiffs on these consignments. The plaintiffs sue now to recover of the defendants for 1,549 hogsheads of tobacco, which they claim Sawyer, Wallace & Co. converted or appropriated wrongfully, or negligently failed to sell when they could have sold by the exercise of reasonable diligence for prices that would have realized the plaintiffs, as they claim, \$220,000. That is the claim plaintiffs make against the defendants. They state in their petition that besides Sawyer and Wallace and another member of the firm, whose name I do not remember, they also sue George A. Newman as a partner. Newman puts in a plea, and denies that he was a partner in the defendants' firm, the firm of Sawyer, Wallace & Co. It is for you to determine on that issue whether George A. Newman was a partner or not. The plea denying that he was a partner puts the burden of proof upon the plaintiffs. He did correspond, as it appears, for the firm, but the plaintiffs must satisfy you, by a clear preponderance of evidence, that he was an actual member of the firm, and, if they have not done so, you must return a verdict on this branch of the case for Newman.

The plaintiffs claim, as I say, \$220,000 damages for the conversion or appropriation or neglect to sell 1,549 hogsheads of tobacco. The defendants answer that claim, and admit that they received in all from plaintiff 2,526 hogsheads of tobacco during the two seasons of 1884 and 1885. The plaintiffs in their reply state that they shipped to the defendants 2,537 hogsheads of tobacco. There is, therefore, as you will perceive, a discrepancy of 11 hogsheads of tobacco, that has not been explained in the evidence, so far as it has been brought to the attention of the court. The burden on that point is on the plaintiffs to show that they did send 2,537 hogsheads of tobacco, instead of 2,526, as claimed in the answer. The defendants say in their answer that they sold 1,125 of these hogsheads of tobacco, leaving on hand at the date of the suit 1,401 hogsheads, which they hold for the account of the plaintiffs. They say in their answer, and it is for you to determine from the proof whether that is correct or not, that they accounted for every hogshead of tobacco sold, being 1,125 hogsheads of tobacco. The accounts current rendered will show that, and they will also show what they had on hand when this suit was commenced. As to that 11 hogsheads of tobacco, the court can throw no light upon it, except to say to you that it is incum-

bent upon the plaintiffs to show that they had that excess of 11 hogsheads more than admitted by the defendants. The court cannot recollect, but you may be able to do so, some evidence on the point that they did have the extra 11 hogsheads. Mr. A. Lowenthal, Jr., puts the number of hogsheads shipped to these defendants from November, 1884, to September, 1885, at 2,174 hogsheads. The defendants admit, and, if there is no proof of a larger number, you will take their statement as correct, that they had received 2,526 hogsheads. If there is no proof on the part of the plaintiffs that they had shipped 2,537 hogsheads, you will take the statement of the defendants that they received 2,526 hogsheads as the correct statement of the number of hogsheads shipped and received by them.

Now, gentlemen, in reference to the relations of these parties as consignor and consignee, shipper and factor, principal and agent, and the rights, duties, and obligations arising out of those relations, court will give you some general instructions; but in all that the court will say you will have to look closely to the evidence to apply these general principles. When a consignment is made to an agent or factor for sale simply, there is a duty upon the part of the agent or factor to exercise diligence in the discharge of the duty that he undertakes to perform. The general principle is that, whenever any man undertakes to perform a work or render a service, he must be considered as bound to bring to the discharge of that work or the performance of the service the skill and diligence that is necessary to its proper performance. That is the general principle. So, when goods are shipped to an agent to sell, the agent is under obligations, upon receiving the goods, to exercise due diligence in the effort to discharge that duty. He of course must exercise or perform his functions faithfully and honestly, but, outside of that, over and above faithfulness and honesty on his part, he is required by the law to exercise due diligence to protect and to advance the interests of his principal. He must not be guilty of negligence in the discharge and performance of his duty in the making of sales. Now these terms "diligence" and "negligence" need some little explanation. "Diligence" is a relative term, to be judged of according to the nature of the subject to which it is to be directed. "Negligence" is a relative term, more or less. It may consist of omission, or it may consist of commission. "Negligence" is the failure to do what a reasonable and prudent man would have done under the circumstances of the situation, or the doing of something that a prudent and reasonable man would not have done under the circumstances. So you see it has the two aspects of omission or commission. Now, as I said, "diligence" is a relative term. Whether a man has exercised the diligence required of him by the law in discharging an agency or not must be determined by all the considerations surrounding the agency. We must look at the circumstances, and, as laid down by Story in the section cited a while ago, we must, in order to determine whether proper diligence has been exercised or not, look to the general customs of the trade. We must look to the course of business as to that particular line or character of trade, and

the common habits of business in the particular matter or article. We must look to the situation of the parties, and the way that the principal and agent deal with each other. Now those are the general duties, and every case must be determined upon its special circumstances,—its special surroundings. You would not expect a commission merchant to whom perishable articles, such as fruits and vegetables, were consigned, to exercise or require the same amount of indulgence and delay in making sales as you would in respect to lumber, or some other article that was not perishable. You can see that, from the nature of the article itself, from the nature of the business, from the course of trade, from the customs of trade at the point to which the shipper has consigned his goods for sale, that which might meet the requirements of the law as to diligence under one state of facts and circumstances would not be sufficient under different conditions. All that must be looked to. You can see that diligence in respect to one article might require that an expeditious sale should be made, that the agent should hurry the article on the market, while in respect to another article he might delay, or might exercise more discretion, and take more time. So I say you cannot, by one universal standard or measure, determine what time is reasonable and what is not for the performance of an agency, without considering the market, the course of business at that market, and the course of dealing between parties.

The court has been requested to instruct you that the mere fact that the defendants went into the pool of the 3d of December, 1885, and that they put 930 hogsheads of the plaintiffs' tobacco into that pool, was, in and of itself, under the evidence in this case, a conversion of the plaintiffs' property by defendants. That is not the law as applied to the facts in this case. In reference to that pool, the court wishes to call your attention to a few things. It is distinctly stated by every witness introduced on the part of the plaintiffs who had any knowledge of the subject, and by Mayo, Seibert, and Pollard, that all or any of the customers of the syndicate whose tobacco was incorporated or included in that pool had a right to withdraw it. It is further stated by these witnesses that they reserved to themselves the right to sell that pooled tobacco to any one else except Reynes Bros. & Co., the agent of the Spanish contractor, De Campo. Mr. Pollard further states that 3,200 hogsheads which were purchased by the pool in the west were not incorporated in the pool, and were not included in the subsequent sale of 10,000 hogsheads to De Campo, conducted through the agent, Bock. Now in that connection, inasmuch as it was the distinct understanding of all these parties that formed the pool that the customers had a right to withdraw their tobacco from the pool when they desired to do so, the question is not material in this case whether defendants notified the plaintiffs that 930 hogsheads of their tobacco had been put into that arrangement, provided the knowledge came to plaintiffs in any other way, and they got all the information about it that they needed and wanted. What is the evidence on that point? The court feels at liberty to comment upon this evidence, but in doing so you must understand that the

court does not mean to usurp your province, and does not mean in thus referring to the evidence that you should conclude that the court is correct. But the court has to watch the evidence closely, in order to apply the law of every case. Col. Martin, the last witness for the plaintiffs, stated in your presence this morning that he knew when the pool was formed, and that within a day or two thereafter he notified the plaintiffs of its formation, early in December, 1885. Mr. Bretano, another witness for the plaintiffs, tells the court and jury that he knew that plaintiffs heard of it early in December,—by the middle, at least,—at Paducah. One of the plaintiffs tells you that he did hear of it at Paducah. This plaintiff tells you, furthermore, that he heard of it through a Mr. Simmons at Evansville, and the letters of plaintiffs, produced by the defendants, and introduced in evidence, disclose a state of facts that put it beyond question that they did ascertain the existence of that pool, and wrote the defendants on the subject on the 24th of December, 1885. The letter is in evidence, and, if the court in giving its substance should fail to give it correctly, counsel on either side will call the attention of the court to the letter itself, and it will be read. Whatever Bretano and whatever the plaintiff Eichel stated on the stand as to the time he had information on the subject, he writes to the defendants under date of December 24, 1885, approving of the pool combination, and expressing the hope, or the doubt, rather, whether they will be able to maintain it, and encourages them to proceed in the effort to maintain it. He fears that they will not be able to hold out. Eichel learns about that time that defendants or the pool have an agent in the west buying tobacco. He further writes under date of December 26, 1885, asking for particulars. To that letter Newman responds under date of December 29, 1885, giving him the outline of the pool, and, under date of January 9, 1886, he says to these defendants that he had all the information he desired. Now, gentlemen, with the right to withdraw this tobacco at any time from the pool by the mere statement to these agents of their wish to withdraw it, if you find from the evidence that plaintiffs, with the knowledge of the pool, approved of the combination, and acquiesced in their property remaining in that situation, and made no demand upon these defendants to withdraw it, they cannot claim that it was converted by the act of putting it into the pool. The court instructs you that it was not converted by the defendants under such circumstances so as to give these plaintiffs the right to call upon defendants for the value of the tobacco at that time.

When an agent transcends his authority, or deals with the subject-matter of his agency out of the usual course of business, it is the duty of the principal, when it is brought to his attention, to ratify or disaffirm the agent's action, and, if he does not disaffirm promptly, or within a reasonable time, he must be treated as acquiescing in what is being done, especially when it is being done in good faith, and for the promotion of the principal's interest. So, if you find these letters as written and as stated by the court, you will find that plaintiffs acquiesced in that pool arrangement, and therefore cannot claim a conversion or a misap-

appropriation of this property by defendants for the act of putting 930 hogsheads of tobacco into that pool. Other letters of plaintiffs and their subsequent dealing with the tobacco are put in evidence as corroborative of such acquiescence; that on October 14, 1887, in Eichel's letter from Paris, he says, in substance, that he did not look for any sales until the next year. In his next letter, of the 7th of January, 1888, he says he does not favor the policy of pressing his lugs on the market. In the subsequent letter of the 14th of January he fixes or designates the price that will bring him out at seven cents per pound, to which the defendants replied, under date of the 18th of January, 1888, that, while they note his views, and concur in his hopes and expectations that the market will advance, they want him to understand that they are not to be controlled by his fixing that price, unless he will make further advances or margins that will be necessary for their protection. Counsel for plaintiffs have commented upon that letter, and deny the right of the defendants to make such a reply, or assert such control over the tobacco. That brings the court up to another question, as to the relations, rights, duties, and obligations of these parties to each other under the facts of this case.

The mere consignment to an agent to sell imposes upon that agent the duty of looking exclusively to the interest of his consignor, and of performing his services and discharging his duties within a reasonable time. He is bound, as a general rule, to obey the instructions of his principal. That is the general rule. But that rule is changed, or very materially modified, when the factor has made advances upon a consignment. When a factor makes advances upon a consignment, unless at the time of accepting the consignment and making the advances there is some stated agreement between the consignor and consignee that the consignee shall hold for a fixed period, or for a fixed price, the control as to the time and mode of sale passes out of the hands of the consignor to those of the factor. It is true that the factor must act in good faith. It is true that he must exercise the right that is then given him to control, to a large extent, the sale of the property, and its management and its price, in good faith, so as not to abuse the trust, nor to sacrifice the consignor; but, after he has made advances upon the property consigned to him without any agreement as to the time of sale, or price at which sale should be made, the factor cannot be controlled by subsequent orders from the principal. He has the right to look to his own protection, looking honestly and looking reasonably to his own protection. He has a special property in the thing or article that is consigned to him, and on which he makes advances. You may call it a "lien," or a "special property," or a "special interest,"—no matter what. He has the right to possession, and he has the right to control the property for his interest and for his indemnity. Fairly, I say; honestly and reasonably. The factor has the right to do that, and especially has he the right to deal with the consignment with a view to his protection and indemnity when the consignor is insolvent, or is unable pecuniarily to meet the demands of the agent or factor for advances made to him.

Now, I say to the jury on the evidence in this case that there is no

actual conversion or appropriation of this property by the defendants. Have the defendants exercised diligence to make sales, or have they been guilty of negligence, such as would impose upon them a liability for this tobacco at any given period? In passing upon this point you must look carefully to the course of trade and course of business in regard to this particular article in the city of New York. The plaintiffs produced a letter written to them by defendants under date of December 1, 1885, in which they were informed distinctly that there was only a "one-man market." In Newman's reply to Eichel's letter of the 26th of December, 1885, it is again stated that the market for lugs and for tobaccos suitable to the Spanish market was a "one-man market;" that there was no buyer but Reynes Bros. & Co. Now Mayo, Seibert, Pollard, and every witness who has been introduced before you testifies to that fact, that while they made quotations as to the prices, they could not obtain those prices on the market. They had to wait the movements of the one-man buyer on the one-man market. Mayo's statement in his deposition, which is here at hand, is that "those were the quotations, but they could not get the prices quoted for a lot of tobacco at any time." They put their samples out, and waited the movements of this one Spanish buyer. He bought lots here and there, as he thought proper, and depressed the market as far as he could do so, and that led to the formation of the pool. It is not material for the court to say whether that pool was contrary to the law of New York or not, and the court does not think proper to go into that. If the plaintiffs acquiesced in it, they cannot claim any benefits arising out of its illegality. Now I say you must look to the nature of the market. What would be negligence in an agent in selling a bale of cotton, for which there is a constant demand all over the world, or from numerous sources, would not perhaps be negligence in a factor undertaking to sell a hogshead of tobacco which had but one market, and one man in the market doing all the buying. I say that is what you have to look to in order to pass upon this question, as to whether there was negligence or whether there was diligence on the defendants' part. It was not to be expected or required of these defendants that, having made these large advances upon this tobacco, they could recklessly force it on the market, and sacrifice their advances. The plaintiffs had rights which they could have exercised, if they had thought proper, whenever they were dissatisfied with the holding of the tobacco, or the delay in selling. They could have repaid to these agents the money that they had advanced to them, with the proper charges, interest, insurance, storage, etc., and reclaimed control and possession of their tobacco, and disposed of it as they pleased. But the defendants were under no obligations to sacrifice it, or injure their security, by a forced sale, especially when the plaintiffs were from time to time advising against pushing the lugs on the market. You must, therefore, in passing upon this question which the court does refer to you, as to whether defendants have been negligent in this transaction, you must look to the state of the market, and the course of dealing with respect to this particular kind of tobacco. Could the defendants in this case have made a sale which would have protected themselves, as well as protected the interests of the plaintiffs? Where is the evidence.

of that? Is there any evidence of it? Is there any evidence—and, if there is, the court has not seen it—that they neglected to sell when they had an offer for this tobacco? Is there any evidence that they pushed their own tobacco, or other people's tobacco, on the market in preference to the plaintiffs'? The court has not heard it. The court has heard no evidence in this case to show that they either waived the exercise of the rights they had, or that they neglected to sell when an opportunity was offered. In that connection it is proper to refer to the evidence given in by the plaintiff Eichel as to what occurred on his first visit to New York after he had been notified about the pool. He had an interview with Newman in the defendants' office. He had, he says, at that time an offer for the tobacco at $6\frac{1}{2}$ cents or $6\frac{3}{4}$ cents, but that he did not tell Newman the price that had been offered. In his second interview, some weeks afterwards, on his second trip to New York, he says he did tell Newman who the proposed purchaser was, and on that second trip he states that he said to Mr. Wallace, of the defendant firm, that "the course you are pursuing will prove ruinous, if continued, to the owners of tobacco." There was no demand to take the tobacco out of the pool. That did not constitute a demand to take it out of the pool. So, too, in reference to all the attempts or negotiations about money arrangements through Col. Martin and the house of David Dows & Co., Lowenthal & Co., and Rice and others, to enable plaintiffs to release the tobacco, not from the pool, but from the possession and control of defendants. That does not amount to anything. If they wanted to take the property out of the hands of the defendants, as the court has already intimated, nothing short of tendering defendants the money due them would have put upon them the duty and obligation of turning the tobacco over to plaintiffs. It is not pretended that that was done.

Now, gentlemen, the court has gone far enough into all this evidence. The court instructs you that the burden of proof lies upon the plaintiffs to establish their allegations of conversion and negligence. They have not, in the judgment of the court, shown any conversion or appropriation of this property by the defendants so as to make them liable for its value. Whether defendants have exercised reasonable care and diligence, such as prudent and reasonable men ought to have exercised in affecting a sale, or whether they have done in the matter what a reasonable and prudent man ought not to have done in making sales, is for you to determine as a matter of fact. In determining it, you must bear in mind, as the court wishes to impress upon you, the course of business, the habit of that particular market, the dealers in the market, the opportunities for selling, and whether they neglected to avail themselves of an opportunity to sell at a price that would save themselves, as well as advance the interests of the plaintiffs.

The court is asked by counsel for plaintiffs to give this instruction, which the court gives:

"If the jury believe from the evidence that the defendants received plaintiffs' tobacco with the discretion on the part of defendants to sell same, then it was their duty to exercise reasonable care and prudence in selling, and making efforts to sell, said tobacco within a reasonable time from its delivery;

and, if defendants failed to exercise such care and discretion, the law is for the plaintiffs, and the jury should find for them the highest reasonable value of said tobacco prevailing at any time during such failure."

The court has given you that already in substance with the qualification, and with this proper restriction, that you must regard the situation of the parties, you must regard the nature of the article, you must regard the character of the market, you must regard the course of dealing in that market with this particular article. Were there buyers to whom the defendants could go and say, "Take this property," at this price or that price? Were there? If there were, it was their duty to make the effort to sell to them; but if there was a one-man market, as the proof introduced shows, and you believe that proof, and that they had to wait, as these witnesses state, for the approach of that buyer, then to make the defendants guilty of negligence it would have to be shown that the buyer did approach them, and offered to buy this particular tobacco at a reasonable price, and that they did not sell.

The defendants have put in a counter-claim, and it is admitted in the answer, that the defendants advanced one hundred and ninety-five thousand and odd dollars to the plaintiff. They now claim that, after proper credits, and transferring from the old account of 1884 a balance of \$8,888.98, that stood to the credit of these plaintiffs on the 1884 account, there is a balance due them of \$186,541 up to the 15th of January, 1890. Now, gentlemen, in reference to that counter-claim. In 1885, 1886, in May, 1887, May, 1888, and on the 13th of May, 1889, the defendants rendered plaintiffs' accounts current showing the amount the plaintiffs owed them for advances, interest, insurance, commission, and storage, etc. One of these accounts, perhaps the account of 1886, the plaintiffs acknowledged the correctness of; but, whether they acknowledged the correctness of these accounts or not, when they received those accounts, and did not, in a reasonable time thereafter, point out errors, or deny their correctness, the law treats their silence as an admission of their correctness. Accepting accounts current without complaining, without a statement of errors, is an acknowledgment by the debtor of their correctness. In addition to the amount stated in these accounts current, defendants state from time to time, running through the years of 1885, 1886, 1887, 1888, and 1889, the number of hogsheads of plaintiffs that were still on hand. The court instructs you, as asked for by counsel for defendants on that point, that plaintiffs have acknowledged thereby their indebtedness to defendants for the amount stated in these accounts current, which, with interest up to 15th of January, 1890, amounts to the sum of \$186,541, which should be your verdict for defendants on their counter-claim.

One other point which the court thinks proper to call your attention to. If there had been a conversion, it would have been, at the most, a constructive conversion, which the plaintiffs could waive or not. But when the plaintiffs get statements from time to time for 1886 and subsequently, and when they express their gratification at the De Campo sale, as in their letter of April 30, 1886, they must be treated and considered as dealing with the tobacco as their own, and so on through

subsequent periods, and in subsequent letters, they treat the tobacco as their own, and they cannot go back behind that. Such conduct on their part is a waiver of any right they had to claim as for a constructive conversion of the property antecedent to the dates of those letters.

You must deal with these transactions, gentlemen, as the parties dealt with them themselves. Men's after-sights are better than their fore-sights, always. We cannot judge of them by what they may say now so well as we can judge of them by contemporaneous current transactions and statements of the parties while the business was going on. Looking to those, we cannot find an actual or constructive conversion of this property that the plaintiffs have not waived under their own letters and course of dealing between them and their agents. You will return your verdict, if you find for the plaintiffs, as the court has indicated as to the amount of damage they have sustained because of negligence upon the part of the defendants in not selling their tobacco. You will return, as a matter of course, a verdict for the defendants for the full amount of their claim, with interest or not, at your discretion, after the 15th of January, 1890. You will also make a return as to whether Newman was a partner. Make a separate return as to that.

Mr. Hargis. Though they may have waived the constructive conversion, that does not relieve the defendants from the performance of duty in regard to this tobacco.

The Court. Not at all. Plaintiffs may waive a constructive conversion. As the court considers, from these letters they have waived any constructive conversion, if any such was committed. There was no actual appropriation of this property by the defendants to their own use. If there was any constructive conversion, plaintiffs have waived it by these letters and subsequent dealing with the property. If, however, you find the defendants guilty of negligence in not effecting a sale that they ought to have effected, looking to their own interest and their own protection, as well as the right of the plaintiffs,—their own protection first, their own indemnity first, and the reasonable rights of the plaintiffs afterwards,—if they have negligently failed to discharge their duty in making a sale, that is a different question; and if you find them guilty of such neglect, if you believe from the evidence, under the character of market and the circumstances of the case, that they could have made a sale, and negligently declined or refused to do so,—then you charge them with the value of the tobacco at such time.

Mr. Humphrey. I would like for your honor to call the attention of the jury to the fact that the defendants will hereafter have to account to the plaintiffs for these hogsheds of tobacco.

The Court. The court instructs the jury that the tobacco on hand is the property of plaintiffs, and will have to be accounted for by defendants to plaintiffs in the event the jury think and find that defendants are not chargeable with its value because of neglect in failing to sell.

The jury found a verdict against the plaintiffs, and in favor of the defendants, in the sum of \$186,541, but without interest.

LINDVALL v. WOODS *et al.*

(Circuit Court, D. Minnesota. February 12, 1891.)

1. MASTER AND SERVANT—DUTIES OF THE MASTER.

The employer owes to the employe to use ordinary care to select and retain competent co-employes, and not to subject the employe to the negligence of incompetent fellow-workmen; also, to exercise ordinary care to furnish a reasonably safe place for the employe to do his work in; also, to use ordinary care to discover any defect in the structure upon which the employe was required to go in performing his work.

2. SAME—ORDINARY CARE.

Ordinary care is that amount of care which an ordinarily prudent person would exercise under the same circumstances, and which ought reasonably to be observed, taking into consideration all the exigencies of the particular service.

3. SAME—WHO ARE FELLOW-SERVANTS.

Fellow-workmen are in a common employment when each of them is employed in a service or work of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting employment, that it may probably expose them to the risk of injury in case he is negligent.

4. SAME—WHO IS VICE-PRINCIPAL.

A foreman of a gang, vested with the control and supervision of a particular work to be done, and with powers to say not only what shall be done, but how it shall be done, and who has full power and authority to command the men under him in their work, and when the work is under his practical direction and control, save and except as he may receive directions from time to time from his employer, and ordinarily there is no one else present authorized to superintend and direct the work of the men, represents the employer, and is his vice-principal, and for his negligence the employer is responsible.

At Law.

Arctander & Arctander, for plaintiff.

Shaw & Cray, for defendant.

NELSON, J., (*charging jury.*) This has been a very long and tedious case, but it is interesting from the fact that many important legal questions have arisen, aside from the general interest taken in the testimony with reference to the facts. You have given it such patient attention that it does not seem to me necessary to go very far into the details of the testimony. The counsel have very thoroughly and exhaustively presented the several theories upon which a verdict is asked at your hands. Now, what is the case, gentlemen? The plaintiff, a laborer, brings this action to recover damages against the defendants for injuries which it is alleged he sustained by reason of the negligence of the defendants in the course of his employment; that is to say, he claims that the injuries he sustained were the natural consequence of the negligence of the defendants; that their negligence was the proximate cause of his injury. It appears that the defendants were contractors,—railroad contractors, principally,—and in the spring of 1888 they had a contract to grade somewhere about 10 or 12 miles of the St. Paul & Duluth Railroad, straightening the track; and in doing this it was necessary to do considerable grading outside of the old track. Upon this work were several gangs of men under foremen,—at least two; one under the charge of Mahoney, (not a very large gang,) the other, near Gladstone, under the charge of Murdock, in which gang the plaintiff worked. The work to be

performed by Murdock's gang near Gladstone was to make a cut through a hill, and fill up several hundred feet of low ground, partially marshy; and the manner of doing this work was by extending, as fast as the excavation was made, trestles, and filling in these trestles according to their height, and thus making the grade continuous. The plaintiff was employed on the work about the 2d of April, 1888. I might say that in doing this work the defendants under Murdock had men who worked in the pit, men who worked on the dump, and a man by the name of Johnson who was assigned to frame the bents of the trestle-work which was to be put up, and erect it, and who, with the aid of other laborers, was to place stringers of different length upon these bents; that upon this temporary trestle-work, what is called a "Petler" car railroad track was to be constructed, in order to bring out on it the cars, each of which contained about a cubic yard of dirt, excavated from the cut. The plaintiff claims that he was injured by the negligence of Murdock, who represented the company, in setting him to work upon an insecure and unsafe structure, (this trestle,) the erection of which Murdock had intrusted to Johnson, an employee; that Johnson was an incompetent person for the work; and that he is entitled to recover for the injuries sustained by reason of that negligence. The defendants deny that there was any negligence on their part; deny that Mr. Murdock, if the injuries resulted from his negligence, was a representative,—a vice-principal; also deny that Johnson was an incompetent person within their knowledge; and the defense urged is that, if there was any negligence, and the plaintiff was injured, it was either the negligence of himself or of his co-employees working with him.

The issues as presented by the pleadings, affirming and denying the facts, as I have stated to you, are to be determined upon the evidence which has been introduced tending to support the several claims, and the law as I deem it proper to give you. You will thus see, gentlemen, that negligence is the gist of this action, and it may not be improper for me at this time to indicate to you what is negligence,—what is legal negligence. Negligence is defined to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the particular situation, or doing what such a person, under the existing circumstances, would not have done. That is the definition which commends itself to most courts as being concise and satisfactory. Now, this negligence being alleged, the burden of proof is upon the plaintiff, by the preponderance of the evidence, to satisfy you that there was negligence on the part of the defendants, or any one who represented them. This negligence cannot be presumed; it must be affirmatively proven, and it is to be determined by you upon the preponderance of all the evidence. It is not sufficient that the plaintiff proves that he has sustained damage by reason of some omission of the defendants; he must also prove that the defendants in such omission violated a legal duty or obligation which they owed the plaintiff by reason of the relation established between them of employer and employee. The defendants are not the insurers of the safety of the plaintiff. They do not guaranty abso-

lutely his safety, and it is necessary for the plaintiff to establish by evidence facts and circumstances from which it may fairly be inferred that his injury resulted from the want of some precaution which the defendants might and ought to have resorted to; and, in addition, the plaintiff should also show with reasonable certainty what particular precaution should have been taken by the defendants. To prove his case, so as to entitle the plaintiff to recover, he must satisfy you by the preponderance of evidence—*First*, of defendants' negligence in failing to perform some duty which they owed him; *second*, that the defendants' negligence was the proximate cause of the injury which he sustained; and you have then what may be called, *third*, the question of the incompetency of Johnson, who, it is claimed, was a fellow-servant, and was, to defendants' knowledge, incompetent for the discharge of the work which he was set to in connection with the plaintiff; and, if those points are resolved in favor of the plaintiff, then another question will arise, to which I will call your attention hereafter. Now, what is the proximate cause? For the plaintiff must prove that if he was injured, as claimed, the negligence of the defendants was the proximate cause of the injury. The proximate cause of an injury is that cause which immediately precedes and directly produces the injury, without which the injury would not have occurred; and it is claimed here that this injury was the natural sequence of the negligence of the defendants, without which it would not have occurred.

This raises a question which it is necessary for me to instruct you upon, and that is, the duties of the employer (in this case the employers) and the duties of the plaintiff. The law imposes upon the defendants the duty to use ordinary care to select and retain competent servants or co-employees with the plaintiff, and not to subject him to the negligence of incompetent fellow-workmen; and also to exercise ordinary care to furnish a reasonably safe place for plaintiff to do his work, and a reasonably safe structure upon which plaintiff was required to go to do his work, such as is reasonably calculated to insure safety when doing his work; also to use ordinary care to discover any defect, if such exist, in the structure upon which the plaintiff was required to go in performing his work; to use ordinary diligence to see that the place where the plaintiff's work called him was in such condition as, from the nature of the work and of plaintiff's employment, he had a right to expect it would be kept; for the plaintiff had a right to assume that all reasonable attention would be given by the defendants to his safety, so that he would not be carelessly and needlessly exposed to risks which might be avoided by the exercise of ordinary care and caution. I say "ordinary care," and it is necessary for me to define what is meant by ordinary care. Ordinary care is defined to be that amount of care which an ordinarily prudent person would exercise under the same circumstances; that is, such care as, taking into consideration all the exigencies of the particular service, ought reasonably to be observed; and the claim here, you will recollect, gentlemen, is that this structure which has been exhibited to you in the models was insecure and unsafe, the bents and stringers

not properly tied, braced, and bolted, so as to render it reasonably safe, and that the defendants, through Murdock, their representative, as the plaintiff claims, failed to exercise ordinary care and caution in making that trestle-work safe. If the defendants have exercised, or if the evidence shows to your satisfaction that the defendants exercised, all the care and caution which is imposed upon them for the safety of the plaintiff in doing his work, the law does not hold them liable for a defect in this trestle or structure which could not be discovered by the exercise of reasonable care; that is, even if this structure was insecure, unsafe, and defective, the law does not hold the defendants liable for any such defect which was unknown to them, and which could not be discovered by them in the exercise of reasonable care. Now, on the other hand, the plaintiff assumed certain risks by virtue of his contract of service, and the relation established between the defendants and himself. The plaintiff assumed all the risks incident to the character of the work which he was employed to do, and, in the absence of any statute, (and we have none in our state relative to individuals or corporations, outside of railroads,) there is included the risk of injury by the negligence of his fellow-workmen in the same common employment. The general doctrine is well settled that an employer is not liable for any injury to an employe caused by the negligence of a co-employe in the same common employment. So it is necessary for me to instruct you, who are fellow-workmen in the same common employment. Fellow-workmen are in a common employment when each of them is employed in a service or work of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting employment, that it may probably expose them to the risk in case he is negligent. I might say here that the theory of plaintiff is that Murdock was a vice-principal, as it is called,—a substitute of the defendants in charge of that work,—and that he was not a co-employe; and that the rule which I have laid down to you with reference to the assumption of risk on the part of the plaintiff does not apply to him, for he was not a co-employe of plaintiff. The duties imposed by law upon the defendants, which I have stated to you with regard to selection of workmen and a safe structure, cannot be delegated by the employer to any one, whether a fellow-employe of the injured party or not, so as to exempt the defendants from all liability for injury sustained by the negligent exercise of these duties. The duties may be delegated, but, if this is done, the person to whom they are delegated, and to whom the execution of them are intrusted, becomes the vice-principal or substitute of the employer, and, if he negligently performs them, and a workman of the common employment to whom the master owes these duties is injured, he has a right of action for damages on that account from the common employer; in other words, the employer is responsible for the negligence of an employe who stands as his direct representative, invested with his own authority over a particular business and over inferior employes, and the latter, when injured by such negligence, are not barred by the doctrine of fellow-employe, as I have stated it to you.

It is claimed, I say, on the part of the plaintiff, first, that Mr. Murdock was a vice-principal. Now when can a person be said or be called legally the vice-principal of another, so as to make the employer responsible for his acts,—his negligent acts? In this case it is for you to determine whether, as is claimed on the part of the plaintiff, Mr. Murdock was the representative of the defendants, and, if he was, whether the plaintiff has satisfied you, by the preponderance of evidence, that the injury occurred on account of his negligence. When a foreman of a gang is vested with the entire management, control, and supervision of a particular work to be done, so as to say not only what shall be done, but how it shall be done, and he has full power and authority to command the men under him in the work, and the work is under his practical direction and control, save and except as he may receive directions from time to time from his employer, and ordinarily there is no one else present and authorized to superintend and direct the work of the men, then he represents the employer,—he stands for the employer. It is claimed that, within that principle, the foreman, Murdock, was the representative of the defendants. And you will recollect, gentlemen, that testimony has been offered tending to show that Mr. Woods, of the firm of Woods & Lovejoy, one of the defendants here, had the superintendency of this 12 miles—10 or 12 miles—of road which was to be graded and built, and that occasionally, from time to time,—according to his own testimony, nearly every day, according to the testimony of others, twice or three times a week,—he visited these different gangs of men, at least this gang under the charge of Murdock. Now, in regard to the claim made by plaintiff that Murdock was a vice-principal, if the preponderance of all the evidence satisfies you that the defendants delegated to Murdock, although he is called “foreman,” the care and management of the work to be performed at this cut, and the work to be performed by this gang was under the practical direction and control of Murdock, subject only to the directions given by him personally, as the local foreman, from time to time by the defendant Woods, and to the latter’s oversight and examination, when he occasionally, so two or three times a week, came to the work, and if Murdock had the authority to employ and discharge the men working there in his gang, and had direct control of their movements so far as concerned the work in his charge, and that ordinarily there was no one else present and authorized to superintend and direct the work or the laborers, then he represented the defendants. “He stood,” as was expressed by a distinguished judge, “in their shoes, whether they fit him or not,” and his negligence is so far the defendants’ negligence that they are responsible to the plaintiff on account of it to the extent he was injured in consequence thereof; in other words, if this work required care and oversight for the proper performance thereof, and the evidence satisfies you that Murdock for that purpose was placed in charge of it, and he was clothed with the duty of supervising and managing the work, and had the power of control and direction over the gang of men under him, including the plaintiff, in the details of the work, and the plaintiff and others were required to obey his commands,

orders, and instructions, then, in executing that duty of control, direction, supervision, and management, Murdock represents the defendants, and for his negligence in performance thereof the defendants are liable, if his negligence was the proximate cause of the plaintiff's injury, whether he is designated as a foreman, construction boss, or by any other name.

On the other hand, if you should believe from the evidence that Murdock was simply a foreman of a gang in which the plaintiff was employed, both he and plaintiff, as occasion required, working side by side, the former merely leading the work, and giving immediate direction to it and to the men, sometimes in the presence of Mr. Woods, as superintendent, then Murdock and plaintiff were fellow-employees in a common employment, and defendants are not liable or responsible for Murdock's negligence. And if you believe that he was simply a foreman, as I have described to you, then the defendants would be entitled to a verdict in this case, unless the plaintiff has proved that the defendants were negligent in the employment of an incompetent servant, who built the structure which it is claimed was unsafe, and that his negligence was the proximate cause of the injury, and unless there was contributory negligence on the part of the plaintiff himself, to which I shall briefly call your attention hereafter. You will recollect that one claim here is that the defendants failed in their duty to employ a competent person; that is, that Johnson was an incompetent employe for the work to which he was assigned. It was the duty of the defendants, as I briefly stated to you, which they personally owed to the plaintiff, to use ordinary care to select fellow-employees of sufficient care and skill to make it probable that he would not be subjected to injury from their failure to possess these qualities; and, if the defendants themselves, or any representative who was authorized to employ the men, failed to perform this duty, they would be liable to the plaintiff for any injuries sustained in consequence of such negligence or incompetency on the part of fellow-workmen thus negligently employed as might be reasonably anticipated as not unlikely to happen from such incompetency, provided they knew of it, or could, by the exercise of ordinary care and caution on their part, have ascertained it. You have heard the testimony, and I shall not repeat it, in regard to the competency and skill of the workman Johnson, who, all the testimony tends to show, was designated to frame the bents, and who, it is claimed on the part of plaintiff, the testimony further tends to show was designated as the person to erect them, with the assistance of other employes that he could call upon, and to place the stringers in position upon them, so that these Petler railroad tracks could be laid out for the purpose of the work. Now it is for you to determine from all the evidence, the burden of proof being upon the plaintiff, the alleged incompetency of Johnson, by the preponderance of evidence, and also whether he was the person designated for that particular work of putting that structure in condition, so that it could be operated as a temporary trestle, upon which the dirt as excavated could be hauled out and filled in. Of course, if he was an incompetent per-

son, and his incompetency was known to the defendants, and if the injury to the plaintiff was occasioned by the negligence of the workman Johnson in that behalf, then the defendants would be responsible, and the plaintiff would be entitled to recover for such damages as you think he is justly entitled to under the circumstances of the case. But the mere fact that this thing fell down, even if you should believe that it was defective and unsafe, is not sufficient evidence to warrant you in finding that the defendants had knowledge that Johnson was an incompetent person for this service; that is, the mere fact that in this particular instance the defect, if there was any defect or insecurity of the structure, was due to a failure of skill on the part of Johnson, that alone is not sufficient to warrant you in finding that the defendants knew that Johnson was an incompetent person. You must take all the evidence in the case, and determine what knowledge the defendants had preceding this work here, before Johnson was employed by them, and from all the evidence—all the attending circumstances—decide and settle the issue as to whether he was incompetent for the work intrusted to him, and, if so, if defendants had knowledge of such incompetency.

Now if you should find all these issues in favor of plaintiff, or if you should find that Murdock was the vice-principal of the defendants, and that his negligence was the proximate cause of this injury, then the plaintiff would be entitled to a verdict; or if you should find that, on the other hand, Murdock was a mere foreman, and not a vice-principal, but that the defendants were negligent in employing Johnson, an incompetent person, and that his injuries were caused by such negligence, then the plaintiff would also be entitled to a verdict, unless he himself was guilty of negligence which contributed to cause his injury. If Lindvall went out upon that structure before the time of this accident, as it is claimed, several times, and if he worked upon the dump in view of it, and knew what was going on there, it was his duty to exercise care and caution on his part to avoid any danger, and it was his duty to see that he was not exposing himself unnecessarily to danger in doing this work. It is true that he had a right to rely upon the superior information of the defendants, or the person who represented them, or Johnson, if you believe that he was designated to put up this structure; but if you believe that, by the exercise of reasonable care and caution on his part, he might have discovered that this structure was unsafe, if you should believe that it was unsafe, and nevertheless went out upon the structure, then he contributed to his own injury, and he cannot recover, though you should find that the defendants themselves were negligent.

Now, gentlemen, I think I have presented this case to you pretty thoroughly, so far as the claim made and the theories advanced by the plaintiff and the defendants. If you should come to the conclusion that the evidence proves no negligence on the part of the defendants, then they are entitled to a verdict. If, on the other hand, you believe that the preponderance of evidence proves negligence on the part of the defendants, then the plaintiff would be entitled to a verdict, unless guilty of contributory negligence, and the question then

is presented; what amount should the plaintiff recover for the injuries sustained? There are certain elements which the jury are to take into consideration in determining the amount the plaintiff, injured under such circumstances, should recover, if he has satisfied the jury that his injury was sustained by the negligence of a person who owed him a legal duty, and they are all founded upon compensation. Nothing else, gentlemen, but compensation for the injuries sustained is the plaintiff entitled to recover. Of course that, to some extent, is left to the sound judgment and discretion of the jury, based upon all the evidence in the case, and the facts disclosed during the progress of the trial. Of course the plaintiff is entitled to compensation for loss of time on account of the injuries sustained. He is further entitled to compensation for pain and suffering. Now that must be left entirely to the jury. What would compensate a person for pain and suffering? You cannot measure it in dollars and cents; at least it must be left to the sound discretion of the jury, and their sound judgment, bearing in mind all the time that it is a compensation, and not what may be called "smart money," which he is entitled to receive. He is also entitled to compensation for any temporary disability, temporary injury, or permanent injury, and the testimony here tends to show that he at least never will regain his eye-sight; also, what impairment there may be to his bodily strength, for the evidence here discloses beyond any dispute that one leg is shorter than it was. He is not the same man that he was before the injury. At the same time you must graduate, or at least measure, the damages on the theory of compensation only; that being left to your sound discretion, gentlemen. It is for you to say on the whole case, if you believe the plaintiff is entitled to a verdict, what amount will compensate him for the injury, bearing in mind that you are to decide this case upon the strict legal rights of the parties and the cold facts which have been developed here in testimony, not upon sympathy for the plaintiff, who is in affliction. That is not an element to be taken into consideration by the jury, for jurors and courts would be less than human if they did not sympathize with a fellow-man in affliction. You can take the case, gentlemen.

The jury returned a verdict for plaintiff for \$3,800.

LATHAM v. DAVIS.

(Circuit Court, D. Colorado. February 2, 1891.)

1. SALE—RESCISSION.

Where a seller of personal property, by a contract which provides that the title shall remain in him until payment of the price, has received in part payment other goods, he cannot, on refusal of the purchaser to pay the balance, maintain replevin for the goods sold, without first returning the goods received in part payment.

2. SAME—REPLEVIN—PLEADING.

In such an action defendant cannot allege counter-claims for damage for plaintiff's failure to perform the contract of sale.

At Law.

R. D. Thompson, for plaintiff.

Chas. Cavender, for defendant.

HALLETT, J., (*orally*.) September 28, 1889, plaintiff sold to defendant a printing-press and other materials, to be delivered on or before October 21st in the same year. Defendant agreed to pay therefor the sum of \$2,763 in cash, and a press and other material then used by defendant at Leadville. The machinery was set up for use, and defendant delivered to plaintiff that which was to be given in exchange for the other, but refused to make the cash payment, alleging that plaintiff did not comply with his contract. Thereupon plaintiff brought this action of replevin, claiming that the sale was conditional, and that he still holds the title to the property. The contract of sale, in so far as it relates to this controversy, is as follows:

"H. H. Latham hereby agrees to sell, for the sum of \$2,763.00 cash, and second-hand machinery, as below, to C. C. Davis & Co., of Leadville, Colo., the following printing material, to be delivered f. o. b. cars at Birmingham, Conn., & Chicago, Ills., on or before the 21st of October, 1889, warranted free from defective workmanship or material: One (1) 39x52 Whitlock, 2 revolution, front delivery, No. 0; 2 roller cylinder press, with steam fixtures complete; 2 sets roller stocks; 2 roller moulds; wrenches; rubber blanket; side-gauge feeder-stands; cutting attachment for press, and counting machine; one 36-inch champion power paper cutter; one (1) Stonemetz folding machine, to attach to press, with paster and trimmer, steam and overhead fixtures, (second-hand.) H. H. Latham agrees to furnish man to superintend setting up new machinery, and to superintend taking down and shipping old machinery; C. C. Davis & Co. to pay his railroad fare to and from Denver, and board him while in Leadville, and to pay all necessary expenses outside of man's time,—the above machinery to be furnished for \$2,763.00 cash; and one (1) 33x50 Chicago Taylor drum cylinder press; one (1) 30-inch Gem lever paper cutter; and one (1) J. H. Hoole & Co. paging and numbering machine, with two (2) brass heads; and all steam and overhead fixtures belonging to second-hand machines, except one counter-shaft cone and pulley for cutting machine. Cash payment to be made as soon as machinery is up, in motion, and working satisfactory. If folding machine will not do the work on paper after a fair trial, H. H. Latham is to furnish one that will do so, free of all expense whatsoever to C. C. Davis & Co. Machines guaranteed to be first class in every respect, and to do as good work as machines of same description and size of other first-class manufacture. It is further agreed that the title to said property shall remain in the seller until the purchase price has been fully paid; and, in case of any default in any of the terms of this contract, the seller shall have the right to take immediate possession of said property. Upon the payment of the purchase price in cash, H. H. Latham agrees to execute and deliver a good and sufficient bill of sale of the above-described property."

The agreement clearly supports the plaintiff's position, but the question is whether he can reclaim the property without returning the press and other materials which he received in part payment for it. By some courts it is held that under an agreement of this kind the buyer forfeits all partial payments upon failure to complete the contract, and is bound to surrender the property on demand. *Fleck v. Warner*, 25 Kan. 492.

The better rule, however, seems to be that in reclaiming the property the seller rescinds the contract of sale in so far as it has been executed, and is thereupon bound to restore to the buyer anything that he may have received in the way of payment. *Hamilton v. Manufacturing Co.*, 54 Ill. 371; *Hine v. Roberts*, 48 Conn. 268; *Preston v. Whitney*, 23 Mich. 260. This rule seems to be especially applicable to a case of this kind, in which property is given in exchange of the same general character as that purchased. Having obtained possession of defendant's old press and material at the time the new machinery was set up, if in this action plaintiff can take the new press without returning the other, defendant will have nothing with which to print his newspaper. The rule relates only to money and property given in payment for the property purchased, as to which the seller ought to put the buyer in the position he held when the contract was made. It does not in any way relate to fulfillment of the contract, or damages for failure therein, and therefore all that is alleged by defendant in his three answers (which he calls counter-claims) as damages for breach of the contract—as that the machinery was not delivered in time; that at plaintiff's request he furnished some part of the materials used; that the machinery was not of the kind or capacity sold; and the like—are not within the rule. Such defenses are not admissible in this form of action. The question here is the right of possession, and whether it is in plaintiff or defendant. All other matters are to be settled in another form of action, which is adapted to the recovery of money. It is difficult to conceive of a counter-claim in an action of replevin; but, if such pleading may be allowed in any case, there is nothing to support it in this case. Under the contract, defendant may insist upon having his press and materials again as a condition to relinquishing that which he purchased; but this is not in the way of counter-claim, but a matter of defense simply. The demurrer will be sustained, and defendant will have leave to amend, so as to present the single matter of defense, as indicated.

UNITED STATES v. HALL.

(District Court, S. D. Georgia, W. D. November 21, 1890.)

1. PERJURY—WHAT CONSTITUTES.

Where a *subpoena duces tecum* has been issued to a witness, requiring him to produce a deed therein described, and he answers orally under oath before the court that he had no such deed, and never had it, and it further appears that the deed he was required to produce was alleged to have been furnished him by the prisoner, if, on the trial of a traverse to the answer made by the respondent to the *subpoena duces tecum*, the prisoner testified that he had furnished or delivered the respondent no such deed, his testimony would be in a matter material to the issue so formed, and, if he testified falsely, not believing his testimony to be true, he would be guilty of perjury.

2. SAME—EVIDENCE.

Before the jury are authorized to convict the defendant on a charge of perjury, they must be satisfied from the testimony of one witness, with corroborating circumstances, or from the testimony of more than one witness, that the prisoner swore and testified falsely, not believing his testimony to be true.

8. SAME.

The evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence. The oath of the accusing witness, therefore, will not avail to convict, unless it be strongly corroborated by other independent circumstances; but the jury will be justified in convicting upon the testimony of a single credible witness so corroborated.

4. SAME—CORROBORATION.

In a case of perjury, every material allegation in the indictment may be shown by a single witness except the allegation that the evidence of the prisoner in question was false, and that he did not believe it to be true. The deed in question being a forgery, it is material to show, as a circumstance of corroboration of the testimony of the accusing witness, that it was in the handwriting of the prisoner, that the latter was extensively engaged in forging, and causing to be forged, deeds to lands in that portion of the state.

5. CREDIBILITY OF WITNESS.

The question whether a witness is impeached or not is for the jury to answer, and, though he swore differently on a former trial, if this was done under duress of bodily harm, it may not affect his testimony.

6. SAME—IMPEACHMENT.

Where the law obliges a party to call a witness, the party calling him is not precluded from proving the truthfulness of any particular fact by any other competent testimony in direct contradiction to what such witness may have testified, and this is not only where it appears that the witness was intentionally mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.

7. TRIAL—INSTRUCTIONS.

Power of judges in the federal courts to sum up the evidence discussed, but declared merely advisory, and not intended to fetter the exercise of the independent judgment of the jury. It is the right and duty of the court to aid the jury "to recall the testimony to their recollection by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts, and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important rests upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their functions wisely and well without this aid. In such cases chance, mistake, or caprice may determine the result." *Nudd v. Burrows*, 91 U. S. 439.

8. SAME—ARGUMENTS OF COUNSEL.

Duty of the jury to discard improper and misleading appeals, adverted to. (*Syllabus by the Court.*)

Indictment for Perjury.

John L. Hardeman, Special Asst. U. S. Atty.

Bacon & Rutherford and *Dessau & Bartlett*, for defendant.

SPEER, J., (*charging jury.*) The laws of the United States provide that every person who, having been sworn conformably to law that he will testify truly, does, willfully, and contrary to such oath, state any material matter which he does not believe to be true, he shall be held guilty of perjury, and, on conviction, shall be punished therefor. The prisoner, Luther A. Hall, has been indicted for an alleged violation of this law. To that indictment he has pleaded not guilty, and thus the charge preferred by the grand jury, with his plea thereon, presents for your determination, under the rules of law, the issue now on trial. The crime of perjury is a crime against public justice. It is a fundamental principle in all judicial investigations—that is, in all trials before the courts—that in the ascertainment of the truth of the matter in controversy society must rely upon the respect and obligation which the

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solemn oath, administered in accordance with law, will have in the mind and conscience of the witness. This crime was not originally punishable by the courts of law. It was deemed in the ages past a sin, rather than a crime, and its punishment was supposed to reside with the offended Deity, who had been solemnly invoked, and the solemn invocation to whom had been disregarded. But for several centuries past the crime has been triable and punishable in the courts, and the statute which the prisoner at the bar is charged to have violated was enacted immediately after the organization of our government, to-wit, in the year 1790. I am sure that all the occurrences of this lengthy trial have given to you, if you did not possess it in its outset, an adequate impression of the importance and gravity of the accusation, as well to the prisoner as to the community. It was well said to the Athenians, by the orator Lycurgus that no country can subsist a twelve-month where an oath is not thought binding, for the want of it must necessarily dissolve society. I allude to the gravity of the offense with which the prisoner stands charged, not to justify or arouse any undue anxiety or excitement in your minds, but to make you, if I can, thoroughly appreciate the magnitude of the issue on trial as it may affect the prisoner, and society as well. While I invoke your anxious and impartial attention to the entire case as it has been and will be submitted, I caution you against confusing the question of guilt or innocence with the magnitude of the charge, or its consequences to any, or to all. You will be careful, gentlemen, to observe the several elements necessary to constitute the crime of perjury. First, the oath must have been taken before a tribunal competent to administer the same, and in a case in which the law of the United States authorizes an oath to be administered. The oath must be that the person taking it will testify truly. Having been so sworn, the person testifying must willfully, and contrary to his oath, state or testify to a material matter which he does not believe to be true. By the language "material matter" is meant evidence or testimony material to the issue then on trial. In such case, a person so lawfully sworn, who willfully, and contrary to his oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury. Now, let us first inquire whether, in the case before the court, the government has shown to the jury that the prisoner, Luther A. Hall, has been placed, by his conduct, in the attitude, in which we may rightfully inquire whether his testimony, about which the trial is had, was false, and not believed by him to be true. It is charged in the indictment that he was sworn as a witness on the trial of the traverse to an answer made by one Judge Goodwin to a *subpœna duces tecum*; that the trial was had upon the hearing of a rule brought by Norman W. Dodge against Luther A. Hall for an alleged violation and contempt of a decree of the circuit court of the United States for this district. It is further charged in the indictment that the oath was taken before the judge of this court, who was then presiding in said circuit court. Now, gentlemen, I charge you, as a matter of law, that the circuit court of the United States for this district and circuit is a tribunal competent to administer an oath; that the judge

of this court has lawful power and authority to preside in the said circuit court of the United States, and had such authority at the time referred to in the bill of indictment, and on the trial of the proceeding therein described, between Norman W. Dodge and Luther A. Hall. I charge you further that, in hearing the answer of a witness to a *subpœna duces tecum*, and on the trial of a traverse to such answer, there is before the court a case, in which a law of the United States authorizes an oath to be administered. I charge you further that, if you believe from the evidence that the prisoner, at the time and on the issue described in the indictment, was sworn in the usual manner, the method of administering the oath is a sufficient compliance with the law. I charge you further, if you find from the evidence that a *subpœna duces tecum* was issued to one Judge Goodwin, requiring him to produce a deed therein described before the court, on a day certain, and he answered that he had no such deed, and it further appears from the evidence that the deed he was required to produce was alleged to have been furnished him by the prisoner; and if it further appears that on the trial of the traverse to the said answer, that the party taking out the *subpœna* insisted, by evidence and otherwise, that the deed sought to be produced was furnished Goodwin by the prisoner, if then the prisoner testified that he had furnished or delivered Goodwin no such deed, his testimony on the occasion described would be in a matter material to the issue. It follows, therefore, that if, on the trial of a traverse to the answer made to a *subpœna duces tecum* issued in the proceeding and manner described in the indictment, the defendant testified, after having been sworn, it will then be the duty of the jury to ascertain whether it be true, as charged in the indictment, that the prisoner testified, and, if he testified, whether he testified falsely, not believing his testimony to be true. Did the prisoner testify? To ascertain this you will look to the testimony. A stenographer, Mr. Richter, who took the testimony in short-hand, testified as follows:

"I took the testimony of all the witnesses introduced, with the exception of the first two or three. I took the testimony of Mr. Hall. *Question.* Did you take the testimony on the hearing of the *subpœna duces tecum* against Judge Goodwin? *Answer.* Yes, sir. *Q.* Did you take the testimony of Mr. Hall on that proceeding? *A.* Yes, sir. *Q.* Just state to the court whether you recall that testimony, so as to give it, or whether you have your notes. *A.* I have my notes. *Q.* Can you read those notes? *A.* Yes, sir."

The witness reads from his notes taken on the trial of the traverse to Goodwin's answer.

"Luther A. Hall sworn. Direct examination by Mr. Erwin: Mr. Hall, state whether or not you ever furnished a deed answering to the description in this *subpœna* issued to Judge Goodwin. *Answer.* I never did. *Question.* State whether or not you ever witnessed a deed as notary public from any one to Judge Goodwin. *A.* No, sir. *Q.* To the two lots 286 & 315? *A.* No, sir; and no man has ever seen any such deed in his possession. I know that I never delivered him any, never witnessed any, and never had any land transactions with him whatever, and any statement to the contrary is false."

The witness L. M. Erwin in substance testified as did the witness Richter; and in fact it is agreed by counsel for the prosecution and for the defense that the transcript from the notes of the witness Richter, taken on the hearing before the circuit court, is substantially a correct recital of the testimony then given. You may therefore conclude that the prisoner, after being duly sworn before a competent tribunal to testify truly, did, in a case where, by a law of the United States, it was authorized to administer the oath, testify to a matter material to the issue, and the question remains for your decision, did he, as the indictment charges, testify willfully and falsely to what he did not believe to be true? If he did, he is guilty of perjury. If he did not, or if you have a reasonable doubt, which I shall presently define to you, whether he did or not, he should be acquitted.

In all trials for perjury it is a rule of evidence, founded upon obvious reasons, that the testimony of a single witness is not sufficient to convict. There must be corroboration of his evidence in some material particular, either by the testimony of another witness, or other witnesses, or by other evidence of a documentary or circumstantial character, which possesses a sufficient corroborative effect. This rule is founded on substantial justice, because, if the testimony of the prisoner upon which perjury is assigned were opposed by the testimony of a single witness, it would be merely oath against oath. It is not true, however, that two witnesses are essentially requisite to disprove the particular fact sworn to; for, if any material circumstance, such as the defendant's own letters and declarations, be proved most clearly by other witnesses in confirmation of the witness who gives the direct testimony to show the perjury, such material circumstance may turn the scale and warrant a conviction. It is not necessary, moreover, that every fact which goes to make up the assignment of perjury should be disproved by two witnesses, for the testimony of a single witness is sufficient to prove that the defendant swore as is alleged in the indictment; and there have been cases where living witnesses were dispensed with altogether, in a prosecution for perjury, as in a case where the false swearing is directly disproved by documentary or written testimony, springing directly from the defendant, with circumstances showing his corrupt intent. In the case at bar, however, before you can convict the defendant, you must be satisfied, from the testimony of one witness, with corroborating circumstances, or from the testimony of more than one witness, that the prisoner swore and testified falsely, not believing his testimony to be true, and in the manner as charged in the indictment. It was formerly the law that two witnesses were necessary to show the crime of perjury, but this rule has long since been modified. The rule now is that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence. The oath of the accusing witness, therefore, will not avail to convict unless it be corroborated by other independent circumstances. But, gentlemen, it is not correct to say that these additional circumstances must necessarily be equal to the testimony of another witness. The oath of the prisoner rel-

ative to which the charge of perjury is made is given the effect of that of the testimony of a credible witness. If, therefore, another credible witness is opposed in his testimony to the oath of the prisoner, the scale of evidence will be exactly balanced, and this equilibrium or evenness in the testimony must be destroyed by material and independent evidence before the party can be convicted. This additional evidence, whether proceeding from letters or documents, or any evidence of other circumstances, is not required to be so strong that, standing alone, it would justify a conviction; but it must be at least strongly corroborative of the testimony of the accusing witness. Now, gentlemen, to apply this rule to the facts of this case. If you should believe from the evidence that a credible witness, as introduced by the government,—we will say, for illustration, Mr. Charles H. Peacock,—has satisfactorily shown to you that the deed in controversy in this case was in the possession of Judge Goodwin, and was in the handwriting of Luther A. Hall, with such circumstances as would justify you in crediting that witness, although you might credit it, this would not justify you in convicting the prisoner, unless there were other circumstances material which had the effect to corroborate the testimony of Mr. Peacock. The term “corroborate the accusing witness” means to make strong; to strengthen; to support; to tend to establish the truth of the statement of the accusing witness. If, therefore, you find in the evidence other independent circumstances in addition to the testimony of a credible accusing witness, which circumstances are material to the issue,—that is, relate to and throw light on the question whether or not the deed mentioned in the indictment was made and delivered as charged,—if these circumstances are sufficient to strengthen, to establish, and support the truth of the testimony of the accusing witness, you would be justified in convicting the defendant on the testimony of the single accusing witness so corroborated. Moreover, gentlemen, it is not true as insisted that the testimony of the single accusing witness in a charge of perjury stands upon the same footing as the testimony of an accomplice. There is a decided difference in principle in the rule where any credible witness testifies and where a participant in crime—in other words, an accomplice—testifies. The conditions are entirely different. An accomplice, who is a criminal because of his crime, while not incompetent, is discredited, generally, unless his testimony is confirmed so as to show its truth. The testimony of a single accusing witness in a case of perjury is not discredited by the law, but is merely, upon principles of common justice, held to be balanced by the oath of the prisoner. The corroborating circumstances in the case of an accomplice must confirmatively show the truth of his evidence. The corroborating circumstances to the testimony of a single accusing witness in a case of perjury, in the language of Mr. Greenleaf in his famous work on Evidence, must be sufficient to destroy the equilibrium between the testimony of that witness and the oath of the prisoner. It is true, also, that in a case of perjury every material allegation in the indictment may be shown by a single witness, except the allegation that the evidence of the prisoner in question was false, and that he did not believe it

to be true. This, however, must be shown by two witnesses, or by one witness with circumstances of satisfactory corroboration. Now, what is the testimony of Mr. C. H. Peacock, the witness whom the government insists is a credible accusing witness? You remember the testimony of the prisoner, L. A. Hall. I will now read you, from the transcript of the stenographic report in this case, a portion of the testimony of Peacock on his direct examination:

"Mr. C. H. Peacock, recalled. *Mr. Hardeman.* Where do you reside, Mr. Peacock? *Answer.* In Eastman. *Question.* How long have you lived there? *A.* 14 years. *Q.* What is your occupation? *A.* I am merchandising, farming, and in the naval store business. *Q.* Previous to your entering that business, were you in any other? *A.* I have been merchandising, sir, for 14 years. *Q.* Have you ever held any other position there? *A.* Yes, sir; I was county treasurer for six years. *Q.* Any other office? (Objections of counsel.) *Q.* Was there any other position you held there? *A.* I was treasurer of the town council for one year. *Q.* Any other? *A.* I was assistant postmaster for 3 years, I think, sir, and 5 months. *Q.* What opportunities have you had for becoming acquainted with the handwriting of Luther A. Hall? *A.* I have seen a great many notices that he wrote, and seen a great deal of his handwriting, and seen deeds that he wrote; seen applications he made for money orders. *Q.* Do you know Judge Goodwin? *A.* Yes, sir. *Q.* Just state whether or not you ever saw any deed in his possession to certain lots of land. *A.* I have seen it. *Q.* What lots were those? *A.* 286 & 315. *Q.* What district were those two lots in? *A.* 16th, is my recollection. *Q.* What county? *A.* Dodge county. *Q.* Who was the grantee in that deed, —to whom was it made? *A.* Judge Goodwin. *Q.* By whom did it purport to be signed? *A.* William Sullivan. *Q.* Who is William Sullivan,—do you know him? *A.* No, sir; I don't. *Q.* What names were signed as witnesses to that deed? *A.* John D. Smith and L. A. Hall, notary public of Dodge county. *Q.* In whose handwriting was that deed made? *A.* I recognized it as Col. Hall's handwriting. *Q.* When was it that Judge Goodwin showed you this deed? *A.* Some time in the early part of the year, April or May. *Q.* Which May? *A.* This year, 1890. It was prior to the time we came up here this summer. *Q.* Was that a written deed or not? *A.* It was a printed form, and filled out, sir. *Q.* I will ask you if there was anything that you noticed about that blank? *A.* Yes, sir. *Q.* What was it? *A.* In reading the deed I saw it was from William Sullivan, and I then turned and saw—I wanted to see—the county that Sullivan lived in, but the county was blank. *Q.* Anything about the blank itself? *A.* Yes, sir; I noticed on the margin of the deed it was the 'Times Journal Printing Company.' *Q.* I will ask you to look at that paper, if you please, sir. *A.* Yes, sir; this is about the same thing; it was on the margin of the deed, 'Times Journal Printing Company,' Eastman. *Q.* Where is that paper printed? *A.* In Eastman."

This witness also testified, at another time, that he was in error as to the date when he saw that deed in the possession of Judge Goodwin; that he had refreshed his memory, since giving his testimony, which I have just read, by reference to a memorandum in his possession. Then he changed his testimony upon that subject so as to indicate the incident as occurring some time in the fall of last year. This was not all the testimony Mr. Peacock gave, but it is the material portion, which I think proper to read to you at this time. Other portions of his testimony, as I shall presently explain to you, are also material. I read this evidence,

as it is proper to do in a court of the United States, merely to assist the jury, and not to conclude them. You must remember all of the testimony for yourselves; that is peculiarly your province,—peculiarly your duty. Now, if you believe that Mr. Peacock is a credible witness, it is your duty to consider his testimony, which I have just read to you. A jury has no right to disregard the testimony of a witness otherwise credible, and which is intelligent, unless it is impeached in some one or more of the methods pointed out by the law. You have before you, then, in the event you regard it credible, the evidence of Peacock that he saw the deed described in the indictment, and in the handwriting of Luther A. Hall, the prisoner, in the possession of Judge Goodwin in the fall of last year. You have it from the same source that the witness offered Goodwin from \$75 to \$100 to obtain the possession of that deed. Now, gentlemen, is this testimony of Mr. Peacock so corroborated by other material circumstances as will support and strengthen it, so as to destroy the equilibrium between it and the testimony of the prisoner, on which the perjury is assigned? If it is, and if, when so corroborated, you believe it to be true, you will be justified in convicting the prisoner, notwithstanding the fact that other witnesses who may have testified for the prosecution are of doubtful truthfulness. Of course, if he is not credible, if his testimony is of that sort that you cannot, acting under your oaths, accept it, or, if credible, if it is not corroborated by other independent material circumstances which strongly tend to establish its truth, you cannot upon it convict the prisoner, and you must, in that event, acquit the prisoner, unless the testimony of the other witnesses is sufficient to turn the scale in behalf of the government. This being true, it will be your duty to inquire if there is, in the evidence which has been submitted to you, sufficient circumstances of corroboration so to turn the scale, and satisfy you that the testimony of Peacock is true, and that the testimony of the prisoner, upon which perjury is assigned, was false, and that he did not believe it to be true. Now what are the circumstances of corroboration upon which the prosecution relies? So far as I can I will allude to them in the order in which the proof was offered. It is in evidence that the prisoner was a defendant to a bill in equity in the circuit court of the United States, and that by decree of that court he was, in the year 1885, restrained with others from any interference with the lands of the Dodes in this district. That bill and the decree is in evidence before you. From this you will be justified in concluding that the defendant had, previously to that decree, been interfering with the lands of the Messrs. Dodge, and that the action of the court was necessary in order to protect the plaintiffs in the bill in their property rights. It is in proof that a Mr. Doughtry has testified that in the latter part of the year 1889 he met the prisoner on the railroad near Rochelle, and that the prisoner told him he would have a man on every one of the Dodge lots before Christmas. It is in evidence that these lots, 315 and 286, in the sixteenth district of Dodge county, were Dodge lots, and it appears from the decree that the defendant was enjoined from any interference with them. It appears further from the

evidence that the person (Judge Goodwin) to whom the government insists the prisoner made the deed which Mr. Peacock says he saw, did actually go into possession of the lots 286 and 315, and did make improvements thereon, such as building houses and clearing lands. This evidence is not contradicted, and a portion of the improvements and clearings, according to the testimony of a Mr. McRimmon, have been seen and examined since this trial began. According to the testimony of this witness, from the appearance of the houses, they would seem to be about a year old. It is also in evidence that at dates approximating the period when the witness Peacock, testifies that he saw this deed in the handwriting of Luther A. Hall, and in the possession of Goodwin, that the prisoner made other deeds of a similar description, written on blanks similar to that on which the deed in dispute was said by Mr. Peacock to have been written, to one Joel Mullis, and another to one G. W. Evans, and other deeds, with the exception of one lot, being to lots belonging to the Dodges, and with which the prisoner was enjoined from interfering. The testimony of the witnesses Mullis, Wilkerson, and Evans was substantially the same. They had heard that the prisoner was "issuing" lands, or "giving out" lands, or "furnishing lands on good terms." They went to him at his office in Eastman, at least Mullis and Evans did, if their testimony is entitled to your credit, and it is not disputed, save by the testimony of the defendant himself, to which I shall presently advert. Another witness, a Mr. Cooper, testified to similar facts. His testimony related to lot 281 in the sixteenth district of Dodge county. He testified that he went to the office of the prisoner; that the prisoner said to him:

"If I [the witness Cooper] would go in possession of any of these lots, he would furnish me with that title, and, if I had any trouble in it, he would defend me for one-half of the land; in other words, he would defend me for one hundred dollars."

In answer to a question in regard to how much land, Mr. Cooper testified: "He said take as much as I wanted; just so I didn't take enough, I forget the amount of it, so it might be kept out of the United States court." The witness stated that this conversation took place about the last of September or the first of October of last year, 1889. The witness stated that he lived within a mile of Eastman, and was a farmer. This witness produced no deed, but testified to the number of the lot by reference to a memorandum he had made from a sworn statement he had given some time after the alleged transaction. G. W. Evans and Joel Mullis both gave testimony to identify the deed, which they swear the prisoner, Hall, furnished them. These deeds are in evidence before you. There is evidence, which, if credible, tends to show that these papers are in the handwriting of the prisoner throughout,—signatures, names of subscribing witnesses, as well as the body of the deed. It is insisted by the government that an inspection of these deeds by the jury will show their spurious and criminal character, and that they are in all respects in the handwriting of the prisoner. The prisoner himself, so far as I now remember,—and if I am wrong the jury will correct me,—made no refer-

ence in his testimony to the alleged transaction with Cooper, and, if I am right, the testimony of Mr. Cooper is uncontradicted. As to the Mullis and Wilkerson transaction, and the Evans transaction, the prisoner stated that he drew the deeds as an attorney at law, but that they were signed by the makers, whose names purport to be attached, and by the subscribing witnesses. He also signed as a subscribing witness and notary public of the state. It is true, gentlemen, that neither the grantors nor the subscribing witnesses to these deeds were produced as witnesses here, and if these deeds are genuine—that is to say, real—deeds, from actual grantors, with real subscribing witnesses, the testimony of such grantors and subscribing witnesses would have been of material importance, and the failure to produce them, if he could do so, raises the presumption against the prisoner that no such persons were in existence. Does it appear that he has made any effort to obtain their testimony? That is for the jury to answer. Are these real deeds then, with real subscribing witnesses, and real grantors?

All of the lots concerned except one, the number of which the witness Evans testifies was written into the deed by the prisoner after the deed had been previously drawn, are Dodge lots. The testimony of the defendant as to these deeds is that he had no connection with them, save that of an attorney at law; and, if this be true, and if the deeds were genuine, and signed by real grantors, no culpability, so far as the present inquiry is concerned, could attach to the defendant therefrom. If, however, you credit the testimony of the witness who testified that the deeds, signatures and all, were throughout in the writing of the prisoner, or if you find from inspection that this is true, in view of the prisoner's testimony as to the deeds, there can be no other conclusion save that the deeds are forgeries, and, if forgeries, relating, as they do, to the Dodge lots, having been prepared about the time when the alleged deed to Judge Goodwin was prepared, and being written on blanks printed by the Times Journal Newspaper of Eastman, their execution by the prisoner would, in the opinion of the court, tend strongly, in connection with the other evidence recited, the declaration of Doughtry, and the transaction with Cooper, to corroborate the testimony of Peacock as to the existence of a similar deed to other lots belonging to the same parties, to-wit, the Dodges, and that such corroborative evidence would be material to the issue on trial, namely, whether or not the prisoner testified falsely, not believing his testimony to be true, in swearing that he had made no such deed, nor delivered it to Judge Goodwin, nor had any landed transactions with him. Of course, gentlemen, with reference to all of this corroborative evidence, you should consider what the prisoner himself has testified. Under the generous and humane system to prisoners prevailing in the federal courts, the prisoner is permitted to testify in his own behalf, and it is for the jury to pass upon the credibility of his testimony, as in the case of another witness. It is also true, however, where there is a conflict between witnesses, the rule of evidence for the guidance of the jury is this: preference should be given to the testimony of that witness who has the least inducement, from interest or other mo-

tives, to testify falsely. You will therefore consider, in weighing the testimony of the prisoner and the witnesses Doughtry, Cooper, Evans, Mullis, and Wilkerson, who has the least inducement of interest operating upon the mind and conscience. I need not advert to the interest the prisoner obviously has in the result of your duty; and, if the evidence discloses any interest in the four or five witnesses for the prosecution whom I have just enumerated, you should recall it, and give it proper consideration. You should likewise give proper effect to the absence of such interest, if it exists on the part of such witness. It is also proper that you should consider, if the explanation which the prisoner has given of the execution of these deeds be reasonable on its face, or credible by intelligent minds. If the names of the grantors are not written in the deeds, and if you believe from the evidence of Peacock and the other evidence that this was true of the alleged Goodwin deed, this, too, with the other evidence, might be a circumstance which might tend to show that they were executed by one and the same person, as a part of a common plan or design, and this would be strengthened as corroborative evidence, if you also believe that they were all in the same handwriting. The prosecution insists that strong corroborative evidence of the criminal purpose of the prisoner to make and use forged deeds to land is found in the letter to Louis Knight, dated November 22, 1889, and directed from Eastman to Poplar Hill. Also in the package of paper of a certain description, which was sent from the prisoner to the same person about that time, with a note or memorandum of direction, which was also in evidence. The letter is as follows:

"EASTMAN, GA., Nov. 22, 1889.

"*Mr. Louis Knight*—DEAR SIR: Inclosed I send you copies of deeds as I wish. Get up the deeds just like these, except as to the age, and send them as early next week as you can, and I will make it all right with you. Write me what day you will send them. Obt., L. A. HALL.

"P. S. I will send more soon."

This memorandum was accompanied by some blank paper of a special character, and reads:

"Use this if you can, as soon as possible, & send me. I have sent for some that is better. L. A. HALL."

With this letter there was inclosed a number of deeds, which are also in the handwriting of the prisoner; in fact, he admits writing the letter and the memorandum, and sending the deeds and the package of special paper. What is the import of this letter? The jury will, in the discharge of their grave duty, give it the reasonable construction which belongs to it, in view of the evidence. The explanation given by the defendant is, that he prepared the deeds in question to annex to a bill in equity which he had brought, or intended to bring for one Tom Griffin, against a certain turpentine company, the name of which he testifies that he could not recall; that, the controversy involved in the bill being settled, he inclosed these copy deeds to Louis Knight, to have them written up and prepared as forged deeds, to be used thereafter for the bene-

fit of his clients, but only to test, by their use, the skill and accuracy of witnesses who would testify to the genuineness of ancient documents. Of course, gentlemen, if this explanation is accepted by you, no criminality can attach to the defendant because of this evidence; but is it reasonable or probable—is it likely—that the defendant could recall the name of the plaintiff to the bill in equity, and be unable to remember the name of the defendant company engaged in gathering turpentine with whom a settlement was effected? That is for the jury to say. Is it reasonable that he would require so many forged deeds to utilize as a test to show the unreliability of witnesses? You will observe that in the postscript to the letter he says also that he will send some more soon. Would or not the package first sent, comprehending numerous deeds, be ample for all purposes as decoys or tests? Why should he send more? Why, too, should he exhibit, as appears from the memorandum inclosing the blank paper, anxiety to have the deeds, so gotten up and aged, returned early next week? You will bear in mind what he says, and, applying to it the usual test which men of business and intelligence apply to kindred transactions in the ordinary affairs of life, you will say whether you believe the explanation of the defendant is reasonable or credible. The defendant is an attorney at law, and if the expedient to which he states he had resorted as an attorney, for the purpose of detecting forgeries in behalf of his clients, is reasonable or probable, would it not have been proper, if true, for him to have shown the propriety of his actions by some attorney? By his statement under oath these papers were copies of deeds that had been intrusted to him by his client, for the purpose of that client's equity suit. Is it competent, or usual, or reasonable that an attorney would have forgeries made of his client's title papers? These inquiries the jury should make and determine properly. The government insists that these papers were sent to Knight to enable Knight, or some person for him, to manufacture forged deeds; and the fact that the prisoner sent them with the request to get them up just like the deeds inclosed, "except as to the age," and also sent paper suitable for the purpose, with the promise to send more, with a request to send them back early next week, tends, as the government insists, to show that the defendant was in the business of getting up and using forged deeds to lands in that section of the state; and the prosecution insists that this is strongly corroborative of the testimony of Peacock, that he furnished to Goodwin the deed in controversy, about the existence of which the assignment of perjury is made. Upon this subject the court charges you that, if you believe from all of this evidence that the defendant was engaged in this business, it is proper that you should consider it as tending to corroborate the testimony of the accusing witness, for the reason that it tends to show a guilty and criminal purpose with reference to the forgery of land-titles as a business, and may serve to throw light upon the question whether the prisoner furnished the forged or fictitious title about which the assignment of perjury is made. This letter having been written the 22d day of November, 1889, or near that time, it would be substantially in approximation also, to the time mentioned by the witness

Peacock when he first saw the deed, as he says, in the custody of Judge Goodwin. If, gentlemen, you believe also from the evidence that Peacock saw the deed, and if you believe that thereafter he offered Judge Goodwin \$75 or \$100 for it, it is a circumstance that you should consider as tending to show the good faith of Peacock, in his testimony that he saw the deed. To sum up the instructions of the court on this branch of the case, I will repeat that, if you believe that Peacock is the single accusing witness who is credible, you would not be justified in convicting the defendant on his testimony, unless you also find that he is strongly corroborated by the independent and material circumstances of the case. If, however, you believe and are satisfied that he is sufficiently corroborated as to the matter about which the perjury is assigned by the several circumstances of corroboration which the court has detailed, as relied upon by the government, or by a sufficient number of those circumstances, it will be your duty to convict the defendant, notwithstanding you may believe it your duty to totally disregard the testimony of the witnesses Joe Hamilton and the two Goodwins, with relation to whom the defendant insists an impeachment is made.

Is the testimony of Mr. Peacock credible? That inquiry is entirely for the jury. Upon this subject it is proper to remind you that the defense relies upon what they insist are contradictions between his testimony on the former trial and his testimony on this trial. If you believe from the evidence that there are important or material and unexplained contradictions between the testimony of Mr. Peacock on the former trial and his testimony on this trial, it would tend to throw suspicion on the reliability of his testimony; but if you find from the evidence that the contradictions were immaterial, and such as a conscientious man might well make,—for instance, an error on the former trial about a number, or a date, which the witness positively corrects on this trial,—such variation, instead of reflecting upon the witness, is rather a circumstance in his favor, as possibly tending to show that he had not prepared with accuracy a fictitious statement, to mislead the court. At best the human memory is fallible, and courts and juries can only demand that the material facts be accurately remembered and correctly given in evidence. It is difficult to find two men, however conscientious, who will give precisely, and in all respects, the same account of a transaction to which they are eye-witnesses. It is also true that few men can give, in every *minutiae*, two identical accounts of one occurrence, especially when those accounts are given at different periods. If, however, you believe that Mr. Peacock has willfully contradicted his testimony, or that he has spoken positively to matters about which he is ignorant, you should discard his testimony from your consideration. It is true, moreover, that, where a witness is impeached by proof of contradictory statements, he may be sustained, and his credit restored, by proof of general good character. It is common, when contradictory statements have been put in evidence, to sustain the witness by proof that he is a man of good character, with scrupulous regard for truth and veracity; and if you believe that contradictory statements of Mr. Peacock

have been shown which would otherwise discredit him, you will then determine whether there had been such proof of his general character for truth and veracity as will justify you in accepting his positive assertions of facts on this trial. The credibility of a witness, as I have heretofore said, is a matter peculiarly within the province of the jury. If, after considering the testimony of Mr. Peacock, and the circumstances relied on to corroborate him, to which your attention has been called, under the rules I have given you, you are not satisfied that the government has avoided the presumption of innocence, which in this, as in all cases, through the humanity of the law, attends the prisoner, you will look to the other evidence, and determine its probative effect; that is, its effect as proof, taken in connection with the testimony of Peacock, and the independent and material circumstances, the declarations, letters, deeds, etc., which the prosecution asserts are sufficient to warrant you in finding the defendant guilty. In this connection you will consider what weight is to be given to the testimony of Judge Goodwin and of Joe Hamilton and of Joe Goodwin. If you believe that these witnesses have been impeached, and that they are unworthy of credit, you should discard their testimony altogether, unless you find that it is so corroborated by the testimony of other witnesses who are credible, and by the general facts of the case, as will justify you in relying upon it, with the other testimony taken and considered together. Although a witness may be successfully impeached, the jury may believe him in whole or in part, if they are satisfied, from all the evidence, that he is telling the truth, in whole or in part. Much has been said to the jury about the perjury of Judge Goodwin, and it is insisted by the defendant that no one should be convicted on his testimony. It is proper, however, for the jury to remember that the government begins its case with the frank avowal and notice to the jury that Goodwin swore falsely on the former trial, and on Saturday of that trial. He denied positively, in answer to the *subpœna duces tecum*, that he had the deed therein described to lots 315 and 286 in the sixteenth district of Dodge county, which the plaintiffs then insisted had been made and delivered to him by Luther A. Hall. It appeared from the record that, after hearing the evidence, he was adjudged contumacious and disobedient to the order of the court. On Monday he came forward to purge himself of his contempt, and he then testified substantially as he has testified before you, the gentlemen of this jury. As I have said, the credit to give this and other witnesses is entirely for the jury; but it is proper, gentlemen, that you should bear in mind that this witness, who is a colored man, and who is shown to be a farmer living in Dodge county, tells you that he testified on the first trial under the fear of personal injury, and it is for the jury to say, in view of all the evidence developed on this trial, whether that statement of the witness was true. You will also bear in mind that Mr. Peacock testified that the witness told him the same thing when he (Peacock) offered him \$75 or \$100 for his alleged deed; and, if Mr. Peacock's statement is true, it would serve to confirm the testimony of Goodwin to the effect that he was testifying under what the law terms "duress." That means

the state of compulsion or necessity in which a person is induced, by actual or threatened violence, to do or not to do a certain thing. If you believe from the evidence that his original testimony was given under such fear of bodily injury as would control his will and his evidence, while it would not excuse him from the crime for which he stands indicted, and which he has yet to answer, it would be material evidence for your consideration. You desire to get at the truth, and it will be your duty to accept the truth, if it be the truth, no matter how it comes to you. The cases are numerous where this precise state of facts has been passed on by the courts. I read from a decision of the supreme court of Georgia:

"It is the well-settled rule that, if a witness knowingly and willfully swear falsely in a material matter, his testimony should be rejected entirely, unless corroborated by the facts and circumstances of the case, or other credible evidence. *Pierre v. State*, 53 Ga. 365, 369. But it is for the jury to give credit to the impeaching testimony, or the actions sought to be impeached, and to determine for itself whether to believe the one or the other; and it is for the jury to determine whether the first swearing was willfully done, or under coercion, as put by the presiding judge in this case. The credibility of all witnesses is for the jury. The weight of all evidence is for their judgment, and this has been extended even to embrace their personal knowledge of the character of witnesses sworn before them. *Head v. Bridges*, September term, 1881, (not yet reported), Pamph. p. 56, [67 Ga. 227.] In the case here, construing the charge given by request with the general charge, it amounts to this: When a witness is satisfactorily impeached by testimony you believe, then his evidence should be rejected, unless corroborated on a material point; but whether he be impeached or not is for you to say, and though others contradict him, you may believe him and reject them; and, though he swore differently on a former trial, you may still believe him on this trial, if he swore under duress of bodily harm on the first." *Williams v. State*, 69 Ga. 34.

In *Hunter's Case*, 43 Ga. 496, a witness was introduced who had sworn differently from his testimony then before the court. When being examined before the jury he testified:

"I was sworn on the inquest. What was read over, I testified then. Swore to tell the whole truth then, but was afraid, because Mr. Hunter, the defendant, threatened my life for seeing what I did. He threatened it when I first came up in my yard. No one was present but he, and I swore on the inquest to a lie, because I was afraid to tell the truth."

The defendant in that case sought to impeach the witness because of that testimony before the inquest, just as the prisoner here has attempted to impeach Judge Goodwin because of his testimony on the former trial on Saturday, corrected by him on Monday; and on that subject the supreme court of the state declared as follows:

"The attempt of the defendant by cross-examination was to impeach the witness in showing his contradictory statements, and he was entitled to give a reason for these contradictory statements, elicited by cross-examination, by showing that he was in fear at the time he uttered them."

The principle so well announced by the supreme court of the state is fully applicable to the facts here, and it is for the jury on their con-

sciences to say whether they believe that Judge Goodwin actually testified under fear on Saturday. If he did, that fear might operate to explain his subsequent declarations to Coleman or Scarborough, if he made them. These were made, as I remember the evidence, while Goodwin was said to have been with a party of men of his own color, going down Fourth street, on Saturday night. On this subject the jury will do well to remember the testimony of Mr. Hill, as well as the judgment of the court in evidence, to the effect that Goodwin was in custody Saturday night, having been adjudged in contempt Saturday morning; and they will say from this whether it be true that he made the declarations with a party on Fourth street, or whether it be true that at that time he was in charge of an officer of this court, as he himself testified in denying this statement. Any suggestion made that Goodwin was coerced into his testimony is literally without evidence to support it, and is contradicted by the record. He is now under indictment for perjury, and must stand his trial as other persons accused.

With reference to the testimony of Joe Hamilton, the court calls the attention of the jury to this legal principle: When the law obliges a party to call a witness, he can hardly be considered as the witness of the party calling him; and, says Prof. Greenleaf in his authoritative treatise on the law of Evidence:

"It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony in direct contradiction to what such witness may have testified, and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief." 1 Greenl. Ev. (14th Ed.) § 443.

Now to apply that rule to Joe Hamilton's testimony. He could hardly be called a witness for the prosecution. The court compelled the district attorney to call him, because it felt the government was under obligation to do all in its power to account for the alleged deed in controversy. The district attorney is therefore at liberty to disprove any fact testified to by Joe Hamilton. It is true, however, that the testimony of Joe Hamilton in any event is not specially important. He was introduced more with the purpose to authorize the production of secondary evidence, than to show anything about the existence of the deed, of which, so far as the evidence discloses, he had no special knowledge; and that was not a question for the court. The jury would be misled, therefore, if they should be induced to regard his testimony as vital to the case. While it is true that the court required the district attorney to introduce Hamilton to testify to the jury, if he could, as to the final disposition of the alleged deed, this does not specially illustrate the question of its existence. The question whether oral contents of a written paper shall be admitted to the jury is a question for the court, and not for the jury. It is not for you to say whether evidence is admissible. The court has admitted the verbal proof of the alleged deed to you for satisfactory legal reasons, and the testimony of Joe Hamilton, relating, as it does, mainly to a preliminary matter for the court, is not evidence on which the issue here de-

pend. You should not permit your minds to be led away from the true issues and the material evidence upon which your verdict should be made.

Nor is the testimony of Joe Goodwin of special importance. He testified here that he had seen the deed, but he also testified that he could not read, and his only knowledge of the deed, therefore, was what Judge Goodwin may have told him. In that form his evidence would probably not even have been admissible had the question been made. Of the impeaching witnesses, one testified (Mr. Herman) that he (Joe) said he had seen no deed. The others, the two Drs. Buchan and Arnold Brown, said that his statement was that he had seen a paper that Judge told him was a deed, but he did not know whether it was a deed or a marriage license. It is true, also, that one or more witnesses testified to proof of his general bad character for truth and veracity.

It is true, gentlemen, that in this, as in all criminal cases, the burden of proof is on the prosecution to satisfy the jury of the truth of its charge against the person accused. It is true, moreover, that absolute certainty is not attainable in any trial. A greater degree of mental conviction is required in criminal cases than in civil cases. The degree of satisfaction and certainty required is not, therefore, absolute conviction or certainty, but the evidence must produce that effect on the minds of the jurors that after its consideration they can, in view of their oaths to impartially try him, have no reasonable doubt of the guilt of the party accused. By a reasonable doubt is not meant a strained or whimsical conjecture, but an actual mental hesitation, caused either by insufficient evidence or unsatisfactory evidence. Of course you will understand that in this, as in all cases, the prisoner is entitled to such a doubt as I have described.

It has been made necessary for the court to advert to the difference which exists between the duties of a presiding judge in this court and the duties of a similar officer in the state courts. In the state courts, the judge, as I understand the rule, can give no intimation to the jury with reference to the evidence. The decisions are piled up under section 3248 of the Code of Georgia, finding the judges in error in any sort of expression by the judge with reference to what has or has not been proven. The statute has expressly decided in the case of *Railroad Co. v. Putnam* to have no standing in the courts of the United States. 118 U. S. 545, 7 Sup. Ct. Rep. 1. It is, in my judgment, a great defect in the law of our state. The experienced and able jurists who preside in the courts of the state because of this rule are almost powerless to aid the jury to ascertain the truth, and to make a proper verdict, and thus the people are, in large measure, deprived of the best results of the training, skill, and experience of their judges. The judges in the state courts may lay down general instructions as to the law. In the language of one of the most distinguished law-writers of the country, Mr. Thompson, the author of the *Law of Negligence*, and other works:

"Such a system is scarcely more wise than it would be to select a lawyer, a doctor, a clergyman, a farmer, a merchant, a carpenter, a shoemaker, a blacksmith, a saloon-keeper, a street-car driver, a capitalist, or a barber, constitute

them a ship-crew, and start them out on a voyage in company with an experienced navigator, who is permitted to give them general instructions on the theory of navigation, but who is prohibited from giving them any positive order how to navigate the ship, and from correcting any blunders they may make in navigating it."

It is quite otherwise in the courts of the United States. Questions of law are to be determined by the court, and questions of fact by the jury; and the court has no power, and, I may say, no desire to control the action of the jury upon the facts. I repeat to you, you should remember and find all the facts for yourselves. And I now read from the decision of the supreme court of the United States, *Nudd v. Burrows*, 91 U. S. 439. You must distinctly understand that what the court said about the facts is merely advisory, and in no wise intended to fetter the exercise of your own independent judgment. It is the right and duty of the court to aid the jury by "recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice may determine the result." The courts of the United States are therefore enabled to direct the attention of the jury to the salient and vital portions of the evidence, and to recall to their consideration the duty they owe, as well to the public as to the prisoner and those connected with him, where matters have been presented and appeals made which are calculated to mislead the jury with regard to their duty as to the issue to be tried by them, and which might mislead the jury into the belief that there is a conflict between the court and the jury as to their respective duties. If such impressions have been made upon the jury, they should be utterly discarded, as having no place in the minds of upright men, who are gravely inquiring into the truth or falsity of a simple issue. It is the province of the court to sum up the salient evidence in the case, and give you in charge the law applicable to the facts; and it is your duty to apply the law as given you in charge by the court to the facts as you may find the facts to be proven. Because I am aware that some of you are not familiar with the practice of the federal courts, and because I have felt that you might be misled as to the correspondent duty of the court and jury, I have thus adverted to this topic. I may add that it is usual and appropriate for questions of law to be argued to the court, and for the jury to take the law from the court. I am sure I need not reiterate or elaborate to you a proposition which every one must understand. You will only do your duty to the public, and as well as to the accused,

in this case, by excluding from your minds promptly, manfully, and sternly all impressions which may have been placed there, or which may have unconsciously found their way there, which are not made by the evidence or the law. The certainty, the regularity, and the inexorable firmness and justice of the action of courts and juries are the absolute and indispensable requisites to the preservation of our civilization. The certainty ceases to exist when the juries are to be moved by appeals to the tender emotions of human nature, to the distress of the unfortunate, to sympathy for the helpless, to the sorrows of the prisoner's family. The regularity of jury trials vanish when juries can be misled into antagonism to constituted authorities, upon feigned issues when no sort of antagonism should exist, and when all are animated simply by an anxious desire to ascertain the truth, and to give due weight and importance to evidence. The firmness and justice of juries are as intangible and uncertain as the viewless winds when they will consider as a guide anything save the law, commanding that which is right, and prohibiting that which is wrong. From the disregard of these considerations, countless little children suffer the ills and calamities which follow the reckless disregard of law and right. Countless families mourn because the administration of the law is at times uncertain and feeble, irresolute and wavering. I say these things to you, gentlemen, not to impress you with anything save this, and that is the solemn and elevated public duty for which you have been selected and designated by the machinery of the law. The duty is as much the due of the prisoner as of the public, and I trust and believe you will approach the consideration of this evidence with the fixed and calm resolve of upright men and worthy jurors, to do full justice to the prisoner and to the public.

In conclusion I desire to invoke at your hands the most careful and impartial examination of the evidence adduced on this important trial. I think you will not find the issues much simplified, and I trust and believe that you will be able to attain a just and righteous verdict at once, protecting the vast interests committed to your care, and the prisoner in the enjoyment of his right to an unprejudiced and impartial trial. In the indictment both counts relate to the same general transaction, and your verdict will therefore be in the usual form.

The prisoner was convicted.

UNITED STATES v. HALL *et al.*

(Circuit Court, W. D. Georgia, S. D. December 13, 1890.)

CHALLENGES IN CRIMINAL CASES.

The act of congress of June, 1872, as embodied in section 819 of the Revised Statutes, restricts parties indicted for felony to 20 peremptory challenges; and, where several parties are indicted for a joint felony, they are deemed a single party for the purposes of all challenges under that section.

(Syllabus by the Court.)

At Law.

Marion Erwin, U. S. Atty., and Fleming du Bignon, for prosecution.

Dessau & Bartlett, Bacon & Rutherford, and C. C. Smith, for defendants.

SPEER, J. The question which the court took under consideration was upon the motion of the prosecuting counsel, made before the defendants had exhausted any of their challenges to jurors, that the court would, as a guide for the conduct of the case, place its construction on section 819 of the Revised Statutes, which fixes and regulates the number of challenges in criminal and civil cases in the courts of the United States. The first portion of this statute is taken from the act of congress approved March 3, 1865, entitled "An act regulating proceedings in criminal cases, and for other purposes." The section provides that, when the offense charged be treason, or a capital offense, the defendants shall be entitled to 20, and the United States to 5, peremptory challenges. In the act of June, 1872, which is entitled "An act to amend an act regulating proceedings in criminal cases, and for other purposes," approved March 3, 1865, the statute, as it is embodied in the Revised Statutes of the United States, was enacted. It superadded, to the language just quoted from the Acts of 1865, the following language:

"On trial of any other felony, the defendant shall be entitled to ten, and the United States to three, peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges, and in all cases where there are several defendants, or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section."

The contention of the government in the case before the court is, that, there being several defendants, they shall be deemed a single party for the purposes of all challenges under this section, and, therefore, as a single party has but 20 challenges, and as they are to be deemed by the statute a single party for the purposes of all challenges, that they are to be restricted to that number. At common law each of the defendants would have been entitled to 35 challenges. The congress of 1790, as it had the clear right to do, limited the number of peremptory challenges in cases of treason to 35, and in other capital offenses to 20. It was held, under this statute, in the case of *U. S. v. Marchant*, 12 Wheat. 483, that each prisoner was entitled to the full number of challenges. See, also, *U. S. v. Shackleford*, 18 How. 590. The number was further re-

duced, as we have seen, by the act of March 3, 1865, regulating proceedings in criminal cases, and by the act of June 8, 1872. The government insists that congress further provided that, where there were several defendants, they shall be deemed a single party for the purposes of challenges. It is undoubtedly in the power of congress to regulate all the details of procedure in criminal trials in the courts of the United States.

In the absence of a statutory change made by congress, we would still have the number of challenges provided by the common law. That this has been changed is undeniable, so far as the number is concerned, and it only remains for the court to determine whether it has been changed so as to deny each of the defendants the several right to the specified number of peremptory challenges. Under the title of "Peremptory Challenges allowed the Prosecution against Joint Defendants," we find the following declaration in the work of Thompson & Merriam on Juries:

"Statutes which guaranty the right of challenge to every person, which is the general form of those relating to peremptory challenges in criminal cases, plainly indicate that defendants are severally entitled to the specified number. The construction is otherwise where it is specified that 'each party' or 'either party shall be entitled,' etc., which is the general form in statutes relating to the challenges in civil cases." Section 162, subd. 5.

These authors further continue: "The statutes of the United States and of many of the states expressly require that joint defendants shall be joined in their challenges," and citation is made to the express statute before the court. In other states each defendant is allowed his separate challenges. In Texas, persons jointly indicted are entitled to challenge separately, but not to the same number as is allowed a single defendant. That the defendants are to be regarded as a single party is manifestly the obvious, and, in the opinion of the court, the necessary and inevitable, construction the statute must have. Where the language of a statute is unambiguous, there is no room for construction. The courts are obliged to take the words in their obvious and ordinary signification; and, when we bear in mind that the purpose of the law was to regulate trials in criminal cases, that it uses the word "defendant" as synonymous with "prisoner," and declares that in all cases where there are several defendants they shall be deemed a single party for the purposes of all challenges, under this section, the court must accept the imperative and paramount authority of the national legislature as controlling the question. It is said, however, that this is practically to deny the prisoners an impartial jury. We do not perceive the force of this statement. The government has but 5 peremptory challenges, the defendants have 20; a larger number than is permitted in a majority of the states of the Union. The states of Missouri, Nevada, Mississippi, Minnesota, Oregon, Virginia, Kentucky, California, and Arkansas, Delaware, West Virginia, and the territories of Utah and Arizona all have precisely the same rule, and we are happy to believe that as the juries are at present organized in this court, selected, as they are, from

men of intelligence and integrity, truly representative of the best interests of the state and country, there would be no difficulty in securing for the prisoners an impartial jury, even had they a far less number of peremptory challenges than the law allows them.

To the argument that the law is unconstitutional the court must reply that it is its duty to hold every act of congress, or of a state legislature to be constitutional, unless it appears plainly and manifestly to the contrary. So far from this being true, similar statutes, as we have seen, are of force in many states of the American Union, and that it is of force in the federal law is significant of that gradual but steady reform, which has taken place in the methods of criminal procedure, and which tend to simplify and cheapen the administration of justice, to lessen its hardships upon the public, and at the same time to preserve to the accused every substantial right necessary to secure a fair trial before an impartial jury, — a trial which will be relieved from any of those features of injustice to the government or to the accused which tend to defeat the ascertainment of truth, and which thus tend towards the demoralization of society. After careful consideration, the court has no hesitation in declaring that the prisoners are to be considered as a single party, and are entitled to the 20 challenges provided by the law, and no more.

UNITED STATES v. LANCASTER *et al.*

(*Circuit Court, W. D. Georgia, S. D. December 11, 1890.*)

1. CONSPIRACY—INTIMIDATION TO PREVENT PROSECUTION FOR CONTEMPT—FEDERAL JURISDICTION.

A citizen of another state, who has obtained a decree in a federal court of this state, settling his title to land, with a perpetual injunction restraining defendants from interfering therewith, has the right to proceed by contempt in the federal court against defendants for a violation of the injunction, which right is secured to him by Const. U. S. art. 3, § 2, par. 1, providing that the judicial power shall extend to all controversies between citizens of different states; and a conspiracy by defendants to intimidate him from prosecuting the contempt proceedings is a violation of Rev. St. U. S. § 5508, which makes it a crime for two or more persons to conspire together for the purpose of intimidating any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States; and for such conspiracy defendants may be indicted and tried in the federal court.

2. SAME.

Though the power to punish for contempt resided in courts of record long before the adoption of the federal constitution, the right of a citizen of a state to apply to a federal court to punish by contempt a violation of its decree against citizens of a sister state is nevertheless secured to him by the constitution and laws of the United States, which provide that the jurisdiction of the federal courts shall extend to all controversies between citizens of different states.

3. SAME—INDICTMENT.

The decree settling the title to the land is a judicial and conclusive determination by the federal court that it had jurisdiction of the subject-matter and of the parties to the suit; and hence the indictment, which alleges that defendants conspired to prevent the complaining witness from enforcing the decree of the federal court, is not defective by reason of its failure to specially allege that the complaining witness is a citizen of a different state from defendants.

4. SAME—MISJOINDER.

Since Rev. St. U. S. § 5508, defines and punishes a conspiracy against the civil rights of a citizen, and section 5509 provides for an additional punishment for a felony committed in pursuance thereof, an indictment which unites a count for conspiracy with another count for a murder committed in pursuance thereof is not bad for misjoinder.

5. SAME—SUFFICIENCY OF INDICTMENT.

Neither is the indictment defective by reason of its failure to set out the decree which the complaining witness sought to enforce, or to specifically describe the federal statute which defendants violated by the formation of the conspiracy.

At Law. Indictment for conspiracy and murder.

Marion Erwin, U. S. Atty., (*Fleming du Bignon*, special counsel,) for the United States.

Bacon & Rutherford, *Dessau & Bartlett*, and *C. C. Smith*, for defendants.

SPEER, J. The prisoners are indicted for the crime of conspiracy to injure, oppress, threaten, and intimidate a citizen of the United States and of the state of New York, to-wit, Norman W. Dodge, because he had exercised a right and privilege secured to him by the constitution and laws of the United States. In another count of the indictment, the conspiracy is charged to have been made and entered upon, to injure, oppress, threaten, and intimidate Norman W. Dodge in the free exercise and enjoyment of rights and privileges secured to him by the constitution and laws of the United States. It will be observed, therefore, that the conspiracy is charged to have purposed the twofold design: *First*, unlawfully and feloniously to injure Norman W. Dodge because of his previous exercise of rights secured to him by the federal constitution and laws; *second*, to accomplish the same unlawful injury, oppression, etc., because he continued in the exercise and the enjoyment of the same rights secured to him by the constitution and laws of the United States. To both counts for conspiracy there is added the charge that, in pursuance of the conspiracy, and according to its felonious combination and agreement, Rich Lowry, *alias* Rich Herring, on the 7th day of October, 1890, within the jurisdiction of the court, did kill and murder John C. Forsyth, the agent of Norman W. Dodge, by shooting him in the head with a shotgun loaded with gunpowder and buckshot. This feature of the indictment is framed with all the essential requisites of an independent indictment for the murder of Forsyth by all of the conspirators. The cause having come on for trial, and the United States attorney proceeding to arraign all of the prisoners except Rich Herring, *alias* Lowry, who had not been arrested, the defendants, except Lem Burch, who had pleaded guilty, and Clements, who was represented by different counsel, demurred to the indictment upon the grounds: (1) That the matters therein charged do not constitute an offense or offenses against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of congress, approved May 31, 1870, entitled "An act to enforce the rights of citizens of the United States," and do not constitute offenses cognizable by the circuit court, and are not within its power and jurisdiction. (2) The defendants are charged with murder and with conspiracy, which is a misjoinder of offenses, with differ-

ent punishments. (3) That because a decree mentioned in the indictment as a muniment of title of Norman W. Dodge is not set out, it is a conclusion of law and not of fact that said decree became and was a muniment of title. To these grounds the additional ground was added to the demurrer by amendment, namely, that the indictment does not set forth what is the statute or law of the United States which secured to Norman W. Dodge the right or privilege which the indictment charged the conspiracy was formed to prevent. The indictment is framed under sections 5508 and 5509 of the Revised Statutes, which read as follows:

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, —they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the constitution or laws of the United States. Sec. 5509. If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed."

The material portion of the indictment which set out and find the nature of the right of Norman W. Dodge, and which describe the alleged conspiracy to injure and oppress him, etc., because of its exercise, and because he had exercised the same, are as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to-wit, on the 2d day of September, in the year of our Lord one thousand eight hundred and ninety, the said Wright Lancaster, John K. Lancaster, Henry Lancaster, James Moore, Louis Knight, Lem Burch, Charles Clemens, Rich Lowry, *alias* Rich Herring, Luther A. Hall, and Andrew J. Renew, now deceased, did, within said division and district, and within the jurisdiction of said court, then and there, amongst themselves, and with divers other evil-disposed persons, to the grand jurors aforesaid unknown, unlawfully and feloniously conspire, confederate, and agree together to injure, oppress, threaten, and intimidate the said Norman W. Dodge, he, the said Norman W. Dodge, being then and there a citizen of the United States of America, in the free exercise and enjoyment of rights and privileges secured to him by the constitution and laws of the United States, the said rights and privileges being herein more particularly set forth as follows: That heretofore, to-wit, on the 5th day of April, A. D. 1886, a final decree was rendered in the circuit court of the United States for said western division of the southern district of Georgia, and perpetual injunction granted in said decree, whereby the title of George E. Dodge was established and declared good and valid to large tracts of lands lying in the counties of Dodge, Telfair, Montgomery, and Laurens, in said southern district of Georgia, said decree having been rendered in the equity cause of George E. Dodge against Luther A. Hall, Oliver H. Briggs, Andrew Cadwell, Red Rawlins, Harrison Grimes, John Dowdy and others. That afterwards (but before the unlawful confederation and conspiracy hereinbefore set forth) the said George E. Dodge in due form of law transferred and conveyed all his title in said lands to said Norman W. Dodge, and the said decree thereby became and was a muniment

of title of the said Norman W. Dodge in and to the said lands, and it thereby became a right and privilege of the said Norman W. Dodge, under the constitution and laws of the United States, by himself and by his agents, duly authorized for that purpose, to institute and prosecute all proper and lawful proceedings in the said circuit court for said division and district, to carry said decree into execution, and to bring before said circuit court, by due process of law, any and all persons violating the terms of the said injunction granted in said decree, for punishment as for a contempt of court. That afterwards, to-wit, on the 12th day of July, A. D. 1890, the said Norman W. Dodge, in the free exercise and enjoyment of the said right and privilege secured to him by the constitution and laws of the United States, by and through his agent, John C. Forsyth, did institute a proceeding in said circuit court for said division and district, for the purpose of obtaining a rule against said Luther A. Hall requiring him to show cause why he should not be punished as for a contempt of court for an alleged violation of the said injunction granted in said decree, said proceeding being a petition for said rule. That afterwards, on the 27th day of August, A. D. 1890, the said Norman W. Dodge, in the free exercise and enjoyment of the said right and privilege secured to him by the constitution and laws of the United States, by and through his agent, John C. Forsyth, did present to the Honorable EMORY SPEER, a judge of the circuit court of the United States for the said western division of the southern district of Georgia, a petition for the purpose of obtaining a rule in said circuit court against said Luther A. Hall, requiring said Hall to show cause why he should not be punished by said circuit court for an alleged violation of the injunction granted in said decree, as aforesaid. That afterwards, to-wit, on the 2d day of September, A. D. 1890, at the time of said unlawful conspiracy and combination in this count mentioned, the said Norman W. Dodge was then and there in the free exercise and enjoyment of the right and privilege secured to him under the constitution and laws of the United States of prosecuting said petitions and proceedings to obtain rules against the said Luther A. Hall, as hereinbefore mentioned, and was then and there engaged in the exercise of said right by prosecuting the same. That on the said 2d day of September, A. D. 1890, at the time of said unlawful conspiracy and combination in this count mentioned, the said Norman W. Dodge was in the free exercise and enjoyment of the said right and privilege secured to him by the constitution and laws of the United States of instituting and prosecuting all proper and lawful proceedings in the said circuit court for said division and district to carry into execution said decree, and to bring before said circuit court, by due process of law, any and all persons violating the terms of the said injunction granted in said decree, for punishment as for a contempt of said circuit court, and was then and there engaged in the free exercise of said right and privilege by prosecuting said proceedings against any and all persons so violating the said injunction as aforesaid. That on the said 2d day of September, A. D. 1890, the said Norman W. Dodge was then and there a citizen of the state of New York, and of the United States of America, and the said Norman W. Dodge was then and there engaged in the exercise of the right and privilege secured to him by the constitution and laws of the United States, of instituting in said circuit court for said division and district suits against any and all squatters and trespassers upon the said lands of said Norman W. Dodge in said division and district, the said squatters and trespassers being citizens of the state of Georgia, residing in said division and district, and the matters in dispute in such suits being within the jurisdiction of the said circuit court for said division and district. And the said Wright Lancaster, John K. Lancaster, Henry Lancaster, James Moore, Louis Knight, Lem Burch, Charles Clemens, Rich Lowry, *alias* Rich Herring, Luther A. Hall, and Andrew J. Renew,

now deceased, and said divers other evil-disposed persons, to the grand jurors aforesaid unknown, wickedly devising and intending to prevent and hinder the said Norman W. Dodge from the further exercise of said rights and privileges secured to him under and by the constitution and laws of the United States, did, on the 2d day of September, A. D. 1890, within said division and district, then and there, amongst themselves, unlawfully and feloniously conspire and combine, confederate, and agree together, as aforesaid, to injure, oppress, threaten, and intimidate the said Norman W. Dodge in the free exercise and enjoyment of the rights and privileges in this count specified, secured to said Norman W. Dodge by the constitution and laws of the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The important question presented by the demurrer is this: Does the indictment set out an offense which is a substantial violation of sections 5508 and 5509 of the Revised Statutes? For the purposes of this inquiry, of course, the allegations in the indictment are taken as true.

Stripped of the technical wording of the indictment, it appears that George E. Dodge, in a suit in equity pending in the United States circuit court for this district, had obtained a perpetual decree of injunction against Luther A. Hall and many others enjoining them from any interference with a large body of lands in this district, the title to which, was by the same decree adjudged to reside in George E. Dodge. Subsequently Norman W. Dodge, by purchase, became the owner of these lands, and, as a consequence, vitally interested in the decree of this court, by which the title of his grantor was settled, and his own rights protected. It became necessary, however, for Norman W. Dodge to present to this court proceedings which would enable him to enforce the rights he had obtained under the decree, and to enforce obedience to the decree. He instituted several rules for that purpose against the persons mentioned in the bill of indictment, some of which rules had been disposed of by the action of the court prior to the 7th day of October of this year, and others were still pending. Norman W. Dodge, it appears, was a citizen of the United States and of the state of New York, and it is not disputed that he had the right, in a matter in which an interest in him was shown, to apply by proceeding to this court to enforce respect and obedience to a final decree of this court, upon which his interest depended. The theory of the indictment is that the right so to apply to the circuit court of the United States for process to enforce its decree, and to bring all persons violating the terms of its injunction, before the court for punishment, was on the part of the said Norman W. Dodge, the exercise of a right and privilege secured to him by the constitution and laws of the United States. It is further comprehended in the scope of the indictment, that, having applied to the court and obtained a rule or rules against certain parties calling upon them to show cause why they should not be adjudged in contempt for their disrespect and disregard of the final decree of the court, that Norman W. Dodge had then the right to press his proceeding to a judicial conclusion, and to obtain the benefit and protection thereby which is usual in cases in equity. It is insisted on the part of the government

that this right resides in the constitution itself, and in several acts of congress creating the courts, defining the jurisdiction and extending it to controversies between the citizens of the several states. It is insisted further that the conspiracy having been formed, and the homicide of Forsyth in pursuance thereof having been committed, to punish and to prevent the exercise of this right, it is clearly within the provisions of the penal sections of the statute above quoted.

For the demurrer, it is argued by the defendants' counsel that Norman W. Dodge had no right secured to him by the constitution and laws of the United States which would authorize him to litigate his controversies depending upon the decree of this court, in the court of the United States. They argue that the power of a court, to punish for contempt exists independently of the constitution or laws of the United States. They call attention to many declarations by text-writers and by the courts to the effect that the power to proceed by the process of contempt is incident to every tribunal, and is derived from its very constitution without any express statutory aid. 2 Bish. Crim. Law, § 243; *Clark v. People*, 12 Amer. Dec. 177; *Ex parte Adams*, 59 Amer. Dec. 234; *Williamson's Case*, 67 Amer. Dec. 374; *State v. Doty*, 90 Amer. Dec. 671; *Ex parte Robinson*, 19 Wall. 505. From these authorities they evoke the argument that the procedure for contempt did not originate in the constitution or laws of the United States, and they argue, therefore, that the right to proceed in the courts of the United States against a party as for a contempt is not a right secured by the constitution or laws of the general government. From *Ex parte Robinson, supra*, they deduce the proposition that the seventeenth section of the judiciary act of 1789 operates as a limitation upon the manner in which the courts of the United States shall exercise the power of prescribing fine and imprisonment for contempts, and is not, therefore, the creation of a power in the court, or rights in applicants for the exercise of that power. The power to proceed for contempt existing inherently in courts of record, they argue that no person is given by the constitution or laws of the United States the right to institute proceedings to have a party punished for disobedience to a decree in a court of the United States; and they argue that the court has no jurisdiction to try a charge of conspiracy to injure or oppress a citizen of the United States because of the exercise or enjoyment of a right secured to him by the constitution and laws of the United States, unless that right owes its creation, its definite and precise existence, to the express language of the federal law. These views have been presented with the earnestness usual with counsel in cases of large import, and the court has endeavored to give the argument the close consideration which such questions deserve.

It is undeniably true that the power of a court to institute, upon proper grounds, procedure for contempt existed long anterior to the existence of the United States, its constitution, or its laws. This is true, however, of nearly every useful and well-known method of procedure known to the law. The bill and the cross-bill in chancery, the declaration in ejectment, the libel in admiralty, indeed the great body of civil

and criminal procedure, was in common use as a part of the machinery of courts, when the constitution was adopted. It would not, however, be insisted, we think, that because a non-resident of the state in a controversy between himself and a citizen resident in this district found it necessary to apply to this court for the issuance of any of its usual writs, that it could be successfully urged that the writ should be refused because it was of an ancient character, and antedated, in its use, our federal government. The right of the non-resident to sue for it finds its existence in the federal law, and it is utterly illogical to say, because the proceeding is inherent in the court, that the applicant, belonging to a class who is entitled to do so, is not exercising a right secured to him by the constitution and the laws, when he makes application for it, or when he presses it to trial after it is issued. It follows, therefore, that, however ancient the procedure because of contempt may be, however inherent and essential to courts of record, if a citizen of the United States, by virtue of the United States law, has the right to apply to the court to evoke its exercise, and to press it to trial after its institution, this right is secured by and is dependent on the United States law. The *Case of Cruikshank*, 92 U. S. 542, relied upon with apparent confidence by the prisoners' counsel to controvert this view, is not, as it appears to the court, at all in conflict with it. In that case the main count of the indictment charged that the conspiracy was formed to injure, oppress, threaten, and intimidate two citizens of the United States of African descent, and persons of color, with the unlawful and felonious intent thereby to hinder and prevent them in their free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose. That this was not a right secured by or dependent on the constitution or laws of the United States is manifest, because the right had always existed in those times when the citizen or subject enjoyed any liberty whatever. But suppose the charge had been that the conspiracy was formed to hinder and prevent the people from assembling to petition congress for a redress of grievances, it would have been, in that event, a violation of a right secured by article 1, par. 1, of the amendments of the constitution, which declares that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for redress of grievances. The supreme court, in *U. S. v. Cruikshank*, expressly holds that if it had been alleged in the indictment that the object of the conspirators was to prevent a meeting for such a purpose as a petition to congress for a redress of grievances, the case would have been within the statute, and within the scope of the sovereignty of the United States. What, then, becomes of the argument that, if a right is not expressly originated and created by the federal law, it is a right without the pale of federal protection? The clause of the constitution just quoted does not create the right to petition government; it merely declares that it shall not be abridged, and yet upon that precise constitutional dec-

laration the supreme court declare that the jurisdiction of the national courts is based, for the protection of the citizens in its exercise. This is a right, therefore, which was a common heritage of the people prior to the formation of the constitution of the United States, and yet it is a right which we have paramount authority for holding is secured by, and dependent on, the constitution and laws of the United States. Analogizing this principle to the question raised by the demurrer, if the constitution had declared that the right of the citizen to appeal to the federal courts should not be infringed, even though that right was a common heritage antedating the constitution, it would have been a right secured by or dependent on the constitution and laws of the United States. Much more, then, is it true that the right is so secured and so depends when it appears by the express letter of the constitution that the judicial power of the government extends to all cases in law and equity arising under the constitution and laws, and to controversies between citizens of different states; and more conclusive still when it appears that by a series of statutes and by a multitude of decisions suitors of the class to which Norman W. Dodge belongs have been admitted with their controversies into the federal courts, and, indeed, that the great bulk of the business in those courts arises from controversies between suitors of his class.

Now let us see if Norman W. Dodge, a citizen of the state of New York, had the right to make application to the circuit court here for the relief he sought. We read from paragraph 1, § 2, art. 3, of the constitution:

"The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, * * * to controversies between citizens of different states."

It would seem that the right of Norman W. Dodge to proceed to enforce the decree of this court of the United States is doubly strong. He may proceed because he is a citizen of another state and his controversy is with citizens of this state. If it be true, however, that this does not sufficiently appear from the indictment, as is insisted in the argument, the case he makes by his petition arises under the constitution and laws of the United States, and for the following reasons: The decree he seeks to enforce is a decree of a United States court. By that decree the court judicially and conclusively settled that it had jurisdiction of the subject-matter of the litigation and the parties concerned. Norman W. Dodge, becoming interested, had the right under the general practice of a court of equity to call the attention of the court to the fact that its injunctions had been violated. 2 High, Inj. § 1449. His proceeding, then, was merely ancillary to a case arising under the laws of the United States, and which the court had held, by entertaining jurisdiction thereof, to be a case of that character. The courts of the United States are of limited jurisdiction, and they can try no case which, either in the action of the court, the exercise of its jurisdiction, or in the controversy itself, is not a case provided for by the laws of the United States. It may be taken, I think, as a conclusive proposition, that wherever a party has a right

to litigate in the United States courts, he is exercising a right secured to him by the constitution and laws of the United States. There are no inherent rights to sue in the United States court, as in the courts of general jurisdiction in the states and in the mother country. The courts themselves were created as tribunals of a special and limited character as to jurisdiction, for the necessities of the federal system; and only those persons can sue in the United States court or proceed there who are given the right to do so by the United States law.

It may be true—it doubtless is true—that parties often become litigants before the United States court because their interests are necessarily and inevitably commingled with the interests of persons who have the express right to litigate there. The court will then proceed to determine the rights of all parties before it; but, even in that case, it does so because it is either expressly authorized to do so, or because the power it exercises is a necessary and inevitable implication from its express constitutional or statutory powers. Wherever, therefore, there exists a right to become a suitor or litigant in the United States courts, it is a right the exercise of which is secured to the party by the constitution or laws of the United States, for, if not secured in this manner, and by these laws, it can have no other security; and it follows, I think, that wherever there is a conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of his right or privilege to become a suitor in the courts of the United States, or, having so become, to injure or oppress him to prevent him from litigating his controversy there, the conspiracy is a violation of section 5508 of the Revised Statutes, a matter of which the courts of the United States properly and clearly have jurisdiction to inquire, and, on conviction, to punish the offenders. Indeed, in my judgment, this is no longer an open question. The argument of counsel for the defendants appears to be completely answered upon the general question of jurisdiction involved by the reasoning of the supreme court of the United States in *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152, a case with which I am somewhat familiar because of the fact that, as district attorney, I conducted it for the government in the circuit court. The power exercised by the government in that case related to the elective franchise, but the principle authorizing its exercise is applicable to any other franchise of a citizen, and there is none more important to a large class of American citizens than the right to sue in the United States court. And we may remark that the ascertained facts in the controversy in which the decree was rendered, and the rules for contempt issued, furnish a most significant illustration of the importance of this right. The local prejudices against strangers and non-resident property owners, unreasonable as they are, confined as they necessarily must be to a small portion of the people, are sufficient in many cases to deny and utterly destroy the most valuable rights of the non-residents. To deny, therefore, in such cases the right of the non-resident to prosecute his remedies in the courts of the United States would be to deny his rights altogether, and to shut and to close to him the avenues to public justice. In the *Case of Yarbrough*, above quoted,

the statute itself was declared constitutional and valid, the opinion was unanimous; the great jurists among the supreme judges, whose habits of thought make them careful always with reference to the exercise of novel powers, either by congress or the courts, found no cause of dissent to the decision pronounced by Mr. Justice MILLER for the court in that case, a decision which has been reaffirmed again and again by the same elevated tribunal. In *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35, which was a charge of conspiracy under the section now before the court to hinder a citizen of the United States of his right to establish his claim to certain lands of the United States under the homestead act, the court say, through Mr. Justice MILLER:

"The first question certified to us as to the constitutional validity of paragraph 5508 of the Revised Statutes was answered in the affirmative by the unanimous opinion of this court in *Yarbrough's Case*, 110 U. S. 651, 4 Sup. Ct. Rep. 152."

They say, further:

"The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of a state. Its object is to guaranty safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the constitution and treaties as well as statutes; and it does not, in this section at least, design to protect any other rights."

Of this class is the right of Norman W. Dodge to proceed to enforce the rights secured to him by the decree of the circuit court and the laws conferring jurisdiction on the court. No law of the state authorized or could authorize him to petition the United States court. His right, then, was not dependent on the laws of the state, but it was, in the language of the court in the *Yarbrough Case*, and reiterated in the *Waddell Case*, "dependent on the laws of the United States." And I repeat that, the demurrer admitting for its purpose the truth of the charge in the indictment that the conspiracy was had and carried out in part, at least, and that it was to injure and oppress Norman W. Dodge because of the exercise of such right, the matter of the indictment is within the purview of the statute, and is within the jurisdiction of the court.

It is urged, however, that there is a misjoinder of a count for conspiracy with a count for murder; that the punishment of the two offenses are different, and for this reason that the indictment must be quashed. On this subject counsel for defendants cite *U. S. v. Scott*, 4 Biss. 29; *U. S. v. Jacoby*, 12 Blatchf. 491; *U. S. v. Burns*, 5 McLean, 23; *U. S. v. Nunnemacher*, 7 Biss. 129. On this subject it will, in our judgment, suffice to say that, while independent crimes cannot be joined in the same indictment where they are of different classes, with different penalties, yet, where a statute provides (as in that before the court) for the definition and punishment of a felonious conspiracy, and for a punishment of an additional character for an overt act of a highly criminal nature, when the latter is committed in pursuance of the conspiracy, it being one-transaction the description of the crime as an entirety in the indictment is not only proper, but is necessary. Indeed, under section

5509 there could be neither punishment nor jurisdiction in the United States court unless the murder was committed as a part of the conspiracy. If it was so committed, congress having provided for its punishment as a part of the punishment for the conspiracy, the penalties cannot be said to differ, nor the offenses to be of a different class.

With relation to the two grounds of demurrer—that the decree which Norman W. Dodge was seeking to enforce is not set out in the indictment; and the other ground, that the statutes which give him the right he was seeking to exercise were not specifically described in the indictment—I do not think that they are well taken.

To the observations which have been so zealously urged to the effect that the pendency of this indictment is a grave instance of disrespect to the autonomy of the state, and the jurisdiction of the superior court of Dodge county, it will be, perhaps, sufficient to say that it can never be any reflection upon the state or its courts, that the general government will attempt to protect its citizens in the enjoyment of those rights secured to them by the constitution and laws of the common country. That it has this power we have seen. In the language of the supreme court of the United States in *U. S. v. Reese*, 92 U. S. 214–217, quoted by Mr. Justice LAMAR in his dissenting opinion in *Neagle's Case*, 10 Sup. Ct. Rep. 658, 676:

“Rights and immunities created by or dependent upon the constitution of the United States can be protected by congress. The form and the manner of the protection may be such as congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected.”

In *Strauder v. West Virginia*, 100 U. S. 303–310, the court says:

“A right or an immunity, whether created by the congress or only guaranteed by it, even without any express delegation of power, may be protected by congress.”

We have seen that congress, in the legitimate exercise of its legislative discretion, has chosen to protect suitors in the courts of the United States in the exercise of their rights to prosecute their suits and actions in those courts, and neither the state nor any tribunal or officer thereof has any color of right to complain that the protection is extended. Indeed, it would occur to the impartial and observant mind that the officers of the state should experience a sense of patriotic gratification that the courts of the United States are sufficiently vigorous and vigilant to institute an investigation into an atrocious crime, such as this indictment describes, and the demurrer for its purposes admits to be true. The date of the alleged crime, or, rather, the terrible and distressing murder committed in its progress, occurred on the 7th day of October. The indictment in this court was filed on November 20th. If warrants had been issued and arrests made by the authorities of the state, the prisoners would not now be before this court. The notable solicitude, and I may say jealousy, exhibited in behalf of the dignity of the state court, expressed, as it is, not by the state or its authorities, but by the counsel for the parties

accused, has not had any considerable, or indeed appreciable effect upon the mind of the court while engaged in the consideration of the purely legal reasons which have impelled it to overrule the demurrer.

UNITED STATES *v.* LANCASTER *et al.*

(*Circuit Court, W. D. Georgia, S. D. January 5, 1891.*)

1. CONSPIRACY—WHAT CONSTITUTES.

A conspiracy is an unlawful confederacy or combination of two or more persons to do an unlawful act, or have accomplished an unlawful purpose. The offense is complete when the unlawful conspiracy, combination, or agreement is made, and a criminal act done in pursuance of the conspiracy is not necessary to justify a conviction for the crime of conspiracy itself.

2. SAME—EVIDENCE—DECLARATIONS.

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act of the whole party, and the proof of such act will be evidence against any of the others who engaged in the same conspiracy. Declarations of a co-conspirator, made during the pendency of the illegal enterprise, is not only evidence against himself, but is evidence against his associates in the crime.

3. SAME—FEDERAL JURISDICTION.

An unlawful combination to injure, oppress, threaten, and intimidate a citizen of the United States in the free exercise of a right and privilege secured to him by the constitution and laws of the United States, and because of his having so exercised the same, is a conspiracy, indictable and punishable under section 5508 of the Revised Statutes. Where a citizen of the United States is interested in a decree of a circuit court of the United States, and where it has become necessary for him to sue out attachments for contempt to enforce respect for said decree, and obedience to the same, and to punish violations thereof, a conspiracy to injure, oppress, threaten, and intimidate him because of the exercise of his right to apply for such relief is a violation of the statute.

4. HOMICIDE—JURISDICTION.

If, in pursuance of the conspiracy above defined, the conspirators murder the agent of the party against whom the conspiracy is directed, they are indictable and punishable under section 5509 of the Revised Statutes, as such crime is punished by the laws of the state in which the murder was committed.

5. CONSPIRACY—SUFFICIENCY OF EVIDENCE.

The evidence necessary to support the charge of conspiracy discussed.

6. SAME.

If it appear that a particular motive for the conspiracy is alleged in the indictment, and the jury is justified from the evidence in finding that such motive did really exist, it will not matter if the conspirators had different motives additional to that the indictment describes.

7. TRIAL—INSTRUCTIONS.

It is the duty of the trial judge in a court of the United States to sum up the evidence for the assistance of the jury. This is not done to interfere with the province of the jury, for, notwithstanding the summary of the judge, they are obliged to find the facts for themselves.

8. IMPEACHMENT OF WITNESS.

Where a witness is sought to be impeached by proof of contradictory statements in matters material to the issue, it must appear that the contradictory matter is material. The witness so attacked may be sustained by proof of general good character, and at last his credit is a question for the jury.

9. EVIDENCE OF CO-CONSPIRATORS—CORROBORATION.

Where three persons who are jointly charged with the conspiracy make disclosures with reference thereto,—one makes a voluntary confession, another is permitted to become a witness for the government, under an implied promise of pardon, and testifies, and the other makes a declaration during the pendency of the criminal enterprise,—and there could have been no collusion or knowledge *inter sese* with

reference to the several statements, the fact that the three statements are, in all material respects, identical, is confirmatory of the testimony of the accomplice, and of the credit of a witness who testifies to the declaration.

10. SAME.

The confirmatory evidence need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others.

11. SAME.

It is a settled rule of evidence that an accomplice, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, but the jury may, if they please, act upon the evidence of an accomplice. It is, as a matter of practice, the duty of the judge to advise them not to convict of felony upon such testimony alone, and without corroboration. No evidence can be legally competent and sufficient to corroborate an accomplice which does not tend to confirm the testimony of the accomplice upon a point material to the issue in the sense that it tends to prove the guilt of the defendant. *Com. v. Holmes*, 127 Mass. 424, decided by Chief Justice GRAY.

12. SAME.

Circumstances of corroboration in this case instanced.

13. CONSPIRACY TO MURDER—FEDERAL JURISDICTION.

It is not within the power of the United States to punish for a conspiracy to murder within the state unless the murder was in violation of a United States statute. In this case the question of the power of the United States to inquire into and punish for the alleged murder of Forsyth depends upon whether the killing was done in pursuance of the conspiracy alleged in the indictment.

14. SAME—EVIDENCE REQUIRED.

It requires more than proof of mere passive cognizance on the part of a prisoner of a crime to sustain a charge of conspiracy, but the jury must find that such prisoner did some act or made some agreement showing an intention to participate in some way in such conspiracy.

15. CRIMINAL LAW—EVIDENCE OF CHARACTER.

Effect of proof of good character discussed. *U. S. v. Jackson*, 29 Fed. Rep. 503, followed.

16. SAME.

Because a prisoner may not choose to put his character in issue he is not to be prejudiced in the minds of the jury thereby.

17. TRIAL—ARGUMENTS OF COUNSEL.

Reference in argument by counsel to impertinent topics commented on.

(*Syllabus by the Court.*)

At Law. Indictment for conspiracy.

Marion Erwin and *F. G. du Bignon*, for the prosecution.

Bacon & Rutherford, *Dessau & Bartlett*, *C. C. Smith*, and *H. V. Washington*, for the prisoners.

SPEER, J., (*charging jury.*) The prisoners are on trial upon an indictment in which they are charged with a conspiracy to injure, oppress, threaten, and intimidate a citizen of the United States of America in the free exercise and enjoyment of a right secured to him by the constitution and laws of the United States. They are further charged with a conspiracy to injure, oppress, threaten, and intimidate the citizen because of his having exercised such right and privilege so secured. The laws of the United States (Rev. St. § 5508) provide that—

“If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years, and shall, moreover, be thereafter [ineligible] to any office or place of honor, profit, or trust created by the constitution or laws of the United States.”

This section defines the conspiracy with which the defendants are charged. The laws of the United States (Id. § 5509) further provide—

“If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed.”

The person against whose rights and privileges, their exercise and enjoyment, the conspiracy is charged to have been directed is Norman W. Dodge, a citizen of the United States and of the state of New York. The rights and privileges, because of which it is alleged that the conspiracy was formed “to injure, oppress, threaten, and intimidate” Norman W. Dodge, were the right to sue out certain contempt proceedings against the parties whose names are mentioned in the indictment as having violated a certain decree of this court, granted and made upon a bill in equity filed, presented, and sued to final judgment by George E. Dodge, which decree had become a muniment of the title of Norman W. Dodge to large bodies of land situated in several counties in this district. As we have seen, from the indictment, the conspiracy was to injure, oppress, threaten, and intimidate the citizen in the exercise and enjoyment of his right, secured by the constitution and laws of the United States, or, in other words, because he continued to exercise that right. It also charges that the conspiracy was formed to injure the citizen because of his having so exercised his right so secured; in other words, because he had in the past exercised the right so secured. You will observe, therefore, gentlemen, that the indictment presents the twofold accusation,—a conspiracy to injure because of a present exercise and of a past exercise of a right secured by the constitution and laws of our general government. It is further charged in the indictment that, in pursuance of the conspiracy, a description of which you have just heard, the prisoners committed a felony, to-wit, the crime of murder of John C. Forsyth, the agent of Norman W. Dodge; and, under the provision of the statute which I have read, it is in the legal contemplation of the indictment that if the prisoners, or two of them, are convicted of this conspiracy, and the murder in pursuance thereof, they shall be punished by the law of the state of Georgia relative to the crime of murder. I will now ask your attention to a somewhat closer analysis of the legal import of this statute, and the indictment which charges the prisoners with its violation. “If two or more persons conspire,”—that is, if two or more persons enter into a conspiracy. Now, what is a conspiracy? It is an unlawful confederacy or combination of two or more persons to do an unlawful act, or to accomplish an unlawful purpose. The offense is complete when the unlawful confederacy, combination, or agreement is made, and a criminal act, done in pursuance of the conspiracy, is not necessary to justify a conviction for the crime of conspiracy itself, but is merely an aggravation of it. The degree of aggravation of a conspiracy by a criminal act committed in pursuance thereof is of course proportioned to the degree of heinousness of the crime so committed. Now, to apply this definition to the charge in this indictment, if you shall find

that two or more of the prisoners entered into an unlawful confederacy or combination to do an unlawful act, or to accomplish an unlawful purpose, and if you should further find that such act or purpose is declared unlawful by the statute under which this indictment is framed, you would be justified in finding that the offense of conspiracy, as charged in the indictment, is complete, notwithstanding you may fail to find that any crime was committed in pursuance of the conspiracy. Such an unlawful agreement for such unlawful purpose would be a crime for which the punishment for conspiracy would attach, notwithstanding that the proof might be silent or insufficient as to an overt criminal act; but if, in addition to the unlawful agreement amounting to a conspiracy, you should also find that two or more of the prisoners had committed an additional crime, to-wit, the crime of murder, as charged in the indictment, and had committed it in pursuance of the conspiracy, such an additional crime would be an aggravation of the conspiracy, and would be, under the federal statute (5509) which I have quoted to you, punishable, on conviction, as such offenses are punished by the laws of the state of Georgia.

What, then, will be your first inquiry? Obviously, was there an unlawful confederacy or combination of two or more persons, or, in other words, was there a conspiracy to accomplish an illegal purpose? If so, the act of one of the conspirators is the act of all. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that any declarations made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the rest of the parties, who, as we have seen, when the combination is proven, are as much responsible as if they had done the act themselves. You will observe, gentlemen, that the act of combination to do wrong is the key-stone, if I may use the expression, in the crime of conspiracy. It is true that the act of unlawful combination is more dangerous and disturbing to the peace of society than would be the crime which is the object of the combination, when accomplished by a single individual. It has been declared that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as to require special criminal restraints. You can readily appreciate why this is true. A conspiracy will become powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and law-abiding characters of the men engaged, and, as a consequence, to the community to which they belong. Such is the general idea of a conspiracy. Now what is the particular conspiracy charged in this indictment, and what is the particular unlawful re-

sult which the grand jury, after its investigation, has imputed to these prisoners? It is a conspiracy, as we have seen, to injure, oppress, threaten, and intimidate Norman W. Dodge, a citizen of the United States, in the exercise—the free exercise—of the right and privilege secured to him by the constitution and laws of the United States, and because of his having so exercised the same. An unlawful combination to accomplish one or both of these results, the court charges you, is a conspiracy indictable and punishable under this statute; and it has been so held by the supreme appellate tribunal of our country. Now, what is the right of Norman W. Dodge, on account of the free exercise of which it is alleged that this conspiracy was formed, to injure and oppress him? It appears, gentlemen, from the recitals in the indictment, and the evidence to prove them, that on the 18th day of April, 1884, George E. Dodge filed his bill in equity in this, the circuit court of the United States for the western division of the southern division of Georgia, against Briggs, Hall, and Sleeper and against any other parties, in the nature of a bill of peace to quiet the title of the plaintiffs to large bodies of land in the counties of Dodge, Telfair, Lawrens, Pulaski, and Montgomery, and to restrain defendants from unlawfully interfering with and trespassing upon the same, and to have certain fraudulent or pretended deeds of the respondent delivered up to be canceled. This bill was pressed to final adjudication on the 5th day of April, 1886. It was defended by Luther A. Hall, among others, both as a respondent and as a solicitor of this court, in its equity branch. After final hearing and trial the court granted a final decree, enjoining the defendants Hall, and all other defendants, their agents and confederates, from any character of interference with the lands in question. This decree was the final judgment in the court, and, since it does not appear that any steps were taken to have it reviewed or reversed, it was in law conclusive. Subsequently to its rendition, Norman W. Dodge, as it appears from the evidence and the deeds before you, acquired by purchase the interest of George E. Dodge in the lands which were the subject-matter of that litigation, and it is true, as it is alleged in the indictment, that this decree became and now is a muniment of title. A muniment is a record,—the evidence or writings whereby a man is enabled to defend the title to his estate. You can readily perceive how this is true of the decree in question. The court charges you that it settled irrevocably, so far as human agency could settle it, the title of George E. Dodge to the lands in question; and, since Norman W. Dodge purchased from George E. Dodge, it became as strong a defense for his title as it was for the title of his grantor, George E. Dodge. Subsequently to the purchase of these lands by Norman W. Dodge, it became necessary, in his opinion, for him to apply to this court by appropriate application, for appropriate proceedings to enforce that decree against persons whom it was alleged did not have the fear of the law in their minds, and who, although enjoined from so doing, were in a lawless manner proceeding to disregard the injunction of the court, and the rights it was intended to protect. It is in evidence before you that Norman W. Dodge, to-wit, on the 24th day

of February, 1890, presented to this court a petition for attachment against Luther A. Hall, one of the prisoners now on trial in this particular case. It was charged that Luther A. Hall had systematically violated and disregarded the injunction of the court, and had interfered with the rights of property it was designed to secure. Upon that petition a rule was issued against the prisoner Hall, and he was tried, and judgment rendered thereon. Subsequently to the date of this judgment, Norman W. Dodge, to-wit, on the 12th day of July, 1890, filed and presented another petition for attachment against Luther A. Hall, because of an alleged additional violation of the decree of this court heretofore mentioned, which violation was subsequent to the judgment as rendered on the first rule. The second petition was filed, the court took it under advisement, and it has been, since that time, a proceeding pending in this court. Thereafter, to-wit, on the — day of August, still another petition for attachment, because of an additional alleged violation of the before-mentioned decree, was forwarded to the presiding judge of this court, who was not then within its local jurisdiction. This petition was returned to the court without action on the first Monday in October of this year, and is likewise pending proceeding here. Now it is alleged in the indictment that Norman W. Dodge, a citizen of the United States, had the right, secured to him by the constitution and laws thereof, to apply for the rules enumerated for the purpose of enforcing obedience to the decree of a court of the United States in a matter in which he was interested; and it is further charged that the conspiracy for which the defendants are on trial was had to injure, oppress, threaten, and intimidate him because of his right to sue for and obtain the rule first issued, and because he was, at the time of the conspiracy, suing for the rules which were then pending. Now, gentlemen, this brings us to the announcement to you of a decision which the court has already pronounced upon a demurrer presented, argued, and considered in the outset of this trial; and the court charges you distinctly, as a matter of law, that Norman W. Dodge, being authorized by the constitution of the United States, and the laws made in pursuance thereof or dependent thereon, to apply to the court for proceedings in attachment as for contempt, to enforce obedience to a decree of the court in which he was interested, such authority conferred upon him a right secured to him by the constitution and laws of the United States, and, if the prisoners conspired to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of such right, the conspiracy would be complete, as defined by the statute, and would, on conviction, subject the perpetrators to its penalty.

We have now seen what is a conspiracy,—what is the particular conspiracy charged in the indictment; and you have been instructed that the latter conspiracy is one relative to which, as jurors of this, the circuit court of the United States, you have the power and the duty to make inquiry, and, on satisfactory proof of the truth of the charge, to find a verdict. This brings us to the inquiry, what is the nature or character of the proof necessary to support a charge of conspiracy? The

first cardinal rule of evidence to which it is my duty to call your attention upon this subject has already been referred to. It is this: After evidence showing the existence of the conspiracy is submitted to the jury, the acts of other conspirators may in all cases be given in evidence against each other, if these acts were done in pursuance of the common illegal object. It is also true that letters written and declarations made by other conspirators are admissible if they are among the things done in pursuance of the conspiracy. It is also true that declarations of the conspirators may be considered a part of the *res gestæ*,—that is, part of the things done in pursuance of the conspiracy,—although they may not be precisely concurrent with the act under trial. It is enough if they spring from it, and are made under circumstances which preclude the opportunity or idea of a fictitious device or after-thought. It is also true that, while the declarations of co-conspirators made after the enterprise has ended are not admissible against each other, yet, if they are made in pursuance of the enterprise, and tending to the accomplishment of the object for which the conspiracy was made and overt acts were performed, they are admissible. It is also true, gentlemen, that it is not necessary that the conspirators should meet together in order to constitute the unlawful combination. If they have a mutual understanding, and act through one or more individuals, as a consequence of such mutual understanding, the conspiracy may be complete, and the declarations of the co-conspirators, made while the criminal enterprise was pending, are admissible against each other. It is indeed, not necessary that all the conspirators should be acquainted even with each other. If they conspire to accomplish the illegal purpose through one common acquaintance or go-between, the conspiracy may be complete, and in that event the act of one conspirator is the act of all. You will perceive that a conspiracy is a joint offense, and you will understand that, if several persons jointly conspire to commit a crime, as each man is acting through all the others, or as all are acting equally through one, the degree of guilt is equal,—the guilt is equally distributed,—and each man is not only equally chargeable with all the guilt, but the law declares that the act of his co-conspirator is his act. He loses his individuality, and becomes identified with the crime with which, and the criminal with whom, he is associated. From the very nature of the crime of conspiracy, it is almost invariably secret in its origin. Naturally every precaution is taken when several deliberately unite to commit a crime so injurious to the public welfare. It is rarely, therefore, the case that there is an actual witness to the unlawful combination itself, or to the circumstances attending its origin. It is peculiarly, therefore, a crime where the evidence of motive and of circumstances are valuable, as indicating the animating cause of the unlawful combination and the unlawful agreement itself. It is not required, therefore, that the conspiracy or the act of conspiring need be proved by direct testimony. It is indeed competent to show the conspiracy by showing disconnected overt acts, where the proof also shows that the conspirators were thrown together, or acted through a common medium, and had a common interest in promoting the object of the conspiracy.

As I have said in another place, a common design is the essence of the charge of conspiracy, and this is made to appear when the parties steadily pursue the same object when acting separately or together, by common or different means, all leading to the same unlawful result. When they do so act with a common unlawful design, the principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is that by the act of conspiring together the conspirators have jointly assumed to themselves as a body the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by one in furtherance of that design a part of the *res gestæ*, and therefore the act of all. It is always important in a charge of conspiracy to show that the alleged conspirators were known intimately to each other, or that they had a common interest in the subject with reference to which the conspiracy was formed; that they were seen conversing together or conferring together. It would be important, also, if it should appear that their intimacy had been criminal and confidential in its character. It is rarely the case that one of the persons engaged in a conspiracy will consent to become a witness to the material fact of the crime. Whenever such person does so consent, if his testimony is in itself reasonable and credible, and if it is corroborated by other evidence as to the material features of the narration, such testimony may become of the most important and satisfactory character. Of course, in a charge of conspiracy, as in every other criminal charge, the crime must be proven as laid in the indictment; but it is only necessary to prove material allegations. Thus, if it appear that a particular motive for the conspiracy is alleged in the indictment, if it sufficiently appear from the evidence, and the jury will be justified in finding that such motives did really exist, it will not matter if the conspirators had additional motives other than that the indictment describes. It will be sufficient for the purpose of the indictment if the motive which it alleges is proven, although the conspirators may possibly or probably have additional motives. The crime of conspiracy, like any other crime, must be shown to the satisfaction of the jury, and beyond a reasonable doubt. When I say "to the satisfaction of the jury," I do not mean to imply that the jury has the right to demand from the government absolute and unerring demonstration, mathematical in its accuracy. Proof of this character is rarely attainable in human investigations, disconnected with the exact sciences. All that the law requires is that the jury shall be morally and reasonably satisfied of the guilt of the accused. If, on consideration of all the evidence of this, as of any other crime, the juror can say on his oath, "I am satisfied that the defendants did the criminal act with which they are charged, and I have no reasonable doubt about it," a conviction will be justified, and all the purposes of a legal investigation met. If, however, upon a fair consideration of all the evidence, the juror is not satisfied of the truth of the charge, and doubts it upon grounds for which he can give a good reason, depending on the evidence, or the want of evidence, the prisoner is entitled to the benefit of that

doubt, and to his acquittal. It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; and, where that proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence. All I have said upon the subject of the degree of satisfaction necessary in a criminal trial, upon reasonable doubt, the presumption of innocence, and explanations of circumstantial evidence consistent with innocence, is as applicable to the crime of murder charged in the indictment as an overt act committed in pursuance of the conspiracy, as to the conspiracy itself. I trust, gentlemen, that you will be enabled to bear in mind all of these general doctrines of the law of conspiracy, and these rules of evidence governing its proof. They will be of great service to you when you come to examine the evidence with reference to the law. It is not to be disputed that the topics are somewhat unusual to the average criminal trial, but courts and juries must rise to the exigency of the responsibilities upon them, and you must, in the discharge of your duty, endeavor to bear in mind, as far as may be possible, the rules which the court has mentioned, and which it anxiously trusts will serve you to ascertain the truth.

Having considered the character of proof usual in cases of conspiracy, we will now advance to the consideration of the proof offered in this particular case. At this point the court will remind you that it is the duty of a judge in a court of the United States to sum up the evidence for the assistance of the jury. This is not done, as it is sometimes said, to usurp by the court the province and prerogatives of the jury; for there is nothing which the court can say which relieves the jury of the duty of finding the facts for themselves. Now, gentlemen, with the purpose to aid you in the ascertainment of truth, but in no sense to control you, the court will call your attention to what appears to be the more salient and important portions of the testimony which has been submitted to you. It is in proof that on the night of the 7th of October of last year, (1890,) Capt. John C. Forsyth was sitting with his family (his wife and children) at the supper table in his home at Normandale, in this district. I allude to the testimony of his daughter, Miss Nellie Forsyth, a young lady apparently some 16 or 17 years of age, who appeared as a witness. Capt. Forsyth, after finishing his evening meal, rose from his table, and, remarking to his wife that he must go to Macon the next day to attend court, left the supper room, and went into his sitting-room, leaving his family at the table. In a few moments, Miss Nellie testified, they heard the noise, by which the court understood her to mean the report of the gun. She heard her father faintly call, "Tell mamma to come," and she and her mother ran to him. When she saw him, he was sitting in his chair, with his eyes closed, and she first thought that he was asleep; but in an instant she saw the blood on the side of his face, and then the wound in the back of his head. Her mother brought water, and tried to staunch the bleeding, but, after a few uncertain movements

of his hand, the dying man fell forward from his chair, and, living in a state of utter unconsciousness for two or three hours, breathed his last. Miss Nellie testified that the room was full of smoke. Her father had been shot through the glass of the open window. Other witnesses testified in a manner to make plain to the jury the incidents of the assassination of Capt. Forsyth. It appeared from this testimony that one of the blinds to the window opening on the front veranda had not been closed. The shot had been fired through the heavy plate glass of the window by the person standing on the veranda. The gun was loaded with buckshot. Buckshot were found in the wound in the head, and some had been driven through into the mouth of the wounded man. The deadly charge from the gun struck the victim on the back of the head and on the left side, and, according to the testimony of Dr. Montgomery, the physician, had been driven through the brain. The charge seemed to have been a very large one. It appeared from the testimony of Mr. Curry and another witness that there were several tracks, all made by one man, on the soft ground of the flower-garden in front of the house. These tracks were made by a man apparently in his socks. He did not have on shoes, and the witness thought he was not entirely barefooted. On the next morning a party took up the trail and followed it for several miles. It had been raining the evening before, and, according to the testimony of Charley Gibbs, they followed it without difficulty. The witness joined the party about a quarter of a mile from Forsyth's house, and followed it for five miles on the tram-road. At first there was but one track, but a short distance further on, another track came in from the direction of an old shanty on the left-hand side. This track had a shoe on, and, having joined the track which had been trailed from Capt. Forsyth's, the tracks were traced together a short distance, where it was evident, from the sign, that the party who came in from the direction of the shanty sat down on the tram-road and pulled off his shoes. The tracks were then followed some five miles, to the neighborhood of the house of the Widow Gillis, a near neighbor to the witness Lem Burch, to whom reference will presently be made. The testimony of Charley Gibbs was not questioned or contradicted in any manner. It does not appear from the evidence that there were any indications as to the identity of the guilty parties on the day after the killing, in the knowledge of the friends of Capt. Forsyth. Some time after the killing, to-wit, on the — day of November, 1890, as we learn from the testimony of Mr. Walter B. Hill, a member of the bar, who is the general counsel for Mr. Norman W. Dodge, a Mr. J. L. Bohanon came to him in Macon, and made certain important disclosures which gave the clue upon which the investigations were made which led up to the arrest of the defendants, the indictment by the grand jury, and the trial in which we are now engaged. Bohanon himself was introduced as a witness, and testified that he was down in Telfair county at the time of the death of Capt. Forsyth. He was engaged in the saw-mill business with Wright Lancaster, one of the prisoners. His home was in Pulaski county, and he had a mill near Hawkinsville; but, getting out of timber, and looking

for a location of the mill, finding that Lancaster wanted a partner, the witness sold his mill near Hawkinsville, and went into business with Lancaster. This was about the last of July. Lancaster informed the witness that he had about 20 lots of timber, and could control a great deal more. The witness testified that after the partnership was formed, and after Lancaster got cut, he told Bohanan to take his mules and get his brother's wagon, (Lancaster's brother,) and move one of the defendants, Moore, on certain lands which Lancaster stated he had bought from a Mr. Bullard. He moved Moore to the Bullard land, or rather Moore moved himself. The witness testified also as to a transaction between himself and Burch relative to the lease of certain lots of land from Burch. Burch asked him \$600 a lot, and wanted cash. John Lancaster, another prisoner, told witness to let Wright make the trade. He knew all about it, and could make it much cheaper. Wright told him where Burch got the lands from, and how. Wright made the trade, and brought the lease and put it in witness' trunk, and it stayed there. Wright stated that he knew how Burch got his land,—how he got all of the lots; that he could do more with him, and could make a better trade than the witness. After witness got the lease, Burch saw him, and asked him if it was all right. Witness told him it was. Afterwards witness told him that he understood the Dodge Company was going to put him in jail for leasing that land. Burch said they would never live to put him in jail; that he had a rifle, and had been practicing with it, and that he would die at the breech of his gun before he would go to jail. It appears otherwise from the evidence that one of the lots which Burch leased to Bohanan and Lancaster had been conveyed to Burch by Wright Lancaster in a deed in evidence dated in 1888. It was one of the lots belonging to Norman W. Dodge, and was embraced in the decree perpetually enjoining Briggs, Hall, and Sleeper, their co-defendants' agents and confederates, from any interference therewith. It is also in evidence that a copy of that decree had been read at Burch's house by Tom Curry, one of the agents of the Dodge Company. The Bullard lands, on which Moore was moved, were also, in whole or in part, embraced in that decree, and were the property of Norman W. Dodge. The witness testified that he went over and lived a short time with Moore on the Bullard lands. On the morning of the 8th of October the witness testified that he was in the commissary at the mill, and he heard somebody out of doors say that Capt. Forsyth was dead. While he was there he states that Wright Lancaster came and put his hands on both sides of the door, and looked in, and said that Capt. Forsyth was dead, and stayed there about a minute. The witness was struck by the expression on his face; thought of it afterwards, and stated that he never would forget it. That day or the next Lem Burch came there, and was very much excited, talking about Capt. Forsyth's death, and asked the witness if he was not scared. The witness told him that he was not, and Burch said, "You had better be." Burch stated to witness:

" 'There is a suspicion resting right here.' * * * I said: 'What do you mean by this?' He said: 'Right around this mill;' and he said: 'The Dodge

Company has offered ten thousand dollars reward [I now quote from the stenographic report of the testimony] for the murderer of Capt. Forsyth, and they have got ten of Pinkerton's men here.' I said: 'Where?' And he said: 'Right around this mill;' and I says, 'Why,' I says, 'I would like to see some of them.' I says, 'As far as that is concerned, Wright Lancaster—I just judged from the way he talked'—I says, 'Wright Lancaster slept in the room with me last night. I know he has nothing to do with it.' He says: 'Well, Wright Lancaster went from Milan to Chauncey with Hall the day he made that speech,' and he says, 'Wright ought never to have done that; that is where he played the mischief,—ruined everything.' Burch was so much excited I suspected him myself as being the murderer of Capt. Forsyth, and I so stated to, I think, Mr. Moore. He told me that if Burch went on in this way people would think it was him. *Question.* You so stated to Mr. Moore? *Answer.* Yes, sir; and I might have to others. *Mr. Erwin.* *Q.* You went to see Mr. Honson in reference to those lots I speak of, Mr. Bohanon,—in reference to these Bullard lots. Now did you make any visit to Mr. Honson with Mr. Moore, and, if so, state what that was,—the object of the visit. *A.* I thought the trouble was between Honson and Lancaster and myself. I told Wright that I would go up and buy Honson out, mill and all, and get rid of him; then we could go ahead with the timbers. *Q.* Timbers on these lots that you refer to? *A.* Yes, sir. Honson claimed that he had bought them from Bullard, and I thought all I had to do was to buy Honson out; and my son wanted to put up a shingle-mill, and Mr. Moore and myself went up there to see Mr. Honson, if I could make a trade with him. I couldn't make a trade with him. He asked me too much for his mill, and besides he said they were trying to bulldoze him, and I thought he insinuated that I was trying to bulldoze him, and I told him I was not. I merely wanted to buy out his mill, to settle the difficulty between him and Wright Lancaster. *Q.* Did you and Moore start back from that visit? *A.* We came back together. *Q.* State how the conversation, if any, occurred between you and Moore on that visit. *A.* Coming on back, sir, I felt embarrassed against the Dodge Company somewhat. I thought they were trying to run over those people down there, and, from what I heard, that I gathered—*Mr. Dessau.* I don't think that is a proper statement for him to make. *By the Court.* Never mind the motive which led him to say that; just tell what Moore said. *A.* I was talking about the killing of Renew, and Mr. Moore told me we better let the suspicion go on like it was,—let them think Renew was the man that killed Capt. Forsyth, and asked me if I knew who killed Capt. Forsyth. I told him I certainly did not; and then he told me all about it. *Q.* You say he stated all about it to you? Tell us what Moore did state to you. *A.* Mr. Moore told me that a negro by the name of Rich Lowry—he didn't give his given name—killed Capt. Forsyth. He said Charley Clemens and Lowry were the men that did it; that they had been taken care of by Mr. Burch for several days,—he didn't know how many days,—and that Burch had them and fed them there until they got a chance to kill him; and he said the dogs were on the wrong track; that these men killed him, and went over across the railroad, over into Montgomery county; and I said: 'Mr. Moore, who all knows about this?' and he mentioned Wright Lancaster, John Lancaster, Clemens, and Lowry,—they all knew about it,—and Burch; and he said: 'Burch asked me if it would do to tell you [witness] about it, and I told him I thought it would.' *Q.* I wanted to ask you whether or not they knew all about it before the killing of Capt. Forsyth? *A.* Yes, sir. *Q.* And whether or not the statements you were just about to make—what time was that made? *A.* I don't know when Burch asked him that. He said Burch asked him if it would do to tell me, and he told Burch he thought it would, and he did tell me. I asked him not to tell anybody that he told me. He didn't ask me not to tell it. I asked

Mr. Moore not to tell anybody that he told me. He came to me the next day, and told me that the dogs were right as far as Burch's; that those parties did go as far as Burch's, and the dogs were on the right track that far, and he said he was not certain but Henry Lancaster wasn't with them, but he didn't know. I think, sir, that is about the conversation that took place between Mr. Moore on that direct line. Q. Did Mr. Moore tell you—Who did he tell you by name,—persons who were concerned in the killing? A. Yes, sir; I stated that a while ago. I asked him who knew about it, and he told me the names of the parties. Q. Was the extent of it just simply that they knew of it? A. Yes, sir; they knew all about it. They had it done, was my understanding, sir. He went on to state further. I told him then: 'The way Burch is acting this thing will be found out.' He says: 'If it is, it won't implicate anybody but himself.' He says: 'These parties have not paid any money to it. Other parties have paid the money,—six hundred dollars. I asked him how much the negro got. He said he got six hundred dollars. Q. Do you know anything about any private consultation between any of these defendants and Mr. Burch before or after the killing of Capt. Forsyth? A. They had conversations every time they met, before and after. Q. Who had conversations? A. Wright and Henry, and every one of them. These men were all together there. They are all right around the mill. Q. Do you know anything about Mr. Wright Lancaster having gone over to Mr. Burch's house shortly after the killing of Capt. Forsyth? A. The same day that Burch was so excited at the mill I spoke to Wright about it myself. He went over to his house, and I heard that he was stricken with paralysis, and had sent for Wright and John to go over and see him. I don't know whether they went or not. I heard they did. The next day I asked Wright what was the matter with Burch, and he said, 'Nothing, only he is acting the fool.' *By Mr. Erwin.* I will ask you this, Mr. Bohannon: Did Mr. Moore tell you anything that the negro had stated—this Rich Lowry—about the killing? A. He said Rich Lowry said it was only a breakfast for him to kill Capt. Forsyth. Q. Did he tell you anything further in that connection about their general purpose? A. They were going to keep on until they stopped the Dodge business. Q. Can you recollect now about the language in that connection? A. They were going to kill them out; they were going to kill the Dodge Company out, until they went away. I went to Mr. Oberly, and took him off in a private room, and told him I knew who killed Capt. Forsyth, and I wanted to sell him my interest down there, and, if he would buy my interest down there, I would tell him the whole thing. He refused to do that; said he was not authorized to do it, and could not do it, but asked me if I would come to Macon with him. I told him I didn't have a cent in my pocket, and if he would pay my way to Macon I would come. He went on up to Mr. Hill's office, and I related the same thing to them; that I knew, and I wasn't able to lose what I had there, and if they would just buy me out, that I would put them into possession of all facts, and they could go ahead if they saw fit. They refused to do that. They said they had no authority; didn't want what I had; wouldn't hardly have it anyhow."

The witness then stated that he made the disclosures which afforded the clew to the theory of the prosecution. This concludes the direct examination of the witness Bohannon. He was also closely cross-examined, without, in the opinion of the court, inducing him to change his direct testimony in any material particular. It is true, however, that this witness had been very fiercely attacked in argument by the defendants' counsel upon two methods of attack looking to his discredit before the jury. The first of these is by attempted proof of statements

contradictory to his testimony under oath. One method of impeaching the testimony of the witness is by proof of contradictory statements in a matter material to the issue. The witness was asked if he did not, on the 18th of October, tell Tom Eason, between Helena and the Ocmulgee river, that "you didn't know of your own knowledge, or had no information, who was the murderer of Capt. Forsyth." The witness answered that he didn't know, and had no recollection, of any such statements. Eason testified for the defense that the witness did say, in substance, what the question imported. It is for the jury to say whether this is sufficient to discredit the witness. The amount of credit to be given a witness is entirely a question for the jury; but it is proper for the jury to consider all the bearings of the facts in evidence before them, and, if they find that the relations between the Lancasters and Eason were close and intimate, they will do well to consider carefully whether a mere evasion of the question, the answer to which, if Bohannon's testimony is true, would impute a terrible crime to the friend of Eason, is a circumstance upon which they can afford to discredit the testimony of the witness. Another attempted contradiction is based upon a question alleged to have been propounded to the witness by one B. H. Frizzell. The witness was asked if he did not state to Frizzell, in substance, that he knew nothing that implicated the Lancasters. This was at the fair in October in this city. The witness replied that he did not say that, but he did tell Frizzell that he had taken out no affidavit against the Lancasters, and it does not appear that any such affidavits were made. Frizzell testified substantially that Bohannon told him that he knew nothing implicating Wright Lancaster. The jury should bear in mind, also, that Frizzell was a lawyer for Lancaster, and came here, according to his own testimony, in part to sound Bohannon. The witness was also asked if he did not say to Mr. W. J. Grace, a young attorney resident in this city, that there was some money in this matter; that witness and Grace could make it, and urged him to go down there, and see if they could not work up the case as detectives. The witness stated that he did not remember any such conversation, but might have talked with Mr. Grace about it. The court charges you upon this subject, if you find that there is a contradiction between the witness and W. J. Grace, it is not a matter upon which an impeachment can be based, because it is not material to the issue. He was also asked if he did not, in a conversation with Mr. M. T. Grace, say that he was up here helping to find out who killed Forsyth. The witness did not deny it. The court does not think this a ground of impeachment. A witness who is impeached by proof of contradictory statements may be sustained by proof of general good character, and the government in this case has offered proof of the general good character for truth and veracity of J. L. Bohannon. Mr. W. W. Harrold, who lives at Eastman, in Dodge county, testified that he knew J. L. Bohannon; that his general character for truth and veracity is good; and that he would be obliged to believe him on his oath. Judge W. L. Grice, Col. George W. Jordan, Sr., Mr. Walker, and Dr. Fleetwood, Mr. Henry Waterman, and Mr. J. D. Bos-

tick testify with unanimity to the general good character for truth and veracity of the witness. These are citizens of the community in which he lives, and it is the province of the jury to determine what weight is to be given to their opinions of their acquaintance or neighbor. A witness is presumed to be truthful until the contrary is made to appear, and it is the duty of the jury to accept the testimony of a witness which is not in itself improbable, or which is not impeached in some of the methods indicated by the law. But, as I have said, the credibility of a witness is entirely for the jury. With reference to the attack made upon this witness upon the alleged ground that he has bartered his testimony in this case, the jury should bear in mind his evidence and the evidence of Mr. Hill, which is all the evidence on that subject, except the testimony of one of the defendants as to the value of the property he had at the mill. It is important, too, for the jury to inquire whether it be true that the witness felt obliged to relinquish possession of his property there at the mill, and, if so, to determine whether he did this upon imaginary grounds, or upon the ground he states, that he has been compelled to remain in Macon for his protection. If it be true that, shortly after the death of Forsyth, the witness suddenly left his place of business without any business reasons, and has remained away since that time, and if this was done before the arrest of the prisoners, and if it further appear that he left his property behind him in the possession of Wright Lancaster, it is a circumstance which may or may not be important, as the jury may or may not believe the motive which he assigns for it. If this was not his motive, why did he leave there, and why has he not returned? The jury will also bear in mind that, according to the testimony of Bohannon and Hill,—and that is all the testimony on this subject, as I have said, except a reference to a value of the property at the mill, taken there by Bohannon,—Bohannon declined to accept any reward, and only asked that a fair valuation be placed upon his property, if needful, by a disinterested party, and that Mr. Dodge buy it at the price so fixed. This even was not promised him. Nevertheless he gave the testimony which has been read to the jury. It is true he was assured that Dodge was a just man, with the natural inference that he would be protected from absolute loss. This is a fact for the jury to consider, and it is for them to say to what extent it would show an interest in Bohannon in his testimony with a view to its discredit. The main inquiry—the vital question—is, do the jury believe that Bohannon has told the truth? and, if they do, they are authorized to accept his testimony, notwithstanding there may be circumstances upon which it may be criticised, and notwithstanding that he may have talked idly or recklessly in the presence of strangers. Such conversations are always to be carefully scanned by the jury, their surrounding circumstances closely examined, before a jury will be authorized to impute perjury thereon. It is proper for the court to direct the attention of the jury to the fact that Bohannon's statement was made before any arrest was made. It is also true that after the arrest of the prisoners one of them made a statement which, while it went further than Bohannon's,

confirmed the disclosures which he made in nearly every important particular. I allude to the statement and subsequent testimony of Lem Burch, one of the parties indicted, who has been permitted to become, under an ancient and salutary practice, existing both in this and the mother country, by which one of a number of persons charged with crime is permitted to become a witness for the government, to supply evidence of guilt which could not otherwise be procured. It does not appear from the evidence that Burch made any confession before he was arrested, and until Bohannon had told the story, and it does not appear that Burch knew what Bohannon had told; and yet the testimony of Burch tallies in large measure with the original disclosures of Bohannon. This is also true of the confession of Clemens. In many material particulars it corroborates Bohannon, and yet, when Clemens made his confession, it does not appear that he knew anything Bohannon had stated, although it was told him that Burch had made a statement. Now the confession of Clemens is not evidence except as against himself; but if the jury, in the absence of any proof of collusion, can discover in the confession of Clemens indications which tend to show that the original statements of Bohannon are true, while the confession is not direct proof to show the guilt of the other prisoners, it may be it is proof, in that event, to sustain the credibility of Bohannon. If it be true, also, that all the subsequent developments of the investigations tend to verify and sustain the original disclosures of Bohannon, as reported to him by Moore, and as he himself observed in the transactions about the mill, this is important for the consideration of the jury.

In estimating the amount of credit to be given to the testimony of Bohannon, you are not authorized, gentlemen, to impute perjury to him unless you feel it your duty so to do. As I have said, until he is contradicted in matters material to the issue, or otherwise impeached in some manner pointed out by the law, he is presumed to tell the truth. In weighing this testimony, to ascertain its value, it is further your duty to consider all the other evidence in the case as relating to it, and whether it contradicts or supports it. Your first inquiry, of course, will be, what motive would Bohannon have to swear falsely, especially against Hall and the Lancasters, Moore, and Knight. Had he ever quarreled with the Lancasters or either of the other defendants? Were his relations cordial or otherwise with the prisoners? If you find a motive for perjury in the evidence, it should go to his discredit; but, if you fail to perceive such a motive, it would be equally strong in favor of his credit. It is urged in argument that he testified to procure a reward, but you will remember, gentlemen, on that subject, of course, as is your duty, the testimony of Mr. Hill that he stated that he would not take a reward, but only desired to be reimbursed what he felt he must lose if he gave his testimony. Even had he testified for a reward, however, that in itself would not necessarily impeach him, but would be a circumstance that the jury should properly estimate as a part of his testimony. If Bohannon really had property interest there which he felt that he would lose as a result of his disclosures, there is nothing illegal in his stipulation, or rather in

his attempt to obtain a stipulation, before giving his testimony, that he should be protected from loss. The *bona fides* and genuineness of his conduct is a question for the jury, as likewise is the amount of credit to be given him. If you find from the evidence that, as a result of Bohannon's disclosures, implicating nine men in this conspiracy, proceedings were instituted which resulted in the flight of two of them and the confessions of two others, this fact, in itself, is a circumstance which tends to corroborate the truth of his statement to the extent that it is true in part, and it would be then for the jury to say whether it is true in its entirety. If you find from the evidence that there was no collusion between Bohannon and Burch and Clemens, and that each made disclosures at different times, without conferring with each other, and without probability that they did, or could have conferred, and if you further find that their disclosures were substantially the same, while the testimony of the two accomplices could not corroborate each other, and while the confession of Clemens cannot be considered as evidence against the other prisoners, yet the unanimity of statements of the three, made without the opportunity of conference, or without proof that they did confer, is a fact which tends to corroborate the three statements so made. I mean to say that the unanimity, if it exists without a conference, if none was had between these three men, may give in the minds of the jury mutual and interchangeable support, each to the others.

Let us now, gentlemen, advance to the consideration of Burch's testimony, and determine, if you can, what is the effect it should legally and properly have in this investigation. You will remember, gentlemen, the circumstances which attended the hearing of this testimony. The witness was desperately ill, and the court, from a desire to insure a thorough and certain investigation of the serious case on trial, went with you to his bedside, and, under circumstances of painful personal inconvenience to court, jury, and counsel, heard this testimony. It was reported by the official stenographer, and is before you. You must, however, as I have said before, remember this testimony, and make your finding with reference to it for yourselves. What I say or read about it is simply to assist you as far as I can. You will have the lease from Burch to Bohannon and Lancaster out with you. You will remember that Burch testified that his titles were fraudulent; that he got them from Andrew Renew and from Luke Williams. One lot he got from Lancaster. The witness testified he had the deeds of these lots made, some to his son, another to his daughter, and another to his wife, to keep from getting into the United States court. As to lot 58, which he got from Wright Lancaster, he paid him \$25 for it. He testified that Renew had no interest in the lots, the titles to which, the witness got from him. He paid Renew \$75 for the title, though he knew he had no interest in the lands. He testified that Wright Lancaster told him that he had the best right to the timber. I now read to you from the stenographic report of the evidence:

"That he would give me [Burch] a start in that business, he said, and I told him I would see about it, and told him I would see Col. Hall, or some-

body, about it. He contended that he would give me one thousand dollars for it, and that was more than I could get,—than anybody else would give me. *Question.* Who was that talking, Wright Lancaster? *Answer.* Yes, sir. He would give me one thousand dollars for it. He said he didn't ask them no odds. I told him they could enjoin him and stop him, and he said they would not do it. He went on and spoke about having Forsyth killed, and said trouble had been. The land trouble down there would have been settled if Billy Clemens had not have got killed; that he would have had Billy Clemens to kill him. *Q.* Would have had Billy Clemens to kill who? *A.* Forsyth. He said that it would have been done; that they were ruining the country, and so on, and said that they knew parties they could get to do it, and he said that he knew who he could get to work at it, and they said, 'What would he do it for?' *Q.* What did they say they would do it for? *A.* He said that he could have it done for six hundred dollars. In the mean time I went up to Eastman, and saw Col. Hall about the titles. *Q.* What time was that, Mr. Burch? *A.* I think it was when he was at home on bond. *Q.* The time he was let out of jail for ten days? *A.* He said that— *By the Court.* Who said? *Witness.* Col. Hall. When I asked him about the land business, he said that 'stick out everybody; everybody stick out;' that he expected some of them would be killed. *Q.* Some of who? *A.* Of them,—the company; and then he spoke in person of Forsyth, and said he would give one hundred dollars. *Q.* One hundred dollars for what? *A.* For his being killed. He wanted to know how they were doing down there, and so on, and I told him, and then I saw Wright after that, and he said to work it up, too, and I told him I was afraid I would get into trouble; that I wanted my lease back, and he said that he would have Forsyth killed, and this here Rich Lowry and Charley Clemens come there to my place to kill him, and stayed there. *Q.* How did they come? *A.* Well, they come to the plum orchard. The first I knew of it, John Lancaster brought my buggy to me, and told me Charles Clemens wanted to see me, and I went down to the plum orchard where he was, and he was knocking along down there, and told me his business, and told me that Wright had sent him; and he knocked around there a day or two, and I seen Rich, and Rich told me that he had—and he said—told me that he would help me to feed him, and told me to kill mutton when I wanted to, and he would help me to feed him. *By the Court.* Who told you that? *A.* Wright Lancaster. *Q.* Help feed who? *A.* Rich Lowry and these boys. *By Mr. Erwin.* Told you to kill mutton whenever you wanted to? *A.* Yes, sir. *Q.* To help feed them? *A.* Yes, sir. *Q.* How long did these men, this Rich Herring, *alias* Rich Lowry, and Charley Clemens stay at your place before the killing of Forsyth actually occurred? *A.* About three weeks. *Q.* About three weeks? *A.* I think it was about three weeks. *Q.* During that time, Mr. Burch, did Wright Lancaster come to your house? *A.* He come there one time. *Q.* Did he stay all night at your house,—one night or not? *A.* If my memory serves me right, he did. *By Mr. Erwin.* Mr. Burch, do you know anything about how Lowry, or whether or not this Rich Lowry, was occupied this year at any time during these three weeks he was stopping at your place? *A.* I don't think he was."

When asked to tell the circumstances of the murder, the witness said:

"Well, I don't know of nothing that happened at all, only they just take their guns. *Q.* Who took their guns? *A.* Charley Clemens and Rich Lowry. *Q.* Did they go off for any purpose that evening? Do you know whether they stated they were going for any purpose? *A.* Well, I knowed that they were going there, of course. I weren't there, I don't think, when they left. *Q.* You were there not long before they did return? *A.* Yes, sir; the dogs woke me up. *Q.* Well, did Rich Lowry make any statement to you as to what they

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had done when they come back that night? A. They both did. Rich Lowry said that he had killed Forsyth. Q. Rich Lowry told you he had killed Forsyth? A. Yes, sir. Q. What did Charley Clemens say about it? A. He said that he did. Q. Said who did? A. Said Rich Lowry did. Rich Lowry said himself he did. Q. Mr. Burch, do you know whether or not there were any inducements offered to Lowry and Clemens to induce them to kill Capt. Forsyth? A. Yes, sir. Q. What was that inducement offered to them? A. Six hundred dollars. Q. Well, who was to pay the six hundred dollars? A. Well, I paid two hundred dollars, or something over two hundred dollars, and Col. Hall was to pay one hundred dollars, and I let him have a pistol worth about—it cost about—sixteen dollars, I reckon. *By the Court.* Let who have it? A. The negro. Q. Lowry? A. Yes, sir. Q. You answered who actually paid the money. My question was whether or not there was any promise to pay them before the killing took place? If so, who made the promise? Who was to have paid the money which was paid,—the six hundred dollars? A. They were to pay it to me, and I was to pay it to him. *By the Court.* No matter who you paid, who paid you? A. Well, Col. Hall was to pay one hundred dollars and Wright Lancaster was to pay two hundred dollars, and I was to pay two hundred dollars, and no more. Louis Knight was to pay all he could. He never paid anything, that I know of. If he did, didn't know it. *By Mr. Erwin.* Q. Mr. Burch, commencing with Wright Lancaster, how did you know that he was to pay you two hundred dollars to pay to the man that killed Capt. Forsyth? A. Well, he told me that he would, and was gwine on snorting around because they hadn't killed him before they did. He said that he had money,—money that he was saving for that purpose,—and then when it was done he had no money, nor he wouldn't pay none. Q. Did he give you any reason for not paying the money after the murder was committed? Did you go to him for the money? A. Yes, sir. *By the Court.* Mr. District Attorney, how did he know that Mr. Hall was to pay one hundred dollars, and how does he know that Mr. Knight was to pay anything. You had better show the conspiracy, if you can show it. *By Mr. Erwin.* Well, Mr. Burch, how did you know that Mr. Hall—Mr. Luther A. Hall—was to pay one hundred dollars to it? A. He told me he would. Q. Where were you when he told you that? A. I was in his office. Q. Where? A. Eastman. Q. At this same time? A. You mean the time when he was out on bond? Yes, sir. Q. Well, I will ask you, Mr. Burch, whether or not Mr. Hall at any time after that time he was out on bond, either by word of mouth or by letter, or otherwise, reminded you of what he had said at that time? A. Yes, sir. Q. How long was it? A. He written me two letters. Q. Wrote you two letters? A. Yes, sir. Q. Where were these letters from? A. They were from Savannah. Q. Was that after the ten days he was out on bond? A. Yes, sir. Q. Mr. Burch, I will ask you whether you have got these letters? A. I got them. Q. Do you know what has become of them? A. No, sir; they were destroyed around there I reckon. I never save no letters. *By Mr. Erwin.* I will state in my place, your honor, that I expect to prove that matter of loss of the letters, and, under the circumstances, I will ask that we proceed with the examination, and make that proof afterwards. *By the Court.* Very well, go on. Q. Now, Mr. Burch, I will ask you what did Mr. Hall say in these letters? A. He written that if matters wasn't attended to before he got back he would have it done himself. Q. Was there any other matter between you and him that was to be attended to other than what you have stated about the killing of Forsyth? A. No, sir. Q. That is all there was to be attended to? A. Yes, sir. Q. Did anybody read that letter that you got? A. My daughter did. Q. Your daughter, Miss Sabie Burch? A. Yes, sir. Q. Did he state anything else, do you recollect, in either of these letters about the land troubles

in general? A. No, sir; I don't think he did. Q. Anything about giving any message to other people? A. No, sir. Q. It was a short letter, then? A. Yes, sir. Q. There were two letters you say you got on the same subject? A. Yes, sir. Q. Well, now in regard to Louis Knight. You said that Wright Lancaster told you to see Louis Knight about what he would contribute towards it? A. Yes, sir. Q. You said that you did see Louis Knight at Milan. I will ask you when you saw him there? A. I could not tell you the date I saw him there. It was a month or more ago. I can't remember the time I saw him there. Q. How long before the killing of Capt. Forsyth, do you suppose? A. I suppose it was probably three weeks. Q. Did you tell Louis Knight that you wanted him to contribute to it? How was it? A. He just said he would do all he could. I knowed he would be able to do as much as any of them. Q. Did he tell you what he would do? that all he could towards— A. Yes, sir; of course, towards the killing of Forsyth. Q. Mr. Burch, I will go back again to that interview of yours with Wright Lancaster after the killing of Mr. Forsyth. You said you went to Wright Lancaster afterwards, and asked him for the money. A. Yes, sir. Q. And he would not pay anything? A. No, sir. Q. Now, did he give you any reason for not paying, or anything of that sort? A. Well, he said he would make that all right with Charley. He was on Charley's bond, and it would have to be paid some time, and he thought he could make that all right. Q. Charley who? A. Charley Clemens. Well, the negro had been sending me word that he would kill me if he didn't get it, and I had been down sick, and I weren't able to do anything. I didn't have no money, only as I could borrow it. I knew the negro would do it, or I thought it. I begun to beg him for the lease on the timber. I told him he could lease it. I told him I would pay it all myself rather than have that negro kill me and some of my folks, and he said that he didn't have it, and then I referred him to what he said about it, and he said he weren't going to pay; that he would make arrangements with Charley; and I says to him, I says: 'Wright, whenever you pass my place, and see my little orphan children and my grave,' I says, 'you can say you are the cause of it;' and he says: 'You are a damn liar;' and he says: 'If you say it again I will pick up a scantling and break your head.' Q. You mean that you told him that you would be the cause of it? A. That he would be the cause of it. I says: 'Whenever you pass my house, and see my little orphan children and my grave,'—that was myself who I was alluding to,—'you can say that you are the cause of it.' And he says, 'You are a damn liar, and if you say it again I will pick up a scantling and break your head.' Q. Mr. Burch, did you have any sickness a day or two after Forsyth's murder? A. I had a stroke of paralysis on Friday. I believe it—I believe it was on Friday. Q. Capt. Forsyth had been killed on the Tuesday previous? A. I believe he had. Q. While you were sick was the time that Mr. Wright Lancaster came over and talked with you? A. No, sir; he did not. Q. Did he come there later? A. He never came there but one time, and that was in about two weeks. He come there one Sunday evening in about two weeks after I had got sick. Q. Now, Mr. Burch, after you had that stroke of paralysis— But before I leave that, do you recollect what time of night it was that Clemens and Lowry got back to your house when they announced that Lowry had killed Forsyth? A. I suppose about eleven o'clock at night. I would say probably about eleven, as near as I can guess. Q. Did they sleep all night in your house? A. No, sir. Q. Did they get up and leave, or how did they do? A. Yes, sir; they left. Q. Well, what happened about their leaving,—what was said? A. Well, I said I told them I was going down the next morning to hunt a beef, and would be on the road down there agin that old shack, and I would see them, and they told me to carry them some rations, and I carried them some rations, and they told me they would stay

there in that old shanty that day. Q. Well, did you see them the next morning? A. Yes, sir. Q. Did you start off with anybody when you saw them there? Was there anybody with you? A. Wyly was with me. Q. Wyly, your son? A. Yes, sir. Q. Did you see them near Turnpike creek? A. They were, I reckon, about—probably about—a quarter of a mile from the Turnpike creek. Q. Well, now, Mr. Burch, was there any money paid to them that morning? A. Yes, sir. Q. How much? A. Well, I am not hardly prepared to tell you exactly; it seems to me like it was that morning. No, sir; no, sir; it was that evening it was paid to them. Q. How much? A. It seems to me like it was thirty dollars. Q. Well, what was said about paying this, if anything,—about the full amount promised? A. He said that they wanted it right away. Q. Well, what further was said? Was anything said about paying the balance? A. No, sir. Well, I don't know as there was right then anything said about the trade, because I intended to see them myself. Q. Was there anything said that morning when you did see them yourself? A. No, sir; there was nothing said. I just handed them the rations, and went on. Q. Was there anything as to their movements that morning,—what they would do with themselves? A. They said that they would stay there in that old shack that day, until after they found out how everything was. As soon as they found out how everything was, they would go down to Charley's father's. Q. Well, Mr. Burch, I will ask you right there, before I forget it, how far does this Widow McGillis live from you? A. About a mile. Q. Did either of those men tell you about how they came back after the murder of Forsyth? What directions were given? A. No, sir; not that night. I have no recollection of it. Q. How far do you live from Normandale? A. We have to go there. We go straight through the woods. It is about six miles. Q. Where did you get the twenty or thirty dollars, that you paid to them,—the first thirty? A. I borrowed twenty of it from Henry Lancaster. I had the other myself. Q. Now, Mr. Burch, after you had taken sick, and the balance of that money was not paid, did you send any part of that money to them that was promised to them in the arrangements? A. I did not. I went off and borrowed. I borrowed, I believe, it was one hundred dollars. I borrowed one hundred dollars from old man Jase Lancaster, or Henry did. It was Henry Lancaster who borrowed it for me. Q. You didn't know this was from Jase Lancaster except what Henry told you? A. No, sir; but I knew he did as good as if I had seen it. Q. You borrowed it through Henry Lancaster? A. Yes, sir; from Jase Lancaster. The poor old fellow lacked a heap of knowing what it was for. Q. Did you make any disposition of that one hundred dollars? A. Before I borrowed that I went up and tried to get some money in Hawkinsville. I could not get none up there, and I got Andy Cadwell to go up there with me, so I came back to Eastman, and Andy borrowed a hundred dollars from Judge Roberts for me. Q. From Judge Roberts? A. Yes, sir. Q. Now, Mr. Burch, what time of day or night did you and Andrew Cadwell reach Eastman? A. Well, the train was, I think, two or three hours late. As soon as we got to Eastman, I think it was probably two hours before day. Q. Two hours before day? A. Yes, sir. Q. Where did you and Mr. Cadwell go when you got to Eastman? A. We went down to a blind tiger there; I reckon it was a blind tiger. Q. Where is this place? A. I could not tell you; it was down there where they got all them blind tigers. We went down there to get something to drink, and we met up with Sam Rogers, and I told them— Q. Met up with Sam Rogers? A. Yes, sir. I told him I was going off, and he could stay around there with Sam until I got back. I slipped off then, and went up to Col. Hall's to get the money. Q. Where did you go. Was it at Col. Hall's office or house? A. It was at his house. Q. At his house? A. Yes, sir. Q. What time was it that you went? Was that before day? A. Yes,

sir. Q. Well, now, what transpired when you went to Mr. Hall's house? A. I went to the door, and he asked what it was, and I told him, and he come down. Q. You told him, and he come down? A. Yes, sir. I told him who it was, and he come down. Q. Come down where? A. Into the sitting-room. Q. Come down into the sitting-room? A. Yes, sir. Q. Well, was it light? A. No, sir; it was an hour until day or more. Q. Well, was it dark when he came in? A. Yes, sir. Well, he had a lamp. Q. Well, was anybody in the sitting-room with you and him? A. No, sir. Q. You were by yourselves? A. Yes, sir. Q. Now, Mr. Burch, you said you got the money from him there? A. Yes, sir. Q. How much was it? A. One hundred dollars. Q. Did Mr. Hall fully understand for what that money was being given then? A. Certainly he did; yes, sir. Q. Did he talk about it? What did he say about it then? A. Well, Mr. Burch, you say— Q. Tell me what Mr. Hall said about it at that time? Did he make any statements in reference to the killing of Mr. Forsyth? If so, tell me what it was in reference to the Dodge company at that time or the Dodges. A. Well, he seemed to be very much displeased, and said that we ought to burn the trestles and bridges and run them out of there, and make them leave the country. Q. He seemed to be very much displeased or pleased? A. Displeased. Q. Because Forsyth was killed? A. Because it looked like he had to pay the money, and they weren't gone. He seemed to be very much displeased about having to pay the money, and there was not more done. Q. Very much displeased at having to pay the money and there was not more done? A. Yes, sir. Q. And they didn't do what? A. They didn't burn the trestles and run them out from there. Q. Burn the trestles and run them out? A. Yes, sir. Q. It was the morning of the circus you got the money from Mr. Hall? A. Yes, sir. Q. Now, then, you were there on the 16th or 17th of October, when the fair was there. Did you see Mr. Hall at that time in reference to the money? A. Yes, sir. Q. What conversation did you have at that time in reference to getting it? A. I told him— I asked him if he was ready to pay, and he said he weren't, and told me to meet him down at court on Monday or Tuesday—on Monday, and he would get it and pay it; and I went out to the river on Monday, and then I thought I would go down on Tuesday or Wednesday, when I got back, and I heard that court had adjourned. Q. Then you went back to Eastman on the 23d, or the day of the circus? A. Yes, sir. Q. Mr. Burch, we will leave Mr. Hall now, and go back again to Herring and Clemens. How did you send the one hundred dollars you got through Henry Lancaster from Mr.—old man Lancaster—Mr. Jase Lancaster? How did you get that money you say you paid to them? A. Henry carried it to them. Q. Henry Lancaster? A. Yes, sir. Q. How did you get the hundred dollars you got from Mr. Hall on the day of the circus,—that was the same day, I understand, that you and Andrew Cadwell borrowed one hundred dollars from Judge Roberts? A. Yes, sir. Q. How did you get that to them? A. Henry carried it. Q. As I understand you, there were two trips made by Henry to pay over that money? A. Yes, sir. *By the Court.* Did you tell Henry Lancaster where to go? A. They told him where they would meet him at. *By the Court.* Did you say they told him where they would meet him? A. Yes, sir. *By Mr. Erwin.* Did Henry tell you anything about it? A. They were to meet him on the Turnpike creek. Q. How did you find it out? A. Henry told me. Q. Mr. Burch, did Henry know about this—what was to be done—before it was done? A. I don't know whether he did or not. He came from the mill down there, and went off with Rich Lowry, and said—Henry said they went to show them the way to Normandale. Q. That he went to show them the way to Normandale? A. Yes, sir. Henry went with me, if my memory serves me right, when we made the first trip. I ain't positive; I think he did. Q. You didn't know for what purpose he was showing them the way?

A. Yes, sir. *By the Court.* What purpose? A. To kill Forsyth. *By Mr. Erwin.* Well, Henry was to come and report to you when he carried this money to Rich Lowry and Clemens, and came back. Did he make any report as to any conversation between them? A. He came back with this word, that they were going—that the negro was going—to kill me if it was not gotten up. Q. What was gotten up? A. The money. Q. What money? A. That was to be paid over by me to them for killing Forsyth."

You will observe, gentlemen, that Henry Lancaster is charged as a co-conspirator in this indictment. The proof is that he lives in Telfair county; that diligent efforts have been made to arrest him, and that he has so far escaped arrest. This is evidence which may tend to show his guilt, and may tend to corroborate Burch's story of his complicity with the crime. Burch also testified, on cross-examination, to the conversation with Bohannon, in which Bohannon told him that the Dodges would put him in jail, and he said:

"I knew that the way we were shaped up there—everything in the timber business—it would be a mighty easy matter to do it. *Question.* Easy matter to do what? *Answer.* To put us in jail.

He was also asked:

"Q. Did you see Louis Knight at any time after the murder of Capt. Forsyth? A. Yes, sir; I saw him at Milan one time. Yes, I saw him twice. I met him around opposite of Mrs. McGillis' one time hunting Sam Williams. I saw him at Milan one evening. Q. Well, did you talk to him about what he was to contribute to this,—about paying the amount for having murdered Forsyth? A. I did, that evening. Q. What did he say to it? A. Well, he was in such a fix with his eye, that it looked like he couldn't do nothing. He said he had lost his eye, and said he couldn't do anything. Q. Well, when Wright Lancaster and you agreed to take this part in the killing of Forsyth, what was the reason he gave why he wanted Forsyth killed? A. Who, Wright Lancaster? He wanted him killed, and thought it would break up the arrangement, and tear everything to pieces, and get him all the timber there was down there. Q. He thought if he didn't get Forsyth killed that Forsyth or his agents would be able to break up the arrangements with Bohannon and Lancaster, and wanted him killed about these lots of lands? A. It weren't only them. My lots weren't nothing. Q. To other lands? A. Yes, sir. Q. They wanted lands for the timber for their mill, was that it? A. Yes, sir; and they didn't have any, I don't think. Q. They didn't have timber for their mill, and, if they didn't kill Forsyth, he would keep them from getting it, did you say, was that it? A. I guess it was. Q. That's from the conversation he had with you. Was that what you gathered? A. Well, yes. I told you he said they were cutting and ruining the country. Q. By cutting all the timber to keep other people from getting it? A. By taking the lands that didn't belong to them. Q. This was to keep them from taking the lands, was it? A. Yes, sir. Q. Did you ever hear them say that they wanted him killed because of anything that any particular person had done? A. Not that I have any recollection of. Q. You don't recollect they ever said they wanted him killed because anybody had done anything? A. Not that I have any recollection of. Q. It was just a general idea. They wanted him killed to keep them from getting the lands they didn't believe belonged to them, is that it? A. Yes, sir. Q. Thinking about it now, as seriously as you can, that is as much of the reason as ever was given by any of them? A. Yes, sir. Q. You spoke about seeing Mr. Hall in the summer. Was it when he was at home, when let out from jail on ten days,—was that the time? A. Yes, sir.

Q. That was in Eastman, was it? A. Yes, sir. Q. You recollect who was present when you saw him? A. I think Elgin Young and E. F. Lee was present with me one time there. I think I saw him two or three or four times, I reckon, that evening when I was there. Q. There was a large number of people there when he came home, wasn't there? A. There was very few people there that evening. Q. But I forgot to ask you, though, when was it that Wright Lancaster stated this to you about the killing,—before Forsyth was killed? A. A great many more times than one. Q. Well, where? A. Well, pretty much everywhere I would see him. Q. It was a constant thing he talked about, was it? A. Yes, sir. He talked about it a great deal. Q. Talked about having Forsyth killed, and it was all because Dodges would get the lands, and he could not get them for his mill? A. Well, he thought that he had gotten into that business, and he thought if they got him snapped up he was gone. Q. Into what business? A. The timber business,—land and timber business. Q. Timber business? A. Yes, sir; land and timber business, where he was running his mill. Q. What do you mean by 'snapped up and was gone?' A. Taking him up and enjoining him. Q. When was the first time he ever said to you that he wanted you to take hold of the matter of having him killed? A. It was down there at his mill. He didn't say he wanted me—to have me take hold of it. He said he was going to have it done. He had two men to do it, and was going to have it done. Q. Well, when was the first time he ever asked you to have anything to do with it? A. It was along in August, I believe. It seems to me, as well as I recollect,—yes, it was behind his old commissary, where we was talking. He said that my place was an out-of-the-way place, where he could keep him concealed. Q. Said what was sort of an out-of-the-way place,—your house? A. Yes, sir. Q. Did he make a proposition to you that you were to take them to your house until they killed Forsyth? A. He said it would be best for them to go there, as they would not be seen there, and keep hid out there. Q. Yes, and you agreed to do it, did you? A. Yes, sir. Q. You agreed to do it at that time? A. No, sir; I didn't agree at that time. Q. At what time did you agree to do it? A. Well, he just sent them there, and Charley told me his business when he come, when he made the proposition that time,—that first time behind the commissary— Q. The time he made this proposition to you behind the commissary, how long did you and him talk together there? A. I suppose we stayed out there—out there on a log—I suppose we talked some fifteen minutes, probably longer. Q. You didn't tell him you wouldn't do it? A. No, sir. Q. When you parted, it was understood that you were going to do it? A. He said he was going to send them. Q. That was in August, you say? A. It seems to me that it was about the first of August. Q. Tell me where it was you first had a conversation with Louis Knight about this matter? A. At Milan. Q. I believe you said it was at Milan; that is where you had a talk with him? A. I talked with him at Milan. Q. Did you go— Wright referred you to him, and you told him Wright Lancaster referred you to him? A. Yes, sir. Q. And you told him you wanted him to pay for having Forsyth killed? A. Yes, sir. Q. And what was it he agreed to do? A. He said he would do all he could. Q. Did he intimate how much that would be? A. No, sir. Q. He was in favor of it, was he? A. I guess he was. Q. Now, Mr. Burch, did he say anything about whether he wanted Forsyth killed or not? A. Yes, sir. Q. And that was the time you went to him to know how much he would give? A. Yes, sir; that seems to me, as well as I remember, about three weeks. Q. Before the killing? A. Yes, sir. Q. At that time Clemens and Rich Lowry had already been to your house, hadn't they? A. Yes, sir; they had been there. Q. Been there before that? A. Yes, sir. Q. Did you see him again at any time at all after the killing,—Louis Knight? A. I met him and Sam

Williams not far from Mrs. McGillis'. Q. Mr. Burch, have you ever said to anybody since you have been in Macon that Louis Knight didn't have anything to do with this matter? A. No, sir; I have not. I said that— All I said about it to anybody was that I said Louis Knight would never have known anything about it, I didn't suppose, if I hadn't spoke to him about it. That is exactly what I said. Q. Who did you say that to? A. I do not know. I can't call it to mind. Q. Have you said it to more than one person? A. I don't know whether I have or not. Q. Do you remember having said that? A. No, sir; I have never said that the— Q. Did you say what you said just now? A. Yes, sir. Q. You did say that you didn't suppose Louis Knight would have known anything about it if you hadn't spoke to him about it? A. Yes, sir; that's what I said. Q. That's what you said, now? A. Yes, sir; I said I told the fellows there in jail about it. Q. Which fellows? A. I told Vaughn, I believe. Q. Vaughn. Who else? A. I think I told the attorney general one night about it. *By Maj. Bacon.* I won't ask anything you said to the attorney general. I will ask you what you said to other people. A. I told you. Q. You can't remember anybody besides Vaughn? A. I may have said it to others. I don't remember the others I said it to, there has been so many talking to me, having so much to say, that I can't keep up with everything. Q. Who has been talking to you? I am not talking about the district attorney. Q. Mr. Burch, when you went to Mr. Hall's house that night, was there any light burning in the house? A. I thought that I could see a light upstairs, as I went there. A. You mean through the windows upstairs? A. Well, I think—I went up, sir, it seems to me like there was a light burning up there. * * * Q. Could you see through the glass door—see upstairs inside—could you see through the glass door, and see Mr. Hall come down the steps? A. I saw him coming down the steps. Q. With a lamp in his hand? A. Yes, sir. Q. You could see that through the glass by the door, could you? A. I guess it was. I don't remember what I saw it through. Q. What sort of a lamp was it? A. I never noticed it. Q. Was it a lamp or a candle? A. I never noticed. He set it on the table. I know it wasn't a candle. Q. What do you call a candle? A. A candle is one of these white things with a wick in it. I never paid no attention to it. Q. Something like a tallow dip? A. I know what is called an old-time candle. I never see none of them; they have gone out of fashion. Q. You never saw a candle, and you saw that night when he came down the steps—Mr. Hall came down the steps—he had a lamp in his hand or a candle? A. I could not say which it was; I told you I never noticed it. I never noticed it at all. Q. You didn't notice down in the room whether it was a lamp or candle? A. I didn't stay but a few minutes. Q. He had the money in his pocket? A. No, sir; he got up and went back up there, and got the money. Q. What kind of money did he pay you? A. Paper money. Q. Paper money? A. Yes, sir. Q. Went upstairs? A. Yes, sir. Q. Did he leave the door open of the room you were in? A. Yes, sir. Q. You saw him go upstairs? A. Yes, sir. Q. Did he carry the lamp or candle out? A. I don't remember. Q. You can't recollect whether he left you in the dark or not, can you? A. It seems to me that he did. I won't be positive about it. Q. Left you in the dark? A. I won't be positive about it. Q. You don't recollect definitely whether he left you in the dark or not? A. No, I don't. Q. Was there any lamp like that hanging in the hall [referring to lamp hanging in the room in which the court was sitting] at Mrs. Hogan's boarding house? A. I never noticed. Q. You could tell whether you saw any or not, can't you? A. From where I was? Q. Yes. A. I think he set the light on the hall table there. He didn't have anything like that burning. Q. Didn't have a lamp like that burning? A. No, sir. Mr. Hall set with the lamp in his hand, and carried it back upstairs with him when he went back up. Q. And left you

in the dark? A. And he brought it back with him. Q. Left you in the dark? A. Yes, sir; he weren't gone over a couple of minutes, if that long. Q. You didn't let him know that you were coming, did you? A. No. Q. How long before that time was it that you had seen him? A. I seen him when that little fair was going on. Q. During the fair? A. Yes, sir. Q. You hadn't seen him since then? A. No, sir; not until that night. Q. When you went to his house that night? A. Yes, sir. Q. You knocked at the door? A. Yes, sir. Q. What did you knock with? A. Knife. Q. Didn't ring any bell or knock on the door,—just knocked with your knife? A. Yes, sir. Q. How many times did you knock? A. I didn't knock many times before he asked who it was. Q. Where did he ask from? A. Upstairs. Q. You hollered out your name to him? A. I told him that it was 'L. B.' Q. L. B.? A. Yes, sir. Q. He came down right away? A. Yes, sir. Q. You think that there was a light there before you knocked? A. It seems to me that they had a light upstairs. I won't be positive about it. It seems to me that they did. Q. Were you ever at his house before? A. I never was inside of his house before in my life. Q. Mr. Burch, who arrested you? A. Mr. Avant I think is the one. Q. One of these deputy-marshals? A. Mr. Avant I think was the one read the warrant. Yes, he is the one that arrested me,—Mr. Avant."

Gentlemen of the jury, that is the testimony both on direct and cross examination of Lem Burch; that is to say, it is, in the opinion of the court, the most material portion of the testimony. I do not mean by this to intimate that you should not recall all else that he has said, consider it, and give it due and proper weight. You must pardon me for dwelling at length on this evidence. No personal weariness of my own, and, with all the deference and respect I feel for yourselves, no consideration of your personal weariness, would justify me in withholding from you anything which, under the law, is material for your consideration in this vast and momentous issue. It is true that the evidence of Burch is the testimony of an accomplice, but it is not incompetent on that account. It may be here observed, and in this connection I use the language of Prof. Greenleaf in his well-known and valuable treatise on the law of evidence, "that it is a settled rule of evidence that a *particeps criminis*,—that is, an accomplice,—notwithstanding the turpitude of his conduct, is not, on that account, an incompetent witness." The admission of accomplices as witnesses for the government is justified by the necessity of the case; it being often impossible to bring the principal offenders to justice without them. The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe it unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement; but, on the other hand, judges, in their discretion, will advise a jury not to convict a felony upon the testimony of an accomplice alone, and without corroboration. And it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty

on the part of the judge; and, considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but only advise them not to give credit to the testimony. But, though it is the settled practice in cases of felony to require other evidence in corroboration of that of an accomplice, yet, in regard to the manner and extent of the corroboration required, learned judges are not perfectly agreed. Some have deemed it sufficient if the witness is confirmed in any material part of the case. Others have required confirmatory evidence that the prisoner actually participated in the offense. It is perfectly clear that it need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. I think the true rule is that the corroborative evidence must relate to some portion of the evidence which is material to the issue, and while it need not go to the whole case; yet, in the language of a famous Massachusetts case, (*Com. v. Holmes*, 127 Mass. 424,) decided by Chief Justice GRAY, it is true that no evidence can be legally competent and sufficient to corroborate an accomplice which does not tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant. It is also true, gentlemen, while the court is careful to remind you that the credit of this witness is entirely for you, it would be very far from your duty if, disregarding what may seem the natural and inherently truthful character of his testimony, you should be hurried away by fierce denunciations, by heated language, and by excited epithets imputing infamy to him. On the contrary, with measured and impartial deliberation, like men who have a large interest at stake, you should carefully, anxiously, and judiciously scan and weigh the evidence. If the denunciations are not justified by the circumstances of the case, they are "sound, and fury signifying nothing." But the verdict of 12 good men is significant, it is imperishable, it is recorded on the permanent records of the court, and it will live in its effect upon the community in which it is rendered. To demand of the jury to utterly discredit and to refuse to consider the testimony of a witness, merely because he is an accomplice, is to ask the jury to hold him incompetent as a witness on that account; while, as we have seen, the law does not make him incompetent, and, should juries do what the law does not do, many of the darkest and most dangerous crimes would go unpunished for the want of evidence of this character. He is therefore not incompetent or disqualified as a witness, like a man who has been convicted of perjury, but he is a competent witness, and it is for the jury to determine whether, under the rule I have given you, his testimony is sufficiently corroborated.

Now upon what facts does the government rely as corroboration of the testimony of Burch? The first inquiry, this being a charge of conspiracy, is, who had a motive to commit it? Upon this subject the govern-

ment calls attention to the fact that the prisoner, Hall, had been enjoined from interfering with the lands of Norman W. Dodge; that he had a large interest in the attempt to dispossess Mr. Dodge of those lands; that he said to Doughtry that he would have a man in possession of every one of the lots to which Dodge had a weak title, by Christmas; that in the letter to Stuckey he inclosed a list of some 89 of these lots, all of which he was enjoined not to interfere with, with a caution to Stuckey to go into possession, to keep the matter quiet, but to be sure not to get enough of the land to give the United States court jurisdiction; that he said to Cooper he would put him in possession of any of the lots, and defend his title for half of the land; that on the trial of the rule against him, issued for violating the injunction, he was convicted and sentenced to five months' imprisonment in the Chatham county jail; that on his way to jail he said to Avant that the Dodges had "put in to persecuting him in the United States court through Forsyth, and, if it was not stopped, he [Forsyth] would be killed." It is further in evidence that after that time two additional rules—one in July and one in August—were presented to the court; that both of them were sworn to by Forsyth, as the agent for the Dodges. These rules, or rather the applications therefor, one of which was filed, and the other not filed, because it had been sent to the judge while he was out of the jurisdiction, will be in evidence before you. It is in the testimony of Burch that Hall had said, while he was out on the 10-days leave that the court gave him to enable him to prepare for trial in the other case, that he would give \$100 to have Forsyth killed. It is also in evidence that Forsyth had been a witness against Hall in the trial of the first rule on which he was convicted, and Burch testified that he received a letter to him on the subject from Hall in the jail after the return of the latter to Savannah. Miss Burch, the daughter of the accomplice, whom the jury had before them as a witness, testified that she had seen the letter, and that it was, in substance: "If you do not attend to the matter, I will have it attended to when I return home;" and Burch had testified that there was no other matter that he had to attend to for Hall save the assassination of Forsyth. It was said by one of the counsel in argument that Miss Burch was under contract to convict these prisoners. There was no such evidence, and nothing that the court recalls which will justify the inference. It is, indeed, true that, so far as the law and the protection to Burch because of his testimony is concerned, it does not make any difference whatever whether or not there is a conviction of any or all of these prisoners. The rule which permits an accomplice to become evidence for the government under promise of protection would not be tolerated for an instant among any civilized people if the construction placed upon it by the counsel could be correct. The result of the trial in which the accomplice testifies is wholly immaterial to his protection. It is also true that in a letter to Freeman, which is in evidence before you, Hall told Freeman to "tell the boys not to get scared," he "would soon be out to help them;" and he said, in substance, that, if it had not been for Forsyth, he would not have been put in jail. The court charges you, gen-

lemen, that all of this evidence, if credible by you, is competent and material to the issue as tending to show a motive on the part of the prisoner, Hall. It is for the jury to say whether or not it is credible, and it is for them to say whether it is sufficient corroboration of the testimony of Burch to justify them in exercising their power to credit it. Evidence which tends to show a motive in Hall of strong animosity against Forsyth, because of his connection with these rules, or either of them, in the United States court, is directly material to your inquiry. You also remember what Hall wrote Norman & Clarke: "Stuckey has lied about me, and has betrayed confidence. I wish somebody would run him out of the country." Stuckey had testified on the trial of the first rule. You may, perhaps, gather from Hall's letter to him, encouraging him to take possession of some 89 of the Dodge lots, the nature of the confidence. Of course, gentlemen, it is proper for you to bear in mind all that Hall said on this subject in his testimony. He denied utterly the statement to Burch and the letter from the jail to Burch. In his letter to Freeman he said he alluded simply to his professional services. He denied the statement to Avant. By the humanity of the federal law he is permitted to testify in his own behalf, and it is for the jury to attach such weight to his testimony as they think they can safely and properly give to it. There is other evidence upon which the government relies as tending to show the animosity of Hall towards the Dodges and their agents. In a public address made at Eastman, according to the testimony of Hamilton Clarke, he said to the people that when the Dodges "came on their lands they should meet them with shot-guns, and leave their carcasses for the buzzards to pick, or cram them down gopher holes." According to the testimony of McCrimmon, he said, in a similar speech at Milan, that the "Dodges should be sent hellward." According to the statement of Issadore McCormick, he said at Chauncey that he was a martyr, and had been persecuted beyond all reason by this great landed monopoly. According to the testimony of Strum, Hall told the witness, who was complaining that one of the Dodges' agents was acting "biggity:" "The nights are dark. You have your guns. The matter is in your own hands,"—or words to that effect. After the killing of Forsyth, according to the testimony of Bright, while complaining of his persecution and imprisonment by the Dodges, he said: "Now I have them on the hip." According to the testimony of the Honorable D. M. ROBERTS, judge of the superior court, shortly after the death of Forsyth the witness was talking with Hall on the streets of Eastman, when two persons came up, and one of them said: "Perhaps the Dodges had better send some more of their d—d agents down here." The other one said: "We have got some more shotguns and buckshot," and Hall replied, according to the testimony of Judge ROBERTS: "They had better send along some steel houses for them to live in." Now, gentlemen, this testimony, if true, is likewise material and important in this investigation. Hall complained, if the witnesses are to be believed, because of his imprisonment and alleged persecution. It does not appear that he was imprisoned otherwise or elsewhere than by the United

States court. He showed very strong resentment towards the Dodges in his public declarations, if the testimony is true. It has been urged that to hold him responsible because of these utterances would be to deny him that free speech which is the heritage of a freeman. It is perhaps not necessary for the court to remind the jury that the liberty of free speech is not a license to the encouragement, public or private, of crimes of violence; and the constitution of the state of Georgia itself, while guarantying liberty of speech, declares that any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty. It is proper, however, that the court should again direct your attention to Hall's testimony on this subject. You will remember how he qualifies, or attempts to qualify, the testimony of Judge ROBERTS. While he admits he advised the people to meet force with force, he denies any encouragement to commit crime in his public speeches. If, however, you credit the witnesses who impute these utterances to him, you may well regard that testimony as material and competent in the corroboration of Burch, because a bitter and truculent feeling towards the Dodges, which would induce Hall to encourage his hearers to commit crimes of violence upon the Dodges or their agents, would be an important element tending to show the motive, and, therefore, the guilt, of the conspiracy to murder one of those agents; and if this was done because he had been imprisoned under a rule sued out by Norman W. Dodge in the United States court, or because of such rules then pending, it would be the more material, tending to show a motive for the precise conspiracy charged in this bill of indictment.

With reference to the testimony of Burch, detailing the circumstances under which he got \$100, as he testifies, from Hall on the 23d of October, with which to pay the murderer Herring, the government relies upon several circumstances of corroboration. They offer evidence to show that Burch and Cadwell had gone to Hawkinsville in an anxious effort to get the money. Burch testifies that Herring had sent him word that if he didn't pay him the money he would kill him. Failing in Hawkinsville, Burch says they came back to Eastman, and reached there before day; that he went out to Hall's, knocked on the door with his knife; that Hall called from the upper window, and asked him who it was. Burch said it was "L. B.," and Hall came down with a lamp in his hand, and admitted him. They went into the sitting-room, and Hall sat down, holding the lamp in his hand while he sat there. Burch stated what he came for, and Hall went up-stairs, and brought the money down, but claimed that Burch and his party had not done enough; they had not burned the trestles, and driven the Dodges out of the country. The testimony of Cadwell is that he came there with Burch that morning. That they went to Sam Rogers', who kept a store and boarding house; went up-stairs, and made a fire. It was before day. That Burch came with him from Hawkinsville. That they had not been there long before the witness missed Burch. He was gone about two hours, or rather the witness did not see him for about two hours. L. M. Peacock testified that he resided at Eastman, and saw Cadwell and

Burch on the 23d of October. They tried to borrow \$100 from him, Cadwell did, and said he wanted it for a friend who was in town. He said that Burch lived 18 miles to the south of Eastman, or rather south, and Cadwell south-east. Sam Rogers testified that Andy Cadwell came to his house the same morning. He went up-stairs, and made a fire; that there was a person with Cadwell who he was very well satisfied was Burch; that some of them came down the stairs and went away, and were gone about a half an hour, or not quite so long. He said it was a half a mile from his house to Hall's place. Now, gentlemen, if the testimony of Cadwell and Rogers be true, it is material and important, as tending to corroborate Burch. These parties were in Hawkinsville the day before. They reached Eastman on the train before day. It was necessary to build them a fire at some inconvenience. What motive, then, would Burch have had, before day, to disappear from the fireside, and be gone for a period as long as that? He says he went to Hall's. Cadwell says he missed him. You will also consider, gentlemen, the intrinsic merit of Burch's statement. He tells you he knocked on Hall's door with his knife after the question is asked him. He says that Hall sat with the lamp in his hand during the interview. These may be trifling circumstances, without importance, but the jury, having their attention called to them, may possibly deem them of that natural character which will negative the idea that the story was concocted. On this subject it is proper to call your attention to the denial of Hall, and to the statement of Hall's daughters and a servant, that his room was down-stairs, and that he always slept down-stairs. If this be true, it may discredit Burch. The jury, however, ought to consider all the circumstances which might surround a man in Hall's situation. He was known to be hostile to the Dodges. Their agent, Forsyth, had been shot dead through his window in a lower room of his house 16 days previously. Fifteen days previously Renew had been killed by the friends of Capt. Forsyth. The jury will inquire whether Hall could have had any apprehension which would cause him to sleep up-stairs. If the testimony of Warren which related to that day is entitled to any credit, there were those who were accusing Hall of participation in the death of Forsyth, and the jury will inquire whether there is any motive which would prompt Hall to stay upstairs instead of in his usual room during that period of excitement. At this point the court will call your attention to the testimony of D. T. Warren, who tells you that he met Burch that day. He had not seen him for two years. After some conversation, Burch said to him: "What is the news?" and Warren replied: "The news is that they are putting the killing of Forsyth on you and Hall and Knight." His words were: "They have got you and Hall and Knight spotted with the killing of Forsyth. It seems to me that Col. Hall has had trouble enough;" and Burch replied that Col. Hall had nothing to do with it, and knew nothing about it; and, pointing to the breech of a gun that was in his buggy, said: "There is the gun that did the work." Great stress is laid upon the testimony of this witness by the defense. The prosecution replies that it is not likely that Burch would

have made, in such a reckless manner, a confession of deadly crime to a man whom he had not seen for two years. They call attention to the fact, too, that Burch came there from Hawkinsville, which is on this side of Eastman, and came on the train, and that he did not come in a buggy. You will remember the testimony of Cadwell and Peacock on that subject. If Burch's buggy was in Eastman, how could it get there? These are matters for the jury. If they believe from the evidence that Burch's buggy was not in Eastman, they should discard the testimony of Warren altogether. That, however, is entirely for the jury. If the jury believe from all this evidence that the testimony of Burch is sufficiently corroborated, or is otherwise entitled to their credit, they are authorized to act upon it. If, however, they do not believe the testimony of Burch, they should discard it, and the prosecution must fail. The circumstances of corroboration relied on to corroborate Burch with reference to Wright Lancaster are that he had moved his brother-in-law, Moore, on the Bullard land, which comprised some of the Dodge lots; that this was a violation of the injunction; that he had deeded one of the Dodge lots to Burch, in violation of the injunction, and that Burch had leased him some of the Dodge lots. Burch testified that Wright Lancaster sent Clemens to him; that he knew nothing about Clemens or Lowry. It appears from the evidence that Clemens lived in a different part of the county from Burch; that Lowry or Herring had been a witness for Clemens in his trial for highway robbery in Coffee county; that John Lancaster brought Clemens to Burch's house; that Clemens slept at Lancaster's the night before. John Lancaster admits carrying Clemens to Burch's house, but explains that he did it merely to carry Burch's buggy back, which he had borrowed. John Lancaster tells you he could never get along with Burch. It seems, however, that he had borrowed his buggy. He tells you that he knew nothing about the coincidence of Lowry's reaching Burch's at the same time Clemens reached there. It is true that Wright Lancaster was on Clemens' bond for robbery, and as his surety, and also as the sheriff of the county, could have arrested Clemens, if it be true that he was a fugitive from justice. Burch said Wright Lancaster said he would send Clemens to his house, and John Lancaster did actually carry him there. The theory of the prosecution is that Wright Lancaster had such a hold on Clemens, and, through him, on Lowry, that he could control Clemens, and induce Lowry to commit the murder for pay. It is in proof by Wyly Burch that, shortly before the murder of Forsyth, that Wright Lancaster came to the house, stayed all night, and slept with Clemens. Bohannon testified that after Burch's sickness and excitement Wright Lancaster went up to see him, and when he came back said that "Burch was acting the fool." The flight of Henry Lancaster is a fact which tends to corroborate Burch's statement that he sent the money to the negro by Henry Lancaster. Bohannon's testimony to the several conferences between Burch and the Lancasters at the mill is of a similar character. Lowry's flight, the testimony of Louis McDaniel, of the two colored men, John Williams and Calvin Fleming, of Montgomery county, the absence

of Lowry from his home in Montgomery county for a month, coincident with the time he remained at Burch's, his return home, his new clothes, his gold watch, his \$200 in money, his conduct in Jessup when he learned that Clemens, Hall, Burch, and the others were arrested, his conduct when he returned to Montgomery county, his statement that they had caught Clemens, and would be after him next, and his subsequent disappearance, all strongly tend to show his guilt, and to corroborate the testimony of Burch in that respect. You will, also, gentlemen, consider the letter to Hill & Harris, and the conversation with Bishop & Chaney, on the part of Hall, in connection with the statement of Bright that he "had the Dodges on the hip" now, and see if the construction which the prosecution attempts to place upon that evidence is justifiable. You will bear in mind the explanation of it that Hall has given. If you believe that Hall was using the murder of Forsyth as a means of forcing or intimidating the Dodges to abandon the proceedings against him, this evidence becomes very material indeed, as tending to support the theory of the prosecution. Of course, if it was a mere appeal for discontinuance of these rules, it would have no such significance. In this connection you should bear in mind that Hall is a lawyer of considerable experience, and you should also consider whether the incidents shortly preceding his application to these gentlemen, the death of Forsyth, and his own public declarations, would render it reasonable that he should be appealing to the Dodges or their attorneys for an amicable settlement or abandonment of the proceedings against him.

The circumstances of corroboration that the government relies on to connect Louis Knight with the conspiracy, to the testimony of Burch, are the proof offered to show his criminal intimacy with Hall in the forgery of deeds, the fact that he had litigation with the Dodges, which he had lost, and the testimony of Curry to the effect that he had charged Forsyth with forgery and perjury. Hall himself testifies that Forsyth told him that Louis Knight was making forged deeds. As a consequence of this, (to state the substance of his testimony,) he sent the copy deeds in evidence to Louis Knight, so that forgeries could be made, so that he might detect other forgeries by comparison before the jury, passing on an issue of forgery. It is in evidence, also, that in one of the envelopes he sent to Louis Knight there was a quantity of paper to be used for this purpose. The letters were mailed about the 22d or 23d of November, and they contained a request for the immediate return of the forged deeds. Hall testifies that he had no court in which he practiced, which met at that time, in which he could possibly use these deeds; and the jury can inquire into the reason for his haste in having them returned, to estimate the credit to be given to the statement as to the use he proposed for these deeds. This evidence is only admissible, however, to show the intimacy between Hall and Knight, which is always proper in a case of conspiracy, and, being proper, it is material to corroborate the testimony of Burch, to show their joint action.

I believe, gentlemen, that I have called your attention to everything I deem material which it is insisted corroborates the testimony of Burch.

Charles Clemens is jointly indicted with the other alleged conspirators, and his position before you is in no sense different, so far as this indictment is concerned. The testimony of Burch is admissible against Clemens, and, if you believe that it is otherwise credible, under the rules I have given you, he might well be convicted on that testimony. He has likewise confessed his guilt. If you believe from the evidence that his confession was voluntary, and admits the crime with which he is charged, and is corroborated as to all the material evidence of that crime, you would be justified in convicting him on the confession so corroborated. He is a person of full age and sound mind, and it is no excuse to him for the commission of crime that he was coerced or persuaded into its commission. Before, however, you can convict Clemens of any crime under this indictment, you must find that he is guilty of the conspiracy as charged in the indictment. You cannot convict him because he may be guilty of murder, for the crime of murder generally this court has no jurisdiction to try or to punish. You will therefore be obliged to acquit Clemens altogether, unless you find that he committed the murder in pursuance of the precise conspiracy charged in this bill of indictment. To determine whether he understood the conspiracy to exist, if you believe from the other evidence in the case that it did exist, you may look to his confession, and, if it shows that he entered the conspiracy after it was formed, he is quite as guilty as one of the original conspirators, if such they be. But I repeat that, if you do not find the conspiracy existed as charged, and for the purpose charged, you will have to acquit Clemens with the others, unless you should also find that the identical conspiracy existed between himself and others who are not on trial. But the conspiracy must be proven as charged.

At this point, I will give you, gentlemen, a request to charge, presented by the counsel for the prisoners, with a trifling modification.

"It is not within the power of the United States to punish for a conspiracy to murder within the state, unless the murder was committed in violation of some one of the United States statutes. *U. S. v. Cruikshank*, 92 U. S. 553. In this case the question of the power of the United States to inquire and punish for the alleged murder of Forsyth depends upon whether the killing was done in pursuance of a conspiracy to intimidate, threaten, or injure Norman W. Dodge, as alleged in the indictment."

Again:

"It needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy. If, therefore, you should find that there was, from the evidence in this case, a conspiracy, as charged in this indictment, then, in order to convict any person with the conspiracy so as to make such person liable under the indictment, you must find that such person did something more than entertain a mere passive cognizance of such conspiracy. You must find that such person did some act or made some agreement showing an intention to participate in some way in such conspiracy."

With reference to proof of intimacy between the alleged conspirators, you should bear in mind the proof that Hall himself testifies that he

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had represented Burch in two cases, and that Burch had brought him money while he was in jail. You should bear in mind, gentlemen, all that the defendants have said in their own behalf. They have all been sworn, and they have all denied all incriminatory features of the evidence for the prosecution. Of course, if you believe them, you should acquit them. With the exception of Hall and Clemens, they have all offered proof of general good character. Good character is a fact, fit, like all other facts proven in the cause, to be weighed and estimated by the jury. Good character of a prisoner may render that doubtful which would otherwise be clear. If the guilt of the accused is proven to the satisfaction of the jury, however, notwithstanding the good character of the accused has been given its due weight by them, it would be their duty to convict the defendants, irrespective of such proof of character; for men who have borne a good character, it is the common experience, may and do commit crimes. In determining whether or not all the prisoners who have put their characters in issue are shown to possess good characters, the jury must consider all the evidence upon that subject. Several witnesses were introduced by the prosecution to show that Louis Knight was a man of bad character, and one witness, I believe, was introduced to show that Wright and John Lancaster had bad characters. The jury will bear in mind all that was said on that subject for and against the character of these prisoners, and make such estimate as they think proper, in view of the evidence. Evidence of character is not evidence, as a general rule, of the highest and most important character in legal investigations. The government cannot put the prisoner's character in issue unless the defense thinks proper to do so. It is true, moreover, that because a prisoner may not choose to put his character in issue, he is not to be prejudiced in the minds of the jury thereby. Evidence has been offered, also, both to attack and sustain the general character for truth and veracity of the witness Burch. A witness impeached by proof of general bad character for truth and veracity may be sustained by proof of general good character for truth and veracity. That is a question entirely for the jury. Even though a witness may be impeached, the jury may credit him, if they are satisfied that he has told the truth in the particular case at bar. At this point the court will read to the jury sections 4320-4323 of the Code of Georgia, which read as follows:

"Murder is the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied." "Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof." "Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." "The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life, in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case, it is not discretionary with the judge. In the latter, it is."

A word of instruction, now, as to the form of your verdict, and I have done. This indictment, as we have seen, is framed under two sections of the Revised Statutes. There are conspiracy counts framed under section 5508, Rev. St., for which the statute provides its own punishment, viz., "not exceeding ten years imprisonment," etc. There are also counts for a substantive and additional felony, framed under section 5509, Rev. St., which provides that if a felony is committed in the progress of such a conspiracy, the parties convicted shall receive their individual punishment, according to the punishment fixed for such felony under the laws of the state. The substantive offense is murder. The jury may, therefore, as they may believe is proper from the evidence, convict all or some of these defendants both on the conspiracy counts and the felony counts; or they may convict all or some of these defendants on the conspiracy counts only, or they may acquit all, or acquit some, and convict the others. A verdict of guilty generally would mean guilty on the conspiracy counts and on the murder counts; the substantive felony being that of accessory before the fact to murder. The punishment on a general verdict of guilty will be death, unless the jury recommend the defendants so found guilty to the mercy of the court, in which case it will be imprisonment for life. If you find all the defendants guilty both on the conspiracy and felony counts, the form of your verdict will be: "We, the jury, find the defendants [naming them] guilty, as charged;" recommending that they be imprisoned for life or not, as you may believe is proper from the evidence. If you find some of the defendants guilty both on the conspiracy and felony counts, and others of the defendants guilty of the conspiracy counts only, the form of your verdict will be: "We, the jury, find the defendants [naming them] guilty, as charged, and we find the defendants [naming them] guilty on the conspiracy counts only," as you may believe is your duty, in view of the evidence. You may find some of the defendants guilty generally, some guilty on the conspiracy counts only, and other not guilty, as you may be impressed; or you may find all of the defendants not guilty.

Gentlemen of the jury, this has been a case of unusual importance,—an investigation of momentous interest,—and it is not surprising, in view of the anxiety and zeal of the advocates, that topics have been presented to your minds which have no pertinence to the issue on trial, and no appropriateness in the range of mental vision of upright, law-respecting, and oath-respecting jurors. Such incidents are so usual in criminal trials that the mind ceases to be startled at their presentation, and yet they are gravely injurious to the cause of justice. I allude to open and palpable appeals to the sympathy and commiseration of the jury, to pathetic allusions to afflicted families, to misleading references to the conduct of parties whose character and conduct is in no sense involved in the issue on trial, and, in short, to all of those *ad captandum* observations, which drop the poison of prejudice into the mind of an unsuspecting juror, and thus palsy and paralyze his best and most honorable efforts in the direction of a stern and inflexible performance of duty. Perhaps nothing is more dangerous in this direction than obser-

ventions which tend to create a false impression upon the mind of the jury that it has become their duty—a point of precedence with them—to disregard the assistance which the court, with the best, the most anxious, and the most earnest desire to aid them to arrive at a just conclusion, has tendered in its instructions. We have much larger latitude in that respect under the federal system than obtains in the courts of the state. We can sum up the evidence, as I have attempted to do in this case. We may, in strong terms, express opinions on the evidence, as I have carefully refrained from doing in this case. We must, however, in any case, in either event, leave the facts to the free finding of the jury, as I have already done, and again do in this case. It is all done, however, to aid the jury, and not to lead them. Permit me to say that it has been the purpose of the court in this laborious trial to give to this evidence a searching scrutiny, which the magnitude of the accusation demanded. In that task the court has witnessed with pleasure and satisfaction the attention, the patience, the impartiality, and the scrupulous regard to duty which has appeared to signalize the action of the jury. The counsel from their respective and opposing positions of advocacy have left nothing undone or unsaid which could influence your verdict, or enable you to see their respective causes in the fullest and clearest light. The court has reviewed the entire case in its instruction, as best it could, and the issue is now finally committed to you. The vast record is consigned to your fair, patriotic, and intelligent arbitrament, and may that Omnipotence whose bright attributes are justice and truth now guide your hearts and minds to their righteous ascertainment.

VERDICT OF THE JURY.

Whereupon, to try the issue joined, a jury being called, the jurors of the jury whereof mention is above made likewise come, who, being called, elected, tried, and sworn the truth to speak in this behalf, and a true verdict render, according to the evidence, upon their oaths say:

"We, the jury, find the defendants Charles Clemens, L. A. Hall, and Wright Lancaster guilty, as charged, and recommend them to the mercy of the court, imprisonment for life; and we find the defendants John K. Lancaster and Louis Knight guilty on the conspiracy counts only; and we find the defendant James Moore not guilty. L. P. ASKEW, Foreman."

CHISHOLM *et al.* v. THE STEAMER ALEX. FOLSOM and THE SCHOONER MARY B. MITCHELL, etc.

(District Court, N. D. Ohio, E. D. January, 1891.)

COLLISION—IN NARROW CHANNEL—SUCTION—TOW UNDER SAIL.

The steamer *Devereaux* and the steamer *Folsom*, with the schooners *Mitchell* and *Nelson* in tow, were passing to the starboard of each other in a narrow channel, where it was necessary that they should proceed slowly and cautiously. The force of suction gave the *Devereaux* a sheer to starboard, and across the course of the

Mitchell, just as the Devereaux's bow passed the stern of the Folsom, whereupon her helm was put hard a-starboard, and her speed increased, to swing her to her course, and the maneuver was partially successful, but the Mitchell took a sheer to starboard just at this time, and the Devereaux struck her on the port bow. The speed of the Folsom and her tow was at least seven miles an hour, and both the schooners in tow had all sail set, with an eight to thirteen mile breeze on the quarter. *Held*, that the collision was caused by the negligence of the Folsom in running at an excessive speed, and with her tow under sail, and to that of the Mitchell in not anticipating the result of suction on the Devereaux, and in not swinging to port to avoid her.

In Admiralty.

H. D. Goulder, for libelants.

F. H. Canfield and Sherman, Hoyt & Dustin, for respondents.

RICKS, J. The libel in this case charged that on the 13th day of August, 1890, the steamer J. H. Devereaux, properly manned and appointed, was bound on a voyage from Marquette, in the state of Michigan, to Cleveland, had proceeded on said voyage as far as the natural channel below the dredged cut in Lake George in the St. Mary's river, and at about 7:20 o'clock of said day she came in collision with the schooner Mary B. Mitchell. The Devereaux was proceeding down the channel cautiously, and at a low rate of speed, when she saw approaching the Folsom, having in tow the schooners Mary B. Mitchell and Nelson. All three of said tows were carrying their sails. The Folsom blew a passing signal of one blast. The Devereaux answered with a signal of two blasts, which was accepted by the Folsom with an answer of two blasts. At this time the vessels were more than half a mile apart. The vessels thereupon approached each other, each in its proper course for passing. The channel was narrow and dangerous. Good seamanship required that the vessels should proceed under check, at a low rate of speed, to avoid suction. The libelants aver that as the Folsom passed the Devereaux, by reason of her great speed, the position of the vessels in such a narrow channel caused the Devereaux to sheer out to starboard, and immediately the helm of the Devereaux was put hard a-starboard, and her speed increased, for the purpose of making her swing back into her proper course, which maneuver was successful. The Devereaux began rapidly swinging back to port; but, although a signal had been blown to the Folsom to check down, yet they aver that the Folsom continued her reckless speed, and the Mitchell did not steer to the westward, but came up towards the course of the Devereaux, presenting her port bow ahead of the Devereaux, seeing which the latter reversed and backed with all the power of her engines, and while so backing collided with the Mitchell's port bow. The principal allegations of negligence are that the tow was carrying sail, and proceeding at too great speed through the channel, thereby causing suction. The answer denies the charges in the libel, and claims that, when the propellers were about abreast of each other, the Devereaux negligently changed her course, and suddenly swung to starboard, in a course which would have carried her across the bows of the Mitchell; that, upon seeing this change of course, the engine of the Folsom was stopped, and the Devereaux, without prop-

only checking, or making any proper effort to avoid collision with the Mitchell, came on, and struck said schooner's bow, doing her great damage in the manner stated.

This brief statement of the issues made by the libel and answer brings us to a consideration of the facts as developed by the testimony. There are certain facts which are either conceded, or so overwhelmingly established by the testimony that they need merely to be stated: *First.* That the channel or natural cut in which this collision occurred was a place requiring great care and prudence on the part of the masters and crews of passing vessels. It was a place where the speed of vessels should be moderate, where the master and crew should be on deck and vigilant, and the vessels in such condition as to be easily handled and controlled. *Second.* That the vessels approached each other in this channel on the day named, and exchanged signals which were well understood and accepted by both parties. *Third.* That each took her proper course, and, until abreast of each other, both were going in a direction which would have enabled them to pass in safety. All the witnesses substantially concur in the statement that when the Devereaux was abreast of the Folsom she took a sudden sheer to starboard, which threw her temporarily into the pathway of the Mitchell. The witnesses vary as to the relative position of the two steamers when this sheer took place, as to how much the Devereaux changed her course, and as to how far she recovered her position when the collision took place. It appears to the court that the preponderance of evidence fully establishes that the Devereaux did not sheer until her bow had passed the stern of the Folsom some little distance, and that the sheer was not caused by any voluntary change of course on the part of the vessel, through the management of her wheel and rudder, or that her previous course, as claimed by the captain of the Folsom, in any way caused her to sheer at the particular moment described. The width of the channel, the depth of the water, the speed of the vessels, according to the clear preponderance of the testimony of the expert witnesses, were all favorable to cause that peculiar, dangerous, but not uncommon, force, commonly called "suction." It is not necessary here to undertake to explain what causes such force. It is sufficient to say that it seems to be a danger very common to vessels passing at such places, and one which all prudent navigators should anticipate and do their utmost to guard against. The sudden and violent sheer of the Devereaux cannot be accounted for upon any other theory. There is not only no testimony tending to show that it was caused by any improper management of her wheel at the time, but it is hardly probable that such a movement could have been brought about by any improper handling of the vessel, if her officers had undertaken it. There seems to be a clear and well established preponderance of evidence that the force of the waters under such circumstances frequently acts upon vessels just as it did upon the Devereaux in this case, and that the sheer of the vessel in itself was not due to any fault or negligence on the part of her master. The only question in the opinion of the court is whether the Devereaux was properly handled both in preparing for such a sheer,

and in directing the course and movement of the vessel after its force was apparent. The captain says that as soon as he began to notice the tendency of the vessel to sheer he at once put his wheel hard starboard, signaled the engineer to give her a quick move forward, and, with the aid of this movement, and relying upon the same natural force of the waters on the stern of the vessel as it came within reach of this suction, hoped she would straighten up and regain her course in the quickest possible manner. But it is claimed that, instead of propelling his vessel forward with greater speed and force, he should have checked and reversed, and thereby have lessened the speed of his vessel, the probabilities of a collision, and the force of a blow if the collision was inevitable. This is purely and entirely a question of seamanship, and I have submitted it to the nautical assessors, with the result to be hereinafter stated. The evidence clearly shows that, whether the captain took the best possible course or not, his handling of the vessel resulted in speedily straightening her, and bringing her nearly back to her original course.

We will leave the Devereaux at this point, and proceed to consider the allegations of negligence charged against the Folsom and her tow. The first and most important allegation to determine in this connection is the speed at which the Folsom and her tow were proceeding up that narrow channel. There is a good deal of conflict in the testimony upon this point, but, with certain controlling facts established, it is not difficult to reach a satisfactory conclusion. The Folsom and her tow started that morning from their anchor at a point from the mouth of the channel varying, according, to the testimony of the witnesses, from two to three miles, and at a time about which the witnesses somewhat differ. The time when the vessels started and the distance they traversed are two very important facts, because they determine the question of speed. There is no substantial variation in the testimony as to the hour when the collision occurred. It is contended on behalf of the defendants that the speed of the Folsom and her tow could not have been as great as the libelants aver, because the distance they traveled and the time occupied clearly show that their speed was not dangerous, or as great as charged. The counsel for the defendants contend that the distance traveled was but 14 miles, and the time occupied 3 hours, which would make the speed less than 5 miles an hour. The nautical assessors have kindly made a careful calculation from the charts and government maps of the distances, and have submitted them to me as follows:

Can in Mud lake to sailor's encampment, - - - - -	33	miles.
Across bend to the other government mark, - - - - -	1	"
Bend to Dark hole, - - - - -	1	"
Dark hole to foot of Sugar island, - - - - -	34	"
Crossing at foot of island, - - - - -	1	"
To Rain's dock, - - - - -	1	"
Rain's dock to Nebish rapids, - - - - -	1	"
Through the Nebish, - - - - -	1	"
Foot of Nebish to first red buoy, - - - - -	14	"
First red buoy to lower red can, - - - - -	14	"
From red can to point of collision, (estimated,) - - - - -	14	"

Deducting overreaches at three-fourths of a mile, leaves fifteen miles from the can in Mud lake to the point of collision. The distance from the place where the tow started in the morning to the can in Mud lake is placed at from two to three miles, so that the least possible distance traveled is seventeen miles; and, giving the defendants the greatest time claimed, (three hours,) it makes the most favorable estimate of the speed possible for them at nearly six miles an hour. But the exact time at which the tow started in the morning is a fact about which witnesses may well vary from a quarter to a half an hour, depending upon the length of time required to take in sail and prepare the vessels for moving.

But there are other facts so well established that there need be no reasonable doubt as to the speed at which these vessels were going. We have the testimony of thoroughly disinterested witnesses, who followed in the rear of this tow, within reasonable distance. The speed at which they were moving is a matter about which they can have no reasonable doubt. The velocity of the wind is also a fact very satisfactorily established by purely disinterested witnesses, and, taking all these things into consideration, the conclusion of the court as a question of fact is that the Folsom and the tow just before the collision were proceeding up this channel at a rate of between six and seven miles an hour. I think this is a very reasonable and fair estimate. I think the court might well find that the rate of speed was even greater than this. The fact that the tow carried sail is substantially conceded, but it is denied that the force of the wind was such as to make these sails draw, or make the vessels less easily handled. As to the force and direction of the wind, we have the testimony of Capt. Malloy and Mate Scott of the Winslow, Mate McCorquodale of the Harvey Brown, Capt. Smith and Mate Millson of the Northern Queen, Joseph Duncanson and Wheelsman Balfour of the Hackett, Capt. Girardon, and Capt. Stone. These witnesses all concur in the fact that there was a stiff breeze blowing substantially S. to S. E. They vary the velocity of the wind at from eight to thirteen miles an hour. Even at the lowest estimate, with the wind from the direction stated, the sails of the tow must have been pulling, and must have accelerated their speed. Sailing in these waters under such circumstances, the direction of the wind and the speed of the vessels considered, was certainly a very exceptional circumstance, and an act of almost criminal recklessness and folly. Many of the oldest masters who have testified in this case say they never saw vessels under sail in that channel under the same circumstances. When the master of the Folsom, with full knowledge that his tow was under sail, the full force of the breeze, and its direction, deliberately took upon himself the peril of navigating that channel under those circumstances, he of course assumed all the risk incident to such a rash act. We have no hesitation in saying that in so doing he was guilty of gross negligence.

The only question left is whether this negligence was the direct and proximate cause of this collision, and whether the Devereaux was without fault, under the circumstances heretofore stated. It is too evident a proposition to need more than mere statement that the vessels, proceed-

ing with their sails drawing, with the wind at the velocity named, and from the direction stated, were not in condition to be properly and skillfully handled in case of peril. The sails pulling under such circumstances would increase the speed, would cause the vessels to lose headway in less time in case of danger, would cause them to luff, would prevent the wheelsman from seeing ahead with ease and certainty, would make the management of the wheel more difficult and laborious, and the increased care and vigilance required in an emergency would add to the demoralization and excitement incident on board a vessel under such circumstances. In this instance, even conceding that the Folsom checked her speed, as claimed by the captain, his movements could not have affected the Mitchell as quickly as it would have done if she had not been under the force and influence of the sail. That the Mitchell was more unmanageable because of the sail under these circumstances, and that she actually sheered to her starboard about the time she was struck, which sheering was undoubtedly caused by her unmanageable condition on account of her sail, is shown by the testimony of two disinterested witnesses, Joseph Duncanson and Mr. Balfour, of the Hackett, who, while at some distance away, were yet in a very favorable position to observe the movements of the vessel, and who positively swear that they specially noticed that the Mitchell did sheer. In this they are supported by the testimony of Capt. Gilmore, Mate Cleveland, Wheelsman Block, and David Robb, of the Devereaux, and partially, at least, corroborated by Mate Millson of the Northern Queen, who puts the Mitchell's spars in such a range with his own vessel that she could not have been in her proper course at the time of the collision.

I therefore find, upon this branch of the case, as a conclusion of fact, that the Mitchell suddenly changed her course by sheering to the starboard. The testimony of the master of the Mitchell shows that he was not without fault in the management of his vessel. Going up the river with sail, and at the speed found by the court, he ought to have been in position to have given prompt orders to his wheelsman, so as to control the movement of his boat. A master of experience should have known that in that channel, and at that speed, two steamers passing as the Folsom and Devereaux were passing were not unlikely to sheer. He ought to have had his wheel starboarded, and his vessel in shape to have responded promptly to the movement of his wheel, and been ready to move that wheel upon the slightest indication of such a sheer. But according to his own testimony he was not in position to act promptly, and he did not. Had he done so, the collision would not have occurred, notwithstanding the sudden and violent sheer the Devereaux took.

With these conclusions of fact found by the court, and with which Capts. Kelly and Mallory, the nautical assessors who have patiently and kindly heard this protracted case with me, agree, I have taken their advice and opinion as to the expert questions of seamanship involved. We all agree that there is such a natural force in navigable waters described as "suction" by the expert witnesses in this case, and that said force would be caused by two steamers passing in that narrow channel, at the speed

and under the circumstances developed by the testimony in this case, and that it would naturally have the effect on one of the vessels as shown in the case of the Devereaux on this occasion. We further agree that the sudden and violent sheer of the Devereaux would not likely be caused by any other force or influence, and that her master, from the moment she began to sheer, directed her movements in a skillful and seaman-like manner. We further find that, while not actually anticipating such a sheer, he nevertheless had his vessel properly in hand, and ready to counteract such movement promptly. We are further of the opinion that the tendency to sheer from suction in that channel by vessels passing under the conditions of this case was well known by skillful seamen, and that the master of the Mitchell should have considered it possible, if not probable, on the part of the Devereaux, and have so far guarded against it as to have had his own vessel in perfect control, and her wheel on the starboard, so as to have headed his vessel to port, and have been able to put her in that course promptly when the emergency made it necessary. We are also of the opinion that, with the wind blowing from the direction and with the velocity heretofore stated, it was gross negligence on the part of the master of the Folsom to have towed his consorts through that channel with sails set and drawing, as hereinbefore found. We are further of the opinion that the speed at which said Folsom and tow were proceeding was too great, that it contributed mainly to cause the suction which drew the Devereaux from her course, and was the proximate cause of the collision. We are further of the opinion that the Devereaux was without fault, and was managed at the time with prudence and proper skill.

The court therefore finds that the allegations of the libel are true so far as found and stated in this opinion, and a decree will be prepared accordingly, and a reference to commissioner to hear testimony and report the damages the Devereaux has sustained by reason of the negligence and wrongful acts of the Folsom and her consort, the Mitchell.

ROANOKE, N. & B. S. S. Co. v. THE LUCY.

(District Court, E. D. North Carolina. January 15, 1891.)

COLLISION—BETWEEN STEAMERS—RIVER BEND—SIGNALS.

Two steam-boats, the M. and the L., collided at a bend of the river, having sighted each other for the first time when they were 100 yards apart. The master, pilot, and two of the crew of the M. testified that she sounded a long blast of her whistle when half a mile from the bend, as required by rule 5 of the board of supervising inspectors. The master, pilot, engineer, and five of the crew of the L. testified that it was their boat that sounded the bend signal. Two disinterested witnesses, who were standing on a wharf, waiting for the L., testified that they knew the whistles of the two steamers; that they heard the signals given at the time of the collision; and that immediately before it they heard the L. give the bend signal, but none was given by the M. The engineer of the M. testified that he did not remember any bend signal from his boat. Held, that the M. was in fault.

In Admiralty.

Albertson & Son and Pruden & Vann, for libelants.

Sharp & Hughes, for claimant.

SEYMOUR, J. Cross-libels have been filed for damages caused by a collision between the steam-boats Meteor and Lucy, which occurred on the Roanoke river. The place was a bend in the river, two and a half miles below Williamston, and the time of day about 3 o'clock of the afternoon. The two steamers met at the very point of the bend. Upon the testimony of both parties they did not sight one another until about 100 yards apart. Supposing their joint speed to have been 10 miles an hour, it would have brought them together within 20 seconds. The Meteor was going down stream, the Lucy up. Both were evidently hugging the bend, or they would have seen one another at a greater distance than 300 feet. It is claimed that the Lucy committed an error in blowing one blast of her whistle, thereby signaling the Meteor that she intended to pass her port to port; that is, on the inside of the bend. It is possible that if she had passed to the left she might have succeeded in crossing the Meteor's bow, and have avoided being sunk by her. This would depend very much upon the relative speed of the boats, concerning which we have no evidence. It is also possible that in such case she would have been struck by the bow of the Meteor. It is not necessary to determine the point, even if it were possible to do so, for the error in judgment, if it were one, was committed *in extremis*, and cannot be considered a fault. As for the allegation that the pilot of the Lucy left the pilot-house before the moment of collision, I do not credit it. It is denied by all on his boat, and is not probable in itself. I have formed the same judgment respecting the alleged error of the pilot of the Meteor in backing after accepting, as he says he did, the signal of the Lucy to pass port to port. It is barely possible that by continuing at full speed he might have crossed the Lucy's bows; but the probability is that the Meteor would, in such case, have been struck amidship instead of near her bow, with greater damage than that actually received. But if there were an error of judgment committed in the 20 seconds or so between the time when the boats became aware of one another's vicinity and the collision, it cannot be considered as a fault, technically so termed, and will not subject to damages. But undoubtedly a fault was committed by one or both of the vessels before reaching the bend, and to that the collision must be attributed. By the fifth rule of the board of supervising inspectors it is provided that whenever a steamer is nearing a short bend or curve in the channel where a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer shall, within half a mile of such bend, give a signal by a long blast of the steam whistle. If such signal shall be answered by a like blast given by the pilot of any approaching vessel, the usual signals for meeting and passing shall immediately be given and answered. If both boats gave the required signal, both were equally at fault in not having subsequently, upon hearing that of the other, given the usual signals for

meeting and passing. I assume it to be impossible that either boat could have sounded its whistle without having been heard by those on the other had they been attentive to their duty. Evidence shows that blasts of the whistle at the time of the collision were heard at a much greater distance. If only one boat sounded, and no answering blast was given, that boat is free from fault, and the liability must rest on the other. Upon this point the witnesses are in direct conflict. The pilot, master, and two of the crew of the Meteor testify that the Meteor sounded a long blast of her whistle before coming to the bend, and that the Lucy did not. The pilot, master, engineer, and five hands on the Lucy testify that it was their boat which sounded a blast before coming to the bend, and that the Meteor did not. I do not lay stress upon the numerical superiority of forces on the Lucy's side. It was her fortune to have a larger crew to swear. The hands, being seafaring men, would naturally think they had heard what their officers had heard. In this state of the evidence I am influenced by two witnesses, who seemed to be impartial, who have no interest in the case, and who happen to have heard the whistles blown just before the collision. Harry Bond and Knowledge Barrow were standing on the river wharf at Williamston waiting for the arrival of the Lucy, on which they intended to go to their place of employment, a lumber-yard further up the river. They say they knew the whistles of the steamers, and that they heard the signals given immediately before the collision. Both of them say that just before, they heard the Lucy give one long bend whistle, and that the Meteor gave no bend whistle. Their employment near the river, and habit of traveling on and listening to river boats, make their statement that they knew the whistle of the Lucy entirely credible. Some significance can also be attached to the fact that the engineer of the Meteor has no recollection of a bend whistle sounded by his boat. It is true that he says he pays no attention to whistles, and that it might have been blown without his noticing it. This may be true, but, on the other hand, the fact that a collision immediately followed the time when the whistle ought to have been sounded renders it quite probable that his attention would have been called to the matter. If he did not observe at the time whether his boat had or had not signaled for the bend, it may be it was because such was not her usual habit. On the whole evidence I am of the opinion that the Lucy did and the Meteor did not sound a long blast for the bend; that the only fault committed was the Meteor's failure to so signal, and that such failure brought about the collision; that the collision, from the moment the boats sighted one another, was inevitable, or, if there was any error then committed, it was one of judgment, in an extremity, and not imputable as a fault; and that therefore judgment must be rendered dismissing the libel of the Meteor, with costs. As for the cross-libel, which, it was agreed, should abide the determination of this suit, I make no direction, as it is pending in the eastern district of Virginia.

THE OPHELIA.¹

THE MIDDLETOWN.

KINNEAR v. STATEN ISLAND RAPID TRANSIT R. Co.

(District Court, S. D. New York. January 21, 1891.)

1. COLLISION—FOG—ANCHORED VESSEL.

Where a ferry-boat, in a dense fog, ran into a bark, which was anchored within the prescribed limits of the anchorage ground in the bay of New York, and whose position was well known to the pilot of the ferry-boat, *held*, that the ferry-boat should have kept off the anchorage ground entirely, as she could have done, and that the ferry-boat was therefore in fault for the collision.

2. SAME—FOG—BELLS—FREQUENCY—INSPECTORS' RULE—LOOKOUT—CHANGE OF WATCH.

A bark, lying at anchor in a fog so dense that objects could not be distinguished 50 feet distant, and in a position where boats were obliged frequently to pass near her, rang her fog bells every three or four minutes. *Held*, that in such situation there was a necessity for more frequent bells than are prescribed by the international regulations, which require the bell to be rung only once every five minutes. No whistle was noticed by those on the bark, though the ferry-boat while approaching whistled every half minute. *Held*, that the bark was also in fault for not ringing the bell as often as required by the inspectors' rules, and for bad lookout at the time of a change in the watch.

In Admiralty. Suit for damages by collision.

Wilcox, Adams & Macklin, for libellant.

Tracy, Macfarland, Ivins, Boardman & Platt, for respondent.

BROWN, J. Near midnight of November 6, 1890, while the libellant's bark *Ophelia*, shortly before arrived from sea, lay at anchor abreast of *Bedloe's* island, a little within the prescribed limits for anchorage ground, she was run into, in a dense fog, by the respondent's ferry-boat *Middletown*, bound from the Battery to Staten island, and sustained damages for which the above libel was filed. Without discussing in detail the conflicts of testimony, I find the following faults in both:

1. The precise point where the *Ophelia* lay being known to the pilot of the ferry-boat, as she had passed her several times in clear weather during the 12 hours preceding, it was the duty of the ferry-boat to have kept further to the eastward, as she might and should have done, the ranges being accurately known, and there being no necessity for the ferry-boat to cross any part of the prescribed anchorage ground, and there being abundant water to the eastward of its exterior limit. *The Bedford*, 5 Blatchf. 200; *The Exchange*, 10 Blatchf. 168.

2. The bell upon the *Ophelia* was not sufficiently rung to answer the requirements of reasonable prudence, and of a reasonable necessity, when she lay anchored in such a fair way in a dense fog. The fog was so dense that objects, excepting lights, could not be distinguished 50 feet distant; and lights at a very short distance only, probably not exceeding 200 feet. The evidence does not show that at the time the ferry-boat

¹Reported by Edward G. Benedict, Esq., of the New York bar.

was approaching the bark, her bell was sounded oftener than once in four minutes. None was heard on the ferry-boat, though she approached at very moderate speed, and her officers were listening carefully for signals. Such an interval is wholly too great for the necessities of such a situation. Ferry-boats are obliged to make their trips even in the densest fog. The ebb tide runs from two to three knots at its strength, and it is impossible that ferry-boats retaining necessary control of their movements in such a tide should go less than four or five knots over the ground. Under such circumstances bells sounded once in three or four minutes only, are too infrequent to be of much use. The frequency with which boats were obliged to pass in this region was known to the bark, or ought to have been known by observation, if not already familiar to her master; and there was therefore obvious necessity for more frequent bells than those prescribed by the international regulations, namely, at least once in five minutes. The rule of the supervising inspectors (page 182) requires the bell to be sounded at intervals of not more than two minutes. I have no doubt, moreover, that fog-signals from the ferry-boat were sounded, as her witnesses testify, at intervals of less than half a minute. The rule last referred to requires them to be sounded at intervals of not more than one minute. The ferry-boat, at the time of collision, knew she was about meeting and passing her sister boat coming up from Staten island; yet the witnesses for the bark all testify that they heard no whistles from the Middletown, and consequently no response by the bell was given to any such signals. The collision occurred at the time of the change of the midnight watch on board the bark. The ship's time was about three-quarters of an hour in advance of the local time. The proper watch was very tardy in getting on deck, and the duty of sounding the bell seems to have remained with the second mate; and there is incidental testimony of considerable weight, which, coupled with the delays in the proper change of watch, may serve to explain the fact, of which I am also satisfied, that sufficient attention was not given at the time to the signals of the Middletown as she was approaching near. The damages and costs must therefore be divided.

THE SERVIA.¹

MILES v. THE SERVIA.

(District Court, S. D. New York. January 22, 1891.)

SHIPPING—PERSONAL INJURY—STEVEDORE—FELLOW-SERVANTS—EFFICIENT CAUSE.

As libelant was loading iron in the hold of a steam-ship, a skid, in ascending to the deck, caught under one of the coamings of a hatch, and the knot in one corner of the skid pulled out, causing the iron on the skid to fall upon the libelant. The evidence showed no defect in the skid, or the ropes or the lanyard; that the efficient cause of the accident was the negligence of the guy-tender or of the engineer, in allowing the skid to catch and in not stopping the engine. *Held*, that they were fellow-servants with libelant, and that the only obligation of the ship was to see that the instruments used were reasonably sound and fit for the service, and libelant could not charge the ship for the accident resulting from the negligence of fellow-servants.

In Admiralty. Suit for personal injuries.

H. H. Shook, for libelant.

Owen, Gray & Sturges, for claimant.

BROWN, J. On the 15th of May, 1890, while the libelant was engaged, as longshore-man, in the hold of the *Servia*, loading Spiegel iron upon skids in the discharge of cargo, the iron upon another skid, going up from the opposite side of the same hatch, fell, and struck him on the hip and back, producing injuries, to recover for which the above libel was filed. The uncontradicted evidence is that the skid from which the iron fell in being raised caught under one of the coamings when part way up, and that one of the lanyards that went through the corner of the skid was pulled through the hole in the corner, through the knot by which it was secured beneath being pulled out, in consequence of which that corner of the skid dropped, and the iron slid off. The evidence does not show any defect in the skid, or in the ropes, or in the lanyards; and the rigger testified to proper previous inspection, and that the knots were tight and secure, and protected in the same way that was customary, and which has been long in use without any previous accident, and that after the accident he examined the lanyard that was pulled through, and found it in perfect condition, except that the knot was pulled out. The man who tended the falls, and whose business it was to keep the skid as it neared the top away from the coamings, stated that, when he saw that the skid was likely to catch, he rang the signal to stop hoisting, as had been done once before on the same ascent, but that the raising was not stopped quick enough, and that the strain resulted in the accident above stated. It would be mere guess-work upon such facts to hold that the skid or knot by which the iron was raised was either out of order, or not reasonably fitted for the work, merely because the knot, under such a strain, was pulled out. When the skid was caught fast under the coamings, and the strain of a powerful engine like this was

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continued, something, evidently, must give away. The derrick might come down, the ropes part, the falls, the hook, or the skid break, or the knot yield; whichever happened, somebody would be likely to be hurt. The obligation of the ship or owner, in such cases, is not that of a guarantor against all accidents, but only that the instruments used shall be reasonably sound and fit for the service. He does not guaranty that machinery or ropes shall not break or yield, under whatever strain, when misused or carelessly worked. The evidence in this case leaves no doubt of negligence of the guy-tender or engineer in letting the skid catch fast, and in not sooner stopping the engine. That was negligence of a fellow-servant, for which the ship is not liable; and that was the efficient cause of the accident. There is not sufficient proof of negligence on the ship's part back of that, contributing to the injury, so as to make the ship liable. The case is substantially like that of *Stringham v. Hilton*, 111 N. Y. 188, 198, 18 N. E. Rep. 870. Libel dismissed.

END OF VOLUME 44.